



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1157 OF 2013

LAZARUS OYOO.....CLAIMANT

VERSUS

CHANDARIA INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent as a general worker on or about 1st February, 2004 and served thereafter in various capacities, the last one being as a dispatch clerk. According to him he worked until 26th April 2013 when the respondent terminated his services without giving him any reason. The claimant averred that in the same month when the respondent terminated his services he had lost his wife and took compassionate leave to bury her.
2. At the time of termination, the claimant averred he was earning a daily wage of Kshs.330 payable weekly. This, he contended was below statutory minimum wage prescribed. He further averred that for the 9 years he served the respondent, he was not allowed to go on annual leave nor paid in lieu.
3. The claimant contended that the termination of his employment was unfair, unreasonable and contrary to fair labour practice. The claimant therefore sought an order for compensation in that regard.
4. The respondent in its memorandum of response averred that the claimant's services were terminated for lawful cause on grounds that, he together with one Mercy Adisa and other employees of the respondent were involved in or facilitated and abetted the theft of respondents goods worth Kshs.152,751/= and attempted theft of goods worth Kshs.625,899/=.
5. The respondent averred that prior to the termination, the claimant was informed that it was intended to terminate his services summarily and that he was entitled to be heard together with a fellow employee or shop floor union representative but the claimant opted to appear alone.
6. The respondent further averred that after taking into account the contents of the claimants oral and written statement, the respondent was satisfied that there existed sufficient grounds for summary dismissal of the claimant and accordingly dismissed him on 21st March, 2013.
7. In his testimony before the Court the claimant stated that by the time he was terminated he was earning Kshs.2,315/= per week. It was his evidence that he never went on leave for the period he

worked. Regarding the circumstances of the termination he stated that his wife was expectant so he took her to hospital but she developed complications and the child died. He was asked by the Hospital to look for Kshs.86,000/= for his wife's treatment and approached the respondents Human Resource Manager for help from the respondent. He was later told the respondent could not help. So he started to look for money from colleagues. Mercy said she could give him Kshs.15,000/=. Meanwhile his wife's condition deteriorated and she died. He therefore left work to prepare for burial arrangements when he resumed work, one of the store supervisors informed him that a Mr. Gurmit wanted to see him. When he went he was told his services were no longer needed and was asked to come after three days to collect his dues. When he returned he was asked to see the Financial Controller who informed him that the respondent had decided not to pay him anything.

8. In cross-examination he stated that he used to be responsible for issuing of gate passes. On the issue of leave he stated he used to ask for leave but since he was alone on the gate pass system he was asked to wait. He was never paid in lieu of leave. Asked about Mercy he admitted knowing her and further stated that she used to attend to Gikomba Mattresses who was one of the respondent's client. On the material date he authorized Mercy to take goods to Gikomba Mattresses using her sales van.

9. The respondent on the other hand called as witness Mr. Mulika who stated that the claimant was initially employed in the cotton department in February, 2004 as a general worker and later moved to stores. By the time he was dismissed he had only worked for 2 years at the store. He denied that the claimant was paid below minimum wage and that the respondent pays minimum statutory wage. He stated that he had a note stating the claimant had financial problems. According to him the claimant was desperate and wanted money to assist his wife. It was his evidence that Mercy diverted goods meant for Gikomba Mattresses to someone else to assist the claimant. Mercy thereafter absconded and by the time the matter was heard, she had never been found. He stated that the claimant was paid terminal dues upon termination.

10. In his closing submissions, Mr. Juma for the claimant submitted that the contention by the respondent that it had not terminated the claimant's services was false since it was contradictory for the respondent to say so yet they paid the claimant one week's wages in lieu of notice. Regarding the claimant's employment status, counsel submitted that despite the fact that the respondent treated the claimant as casual worker for 9 years that he worked for them, section 37(1) of the employment act read together with section 35(1) (c) meant that the claimant was entitled to benefits under section 35(1)(c).

11. Regarding termination, Counsel submitted that section 41 of the Employment Act deals with procedural justice before termination of employment. The claimant was however simply called upon return from his wife's funeral and told that he was terminated and issued with a certificate of service. According to Mr. Juma, the claimant was not given any reasons for his termination as contemplated under the Act and after the filing of the claim, the respondent attempted to justify the termination to be on account of alleged collusion with one Mercy Adisa to defraud the respondent.

