



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 190 OF 2013

(Before Hon. Lady Justice Hellen Wasilwa on 16.1.2014)

AMOS OHURU WASONGA.....CLAIMANT

VERSUS

KINGSWAY TYRES CO. LIMITED.....RESPONDENT

JUDGMENT

The claimant herein Amos Ohuru Wasonga filed his statement of Claim on the 17th November 2011 through the firm of Bruce Odeny and Company Advocates. The claimant's case is that he was employed by the respondent as a Salesman in year 2000. He served the respondent diligently but on 23.4.2011 out of the blues he received a termination letter. The termination letter did not give any reasons for the action of the respondent and the claimant told court that he had never committed any misconduct nor been called for any hearing where his misconduct was explained to him. By then, the claimant was earning 42,160/=. The claimant sought services of counsel to try and seek his dues from the respondents but the respondents ignored the demand notice served on them on 10.8.2011. The claimant now seeks payment of Kshs 265,404/= being his three months salary in lieu of notice, leave not taken in 2011, and gratuity at 15% of his salary for 11 years. He also seeks costs of this suit.

The respondents on other hand filed their Memo of response on 15th December 2011 through the firm of Mbaluka and Company Advocates. They called no witnesses but in their Memo of response, they admitted that the claimant was their employee earning a gross salary of Kshs 32,000/= and not 42,160/=. They also stated that the claimant was dismissed summarily on 23.4.2011 but with notice, warning and legal justification. They aver that the claimant was given an opportunity to be heard and defend himself and so is not entitled to any claim he has sought. They contend that the claimant was infact paid all his terminal dues offset against his liabilities to the respondent including salary advance and loans.

I have considered the evidence of both Parties, the issues for determination are as follows;

1. ***Whether the respondent was justified in dismissing the claimant?***
2. ***Whether the claimant was paid his dues as alleged by respondent?***
3. ***Whether the claimant is entitled to any payments as prayed?***

The Claimant stated that he received a dismissal letter without any explanation. The letter reads as follows:

Dear Amos,

Your services have been terminated with effect from 26th April, 2011.

Thank you.

Kingsways Tyres Ltd

Signed

Human Resource Manager

There is no reason as to this termination. The respondent had averred that they gave the claimant an opportunity to be heard and had warned him before which they have not demonstrated in any way.

The action of terminating the claimant without giving reasons contravenes the provision of Section 43(1) of the Employment Act 2008 which states that

“In any claim arising out of termination of a contract the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

Other than the Employment Act 2007, the International Labour Organization Report of the Committee of Experts on the Application of Conventions and Recommendation (Article 19, 22 and 35 of the Constitution) 1995, had this to say at Paragraph 75 and 76 on issue of giving valid reasons for termination of employment

“75. Article 4 of the Constitution provides that “the employment of the worker shall not be terminated unless there is a valid reason for such termination -----

76. The need to base termination of employment on a valid reason is the cornerstone of the Constitutional Provisions. The adoption of this principle removes the possibility of the employer to unilaterally end an employment relationship of indeterminable duration by means of a period of notice or conversation in lieu thereof. It should be noted here that the question of termination of employment for a valid reason is distinct from that of a workers right to a period of notice and severance allowance”

The failure to give the claimant herein any valid reasons makes his termination unfair and unjustified.

The claimant was further not given any hearing as demanded by Section 41(1) and (2) of the Employment Act as follows –

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub – section (1) make.”

The right to a hearing is also provided under Article 50(1) of the Kenya Constitution which states as follows: -

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and

impartial tribunal and body.”

And the Report of the Committee of Experts (ibid) Paragraph 150 which states that;

“It should be noted that the opportunity for a worker to defend himself must be given before employment is terminated. Even if the worker is entitled to procedures after the termination of employment and even if the termination is not considered as final until the appeals procedures are exhausted, it is necessary for the Application of Article 7 that the worker be given an opportunity to defend himself “before his employment is considered to have been terminated”

It is therefore apparent that the claimant was unfairly terminated and the decision to terminate him was not justified.

The second issue relates to payment of his dues. The respondent contends that the claimant was paid all his dues. Nothing has also been exhibited by the respondents as proof that he was actually paid and therefore the respondents averments is merely a mere statement. The claimant seeks payment of his dues including notice, leave and gratuity. I note that the claimant's salary was 42,160/= as per his January 2011 payslip and not 32,000/= as alleged by the respondents and this is tandem with Section 49(1)(c) of Employment Act which envisages that where the dismissal is unjustified the Labour Officer may recommend to the employer to pay the employee any of the following;

“The equivalent of a number of Months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal”.

It therefore follows that in calculating the dues, it should be based on gross and not basic pay.

Given that the claimant was not paid his dues, I find that he is entitled to

1. **1 Months salary in lieu of notice 42,160/=.**
2. **Leave for 2011 not taken – 42,160/=**
3. **Damages for unlawful dismissal equivalent to 12 months salary = 42,160/= X 12= 505,920/=**
4. **Salary for April 2011 -upto 24.4.2011 = 33,728/=**

TOTAL - Kshs 623,968/=

The claimant is not entitled to gratuity payment as Section 35(6) of Employment Act forbids an employee who is a member of NSSF from receiving service pay, and the claimant has not shown that he was entitled to gratuity under any other arrangement.

5. The claimant will also be issued with a Certificate of Service .

The respondents will meet costs of this case.

16th January 2014

HELLEN WASILWA

JUDGE

Appearance

Indimuli holding brief Odeny for Claimant

N/A for respondents

C/c- Wamache

