



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 491 OF 2014

JOSEPH NGOME.....CLAIMANT

VERSUS

NETWORK STYLES SECURITY [K] LIMITED.....RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a Claim for damages for unfair and unlawful termination of employment. It is the claimant's case that the termination of his employment contract by the Respondent on 21.5.2014 was not founded on a justifiable reason and was not done through a fair procedure. The Respondent filed no defence despite being served with summons and as such the Suit was heard exparte on 20.7.2015 when the claimant testified as Cw1 and thereafter his counsel filed written submissions.

Analysis and Determination

2. After considering the material placed before the court, there is no dispute that the claimant was employed by the Respondent as a night security guard from 1.7.2005 to 21.5.2015 when his employment was terminated by the Respondent. The issues for termination is whether the termination was unfair and unlawful and whether the reliefs sought should be granted.

Unfair and Unlawful Termination

3. The burden of proving unfair termination of employment is on the employee according to section 47(5) of the Employment Act (E.A). The burden is discharged if he proves that the employment was terminated without any valid and fair reason and that the same was done without following a fair procedure. According to his uncontested evidence, the claimant requested his boss Mr. Evans Makori for salary increase on 21.5.2014 but he was told to continue working. That at 8pm the same day, the boss brought another guard to replace Cw1 and told him to go home. Cw1 then reported the matter to his Trade Union which served a demand letter to the Respondent. According to Cw1, the termination was unfair because no justifiable reason was cited for the termination save that it was prompted by the request for salary increment. That in addition to the lack of valid reason, the termination was not precedent by any notice or a fair hearing.

4. Under section 45(2) of the EA, termination is unfair if the employer fails to prove that the

determination was founded on a valid and fair reason and further that the termination was done through a fair procedure. In this case the employer never participated in those proceedings and as such she did not discharge the burden of proving procedural as well as substantive fairness. Consequently the court finds on a balance of probability that the termination of the claimant's contract of employment was unfair and unlawful within the meaning of section 45 of the EA.

RELIEFS

5. In view of the foregoing finding, the court makes declaration that the termination of the Claimant's employment was unlawful and unfair as prayed. In addition, the court awards him damages under section 49(1) of the EA because he has not wished to be reinstated or engaged under section 49(3) of the EA. He has also not caused his termination through misconduct. The damages awarded are based on the minimum statutory salary prescribed by the 2013 General Wage Order being Kshs. 10911. He will therefore get Kshs. 10911 being one month salary in lieu of notice as prayed. He will also get Kshs.8000 being salary arrears for October and November, 2013 as prayed. He will also get Kshs. 18548.7 being unpaid salary for May 2014 and 21 days worked in April 2014.

6. He is awarded 42 days leave for the year 2011 and 2012 based on the basic pay prescribed by the Wage Order for the respective year. Hence the award of Kshs. 8463 and Kshs. 9266.30 totaling to Kshs. 17,729.30. The rest of the Claim for leave for the period before 2011 is disallowed on ground of the time bar erected by section 90 of the EA which limits causes of action founded on employment to 3 years. The claimant has of course admitted that he took leave for 2013 and 2014. He is also to get pay for 4 off days per month for 3 years between May 2011 and 2014. Hence $Kshs. 10911 \times 4 \times 36 / 30 = 52372.80$. He will also get salary arrears in respect of under payment of salary for the period between May 2013 and May 2014 as prayed. Hence $(Kshs. 10911 - 6500) \times 12 = 52932$.

7. The Claim for public holidays is dismissed for want of particulars and evidence. Likewise the claim for severance pay is dismissed because the termination was not through redundancy. The claimant was however to get 3 months gross salary of Kshs. 10911 totaling to Kshs. 32733. The reason for awarding 3 months' salary compensation is because, with due diligence, the claimant could secure an alternative employment. In addition, the court has considered his long service to the Respondent. The claimant will also get a Certificate of Service.

DISPOSITION

13. For the reasons stated above, judgment is entered for the Claimant, declaring the termination of employment unfair and unlawful and by awarding him Kshs. 185,226.80 and Certificate of Service. He will also be awarded costs and interest.

Dated, Signed and delivered this 13th day of November 2015.

O. N. MAKAU

Judge