12. Concerning underpayment, Counsel submitted that paying the claimant Kshs.330/= per day was below statutory minimum wage prescribed by Wages General Amendment Order, 2011 and 2012. According to Counsel, the claimant as a clerical officer was entitled as minimum wage, to Kshs.561/= per day in 2011 and Kshs.635.30 in 2012. According to Counsel the total underpayment amounted to Kshs.198,958.76 which he urged the Court to award. Concerning leave, Counsel submitted that for the 9 years the claimant worked for the respondent he never took his annual leave or paid in lieu thereof. The claimant therefore sought that the Court orders that he be paid for leave earned but not taken.

13. An employer has the burden of proving the reason or reasons for termination of employment. Failure to do so would lead to a finding that the termination was unfair. Further under section 47(5) of the Employment Act, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee while the burden of justifying the grounds for termination or dismissal rests with the employer.

14. According to the respondent through its witness Mr. Joash Mulika the claimant was not dismissed.

The claimant was however implicated in the loss of some goods which were released to one Mercy Adisa to deliver to one of the respondent's customers. The police were called into the matter and interrogated the claimant and found him blameless. The police in fact considered using him as a prosecution witness once Mercy was found. The respondent however on 26th April, 2013 paid the claimant his final dues and procured his thumb print on the final dues form. The respondent further on the same day issued the claimant with certificate of service. It therefore cannot be true that the claimant's services were not terminated. If it be true, which is doubtful, that the respondent wanted to use the claimant as prosecution witness against Mercy once apprehended, then why pay him his final dues and issue him with a certificate of service? The only reasonable conclusion from the foregoing is that the respondent did not have a valid or justifiable reason to dismiss the claimant or if it did, it failed to prove the same as required of it under section 43 of the Employment Act. The Court therefore finds that the termination of the claimant's services was unfair within the meaning of section 45 of the employment Act and orders that he be paid ten month's salary on account of unfair termination of services.

15. On the issue of the claimant's employment status, it was not in dispute that the claimant regularly worked for the respondent since 2004 and that in the year 2011, he was moved to stores as a dispatch clerk. Section 37 of the Employment Act converts the services of a casual worker who has been in continuous engagement with his or her employer for an aggregate period of not less than one month, to a regular employee whose wages are paid monthly and termination of such employees services shall follow the provisions of section 35(1) (c). That is to say such employee shall be entitled to among others, not less than one month's notice of termination or a month's pay in lieu and service pay for every year worked.

16. Regarding leave, the claimant stated that as dispatch clerk he could not take leave because he was the only one on post. He further stated that he did not get paid in lieu of untaken leave. The respondent as the person with the onus of keeping employment records, did not produce any evidence to controvert the claimant's allegations. Failure to allow an employee to proceed on leave when accrued is a continuing injury which must be brought within twelve months next after cessation thereof. The claimant's services were terminated on 26th April, 2013. He filed the present suit on 23rd July, 2013 hence was within time. The same principle applies with regard to the claim for underpayment. However this is limited to the period between 2011 and 2013 when the claimant worked as a dispatch clerk. There was no claim and no evidence was led that as a general worker, he was underpaid.

17. In conclusion the Court enters judgment in favour of the claimant against the respondent as follows:-

Kshs.

(a) One month's pay in lieu of notice

Calculated based on statutory minimum

wage for clerks in Nairobi

@635 per day (2012)17,780.00

(b) Ten month's salary for unfair termination

of services.....177,800.00

(c) Payment for leave accrued but not taken

2004-2011 (@6,930 x 7) + 2011-2013

(@13,335 x 2) + pro rata for 4 months in

April, 2013 (1,111p.m. x 3).....78,513.00

(d) Underpayment of wages from 2011 –
 April, 2013 (635-330 x 28 months).....8,540.00

(e) Service pay @ 15 days’ pay for each
 Complete year of service (9,525 x 9 years).....85,725.00

368,358.00

18. The claimant shall have costs of the suit.

19. It is so ordered.

Dated at Nairobi this 13th day of November 2015

Abuodha J. N.

Judge

Delivered this 13th day of November 2015

In the presence of:-

.....for the Claimant and
for the Respondent.

Abuodha J. N.

Judge