



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 183 OF 2014

JOB ONYINKWACLAIMANT

v

EXPRESSIONS FLORA LIMITEDRESPONDENT

JUDGMENT

1. Job Onyinkwa (Claimant) commenced legal proceedings against Expressions Flora Ltd (Respondent) on 5 June 2014 (the pleading was inelegantly drafted and incoherent and were it a patient, it would have been in a comatose state), and he stated the issues in dispute as

1. Wrongful dismissal of the Claimant from employment by the Respondent.
2. Respondent's failure to issue Claimant with a three month notice to terminate his employment.
3. Respondent's failure to pay the Claimant's terminal benefits upon terminating his employment.
4. Respondent's failure to pay the Claimant night allowances for the entire period within employment.
5. Respondent's failure to pay the Claimant a salary in lieu of leave not taken.
6. Respondent's failure to pay the Claimant for overtime worked.

2. The Respondent filed a Response on 16 July 2014. It also filed a list of witnesses and documents.

3. On 17 September 2014, the parties agreed by consent that the Cause be heard on 24 November 2014.

4. When the Cause was called up for hearing on 24 November 2014 both parties were ready and the Claimant's testimony was taken but at the close of the Claimant's case, the Respondent's counsel informed the Court that he was not ready because his witnesses were absent despite being advised of the hearing.

5. The Court granted the adjournment sought by the Respondent and directed the Respondent to pay adjournment fees. The Respondent's case was fixed for 29 January 2015, but because the Court did not sit on that date, the Cause was mentioned on 22 April 2015, and the Respondent's case was fixed for 21 July 2015. The Claimant was directed to serve a hearing notice upon the Respondent.

6. On 21 July 2015, Mr. Muli holding brief for Mr. Omollo sought another adjournment which was declined.

7. Mr. Muli thereafter informed the Court that he had no further instructions and the Court had no option but to order that the Respondent's case be closed.

8. This was prompted by two reasons. First, an advocate holding brief should be aware that it means he has full instructions. Holding brief is not only for purposes of seeking adjournments.

9. Secondly, the Respondent had also not paid adjournment fees as ordered on 24 November 2014.

10. The Court has considered the pleadings by parties, the evidence and documents filed and identified the issues for determination as, *whether the dismissal of the Claimant was unfair and appropriate remedies/orders including contractual and statutory entitlements.*

Whether dismissal was unfair

11. The Claimant's employment was terminated through a letter dated 14 March 2011. The reason given was that the Claimant left his work place without informing the Respondent and failing to report back to work when called by an Administrator.

12. During testimony, the Claimant informed the Court that he was given a termination letter on 30 March 2011 (the date of 14 March 2011 appears to be a typing error when compared with the date in the body of the letter) and that no reasons were given.

13. According to the Claimant, the dismissal was unfair.

14. In its Response, the Respondent made general denials of the facts set out by the Claimant and put him to strict proof.

15. In a complaint of unfair termination of employment, bare denials and putting the employee Claimant to strict proof will not do. This type of pleading is inadequate and does not meet the statutory standard.

16. I say so because section 43 of the Employment Act, 2007 expressly places a burden upon the employer to prove the reasons for a dismissal while section 45 of the Act require the employer to prove the reasons as valid and fair.

17. Further section 10(3) and (7) of the Act places an obligation upon an employer to meet a certain statutory burden in as far as assertions by an employee are concerned.

18. The Respondent did not meet the standards expected through its pleadings. It did not call any witnesses.

19. But an employee also has a low threshold standard of proof to meet. That requirement is located in section 47(5) of the Employment Act, 2007.

20. Although the Claimant's case was poorly prosecuted, it is not in doubt that a hearing as contemplated by section 41 of the Employment Act, 2007 was not held. Similarly, there is nothing to suggest that a written notice of termination of employment as required by section 35 of the Act was issued.

21. The Respondent by failing to call its witnesses did not justify the reasons for the separation or tender evidence in support of the facts outlined in its pleadings why it did not issue a notice or why summary dismissal was warranted.

22. The Court therefore reaches the conclusion that the dismissal was both procedurally and substantively unfair.

Appropriate remedies/orders including contractual and statutory entitlements

23. In an employment relationship, there are certain entitlements which accrue in terms of contractual agreement or statutory application. The Court will consider them alongside the remedies.

Overtime

24. The Claimant in the pleadings sought Kshs 100,000/- on account of overtime.

25. Of course the Court notes that it is a notorious fact that guards work for 12 hours and section 10 of the Employment Act, 2007 placed an obligation upon the Respondent to controvert the claim. No records of employment were produced and the Court finds for the Claimant.

Leave

26. The Claimant also pleaded that he did not go on annual leave. During testimony he stated that he did not go on leave from 2009 to 2011.

27. The Claimant quantified the amount sought on account of leave as Kshs 5,000/-.

28. But because the law entitles an employee to at least 21 days annual leave for each completed year of service with full pay, the Court would grant the Claimant one month's basic pay for 2009, 2010 and 2011 (each year) in lieu of leave.

29. The Claimant's unchallenged testimony was that from 1 November 2009, the wage was Kshs 5,000/-.

NSSF contributions

30. The Claimant sought Kshs 9,600/- being monies deducted but not remitted to the National Social Security Fund.

31. By deducting and failing to remit NSSF contributions, the Respondent was committing an offence.

32. The said deductions should be refunded to the Claimant.

Night allowance

33. The Claimant did not lay sufficient material before Court on this head of claim.

Salary in lieu of notice

34. The Claimant sought 3 months wages in lieu of notice. He did not provide any contractual basis for 3 months notice as opposed to the statutory minimum of 1 month provided for in section 35 of the Employment Act, 2007.

Terminal benefits

35. Under this head, the Claimant sought Kshs 7,000/-. A contractual or statutory foundation for this was not disclosed.

Compensation

36. The dismissal of the Claimant was unfair. Compensation is one of the primary remedies, though a discretionary remedy.

37. In the view of the Court, this is not a suitable case to exercise the discretion in favour of the Claimant.

Conclusion and Orders

38. The Court finds and holds that the Respondent has failed to prove the reasons for the dismissal of the Claimant or that the reasons were valid and fair and therefore the dismissal was unfair.

39. The Court awards and orders the Respondent to pay the Claimant

(a) Overtime Kshs 100,000/-

(b) Leave Kshs 5,000/-

(c) NSSF deductions Kshs 9,600/-

(d) 1 month wage in lieu of notice Kshs 5,000/-

TOTAL Kshs 119,600/-.

40. The other heads of claim are dismissed.

41. The Memorandum of Claim was incoherently drafted and case poorly prosecuted. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 17th day of December 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kibet instructed by Mirugi Kariuki & Co. Advocates

For Respondent Maangi, Otieno & Co. Advocates

Court Assistant Nixon