



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 274 OF 2013

JARED O. OTETECLAIMANT

VERSUS

FACTORY GUARDS LTDRESPONDENT

J U D G M E N T

BACKGROUND

The claimant was employed by the respondent on 13/2/2004. His job title was security guard and worked until 21/11/2011 when he was unfairly summarily dismissed. The reason for the termination was that some goods were stolen from his place of work. As at the time of his dismissal he was earning gross salary of ksh.16,984.55 per month. He now brings this suit claiming accrued terminal benefits plus damages for unfair termination amounting to ksh.201,954.70/.

The suit was never defended by the respondent and as such it was heard exparte on 28/10/2013.

CLAIMANT'S CASE

The claimant stated that he was employed on 13/2/2004 and that his gross salary was ksh.16,984.55 as shown in the exhibits annexed to the claim. He further stated that he worked until 21/11/2011 when he was terminated on allegation of theft. Before the said summary dismissal, he was arrested and charges in court on 14/11/2011 and thereafter suspended from work on 15/11/2011. The dismissal letter was served to him on 21/11/2011 before any disciplinary hearing. He further contended that he had never been served with any warning letter before the dismissal. He therefore prayed for salary between November 2011 to date, leave for the same period, severance pay from 2004 to date, and certificate of service as per prayer C in the claim.

After the close of the hearing, the learned counsel for the claimant filed brief submissions.

ANALYSIS AND DETERMINATION

Upon reading the memorandum of claim and upon considering the evidence and the submissions filed, the court has raised the following issues for determination:

- a. **Whether the summary dismissal of the claimant amounted to unfair termination of his employment.**
- b. **Whether the claimant is entitled to the reliefs sought.**

Whether the summary dismissal was unfair

The uncontested evidence of the claimant is that he was arrested and charged in court on 14/11/2011. On 15/11/2011 he received a suspension letter accusing him of theft at his work place where he was supposed to be guarding. Eventually on 21/11/2011 the claimant was served with a letter of summary dismissal.

The claimant contends that the dismissal was unfair. No evidence was adduced to rebut the allegation of unfairness. Section 41 of the Employment Act bars an employer from dismissing an employee under Section 44 *supra*, before according a disciplinary hearing on the employee. The disciplinary hearing entitles the employee to be accompanied by a fellow employee or union shop floor representative of his choice. The proceedings would involve the employer’s explanation to the employee of the reason for the intended dismissal and then invite the employee and his companion to make their representations before a decision is made. The proceedings are to be conducted in a language which the employee is conversant with.

In the present case the respondent has not demonstrated that Section 41 *supra* was complied with before the summary dismissal of the claimant. The court is therefore satisfied that the summary dismissal was in violation of the claimant’s right to a disciplinary hearing as enshrined under Section 41 of the Employment Act. In addition the burden of proving the validity of the reason for dismissal lies with the employer who did not file defence.

Whether the claimant is entitled to the reliefs sought.

Section 49 of the Employment Act provides for the remedies available for unfair termination of employment. They include notice pay, accrued salary, leave and compensation for unfair termination of upto 12 months gross salary among others.

The claimant has prayed for one month salary in lieu of notice, salary for November 2011, accrued leave, severance pay for 9 years, maximum 12 month salary for unfair dismissal, certificate of service and costs. The court awards him the prayer for notice pay, salary for November 2011, 12 months salary for unfair dismissal, certificate of service and costs.

The claimant’s payslips produced as Appendix 1 for October 2011 is proof that the claimant was receiving his salary at intervals of one month in arrears. Under Section 35 of the Employment Act he was entitled to one month prior notice before termination for his services. He will get ksh.9732.45 for notice pay as prayed. He prayed costs for ksh.7860.80 for days worked in November 2011 and he is awarded the same.

The claimant is entitled to 12 months gross salary which amounts to ksh.203,814.60. He however prayed for kshs. 116,789.40 which is what he is awarded. The claimant is also awarded certificate of service and costs.

The claimant has not proved his claim for accrued leave and it is dismissed. One cannot earn leave after dismissal unless he was reinstated. The claim for severance pay is likewise dismissed because the termination of the contract was not through redundancy. Even if it was to be construed to mean service pay under Section 35 of the Employment Act, the claim would still fail because the payslips he produced indicates that he was a member of NSSF and the employer deducted and remitted dues in favour of the claimant.

DISPOSITION

As a consequence of the reasons aforestated, the court enters judgment for the claimant against the respondent as follows:

- a. **One month salary in lieu of notice9,732.45**
- b. **Salary for November 20117,860.80**

c. **12 months salary for unfair termination.....116,789.40 134,382.65**

d. **Interest on (c) from 21/11/2011 till pay in full**

e. **Certificate of service**

f. **Costs plus interest**

Orders accordingly

Dated, signed and delivered this 14th day of February 2014

O.N. Makau

Judge