



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE NO.140 OF 2015

JOHN ASHOYA.....CLAIMANT

VERSUS

HIGH GROVE LIMITEDRESPONDENT

J U D G M E N T

Introduction

1. The claimant brings this suit claiming terminal dues plus compensation for unlawful termination of his employment by the respondent. He avers that he was employed by the respondent in February 2013 as a casual labourer earning ksh 300 per day. He later became an electrician earning Ksh 9,800 per month. That on 10.9.2014, he was on duty doing wiring in one of the respondent's houses when he fell from a height and suffered severe injuries. He was treated at Jocham hospital and the Coast general hospital but when he recovered he was not allowed back to work. He thereafter brought this suit because his rights as an employee were greatly breached and trampled.
2. The respondent never filed any defence despite being served with summons and hearing notice. The case was therefor heard exparte on 20.7.2015 when the claimant testified as Cw1 and called Benjamin Metika as Cw2. Thereafter his counsel filed written submissions.

Analysis and Determination.

3. The pleadings and evidence by the claimant have not been contested consequently, the court makes a finding of fact that the claimant was employed by the respondent as a casual labourer and later as an Electrician earning Ksh 9,800 per month. That the duration of his employment was from February 2013 and 10.9.2014 when he was terminated after being injured in an industrial accident. The issues for determination are whether the termination of his employment was unlawful and whether the relief s sought should be granted.

Unlawful Termination.

4. Cw1 told the court that he worked from February 2013 and continued up to 10.9.2014 when he fell from a height while on duty and sustained severe injuries. That when he recovered he was barred from resuming duty. That the respondent's secretary told him to write a letter to claim for his service pay but instead he went to instruct a lawyer who served a demand letter to the respondent. Cw2 is former employee of the respondent. He told the court that on 10.9.2014, Cw1 was on duty doing wiring on top of a house when he fell down and they took him to hospital. Without any

- evidence from the defence to rebut the above claimant's evidence, the court finds on a balance of probability that the claimant's employment was unlawfully and unfairly terminated by the respondent on 10.9.2014 after he was involved in an industrial accident.
5. The termination was without prior notice and it was not founded on any valid and fair reason. The only reason for his termination is that he got injured while on duty otherwise he would have continued with his employment. That reason for dismissal was not fair for termination of his services because the claimant was not totally incapacitated and the accident was not due to his misconduct. Even if he had become incapacitated or had misconducted himself, the procedure followed in terminating his services was not fair. Section 41 of the EA bars an employer from dismissing his employees on ground of misconduct, poor performance or in capacity without first explain the reason for the intended dismissal to the employee in the presence of a fellow employee or union shop floor representative of his choice, and thereafter inviting the two to air the representation. That such proceedings must be conducted in a language of the employee understanding.
 6. In this case the claimant returned to work after medication and the only officer of the respondent who addressed him was the secretary who told him that his employment was over and advised him to apply for his service pay. That procedure was not in consonance with the mandatory procedure proscribed under section 41 of the EA. According to section 45 of the Act, termination of employee is unfair if the employer fails to prove, like in this case, that it was founded on a valid and fair reason and that it was done after following a fair procedure.

Reliefs

7. In view of the finding that termination of the claimant's employment was procedurally and substantively unfair, the court make declaration that the said termination was unlawful. The claimant is therefore awarded Ksh 9,800 being one month's salary in lieu of notice. He will also get Ksh 9,800 as prayed for the 33.25 accrued leave days for the period of one year seven months served. The claimant is also awarded gross salary for 8 months as compensation for unlawful termination of his employment being Ksh 78,400. The reason for making such an award is that Cw1 may not be likely to secure a similar employment of climbing a top house within 8 months due to the injuries suffered on 10.9.2014.

Disposition

8. For the reasons stated above judgment is entered for the claimant declaring termination of his employment unlawful and awarding him Ksh 98,000 plus costs and interest.

Signed, Dated and Delivered at Mombasa this 13th day of November 2015.

ONESMUS MAKAU

JUDGE

13.11.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:

For the Respondent:

Court

Judgment delivered in their presence/absence in open court.

ONESMUS MAKAU

JUDGE