



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 390 OF 2013

BENJAMIN SIMIYU WABUKECLAIMANT

VERSUS

MACHIRI LIMITED1ST RESPONDENT

GEORGE NJOROGE2ND RESPONDENT

J U D G M E N T

INTRODUCTION

The claimant has brought this suit claiming accrued employment benefits plus compensation for unfair termination of employment. He alleges that he was employed by the respondent as a labourer on 24/9/2012 at a monthly salary of ksh.13500 but was verbally summarily dismissed on 18/2/2013 for championing the grievances of the other workers as the representative. The respondents in their defence contended that they dismissed the claimant by a letter dated 14/2/2013 for gross misconduct, namely stealing or failing to account for cement belonging to the 1st respondent. They denied the allegation that the claimant was the worker's chosen representative.

The case was heard on 12/2/2014 and 25/2/2014 when the claimant testified as CW1 and Mr. Harrison Wachira Nderitu represented the respondents as RW1.

CLAIMANT'S CASE

CW1 testified that he joined the respondent on 24/9/2012 as a manual labourer and worked until 18/2/13. He was also the worker's representative from 8/11/2012 recognized by the management. He attended meetings with the management on 27/11/2012 and 4/12/2012 and 10/12/2012 to champion the workers demands related to salary increase, workers identify cards, NSSF and NHIF contribution. There was no union and as such the Respondent had requested the workers to chose one person to represent them in meetings with the management instead of every one asking to meet the management.

It is in the exercise of such representative duties that the claimant contends that he was summarily dismissed verbally on 18/2/2013. According to him the dismissal was unfair because he was never granted any hearing or any notice before the termination.

The reason for dismissal also according to him was unfair because he was accused of enlightening the other workers on their labour rights. At the time of dismissal he was earning a salary of Ksh.13500

per month. He prayed for one month salary in lieu of notice, salary arrears for September 2012- February 2013, prorata leave for the service period, 16 rest days worked, overtime of 72 hours, certificate of service and 12 months salary for unfair dismissal totaling to ksh.209,709.

On cross examination he admitted that his pay interval was weekly at ksh.3150. He contended that he was the workers lawful representative by referring to the minutes between him and the management. He denied ever receiving any dismissal letter dated 13/2/2013 alleging that he was dismissed for stealing cement. He denied stealing any cement.

DEFENCE CASE

RW1 is the site agent for the respondent. He admitted that the CW1 was their employee from 24/9/2012 but maintained that he was dismissed on 13/2/2013 for stealing or failing to account for 3 bags of cement. He relied on the statement written by Mr. Simon Mwangi a former site Agent dated 16/7/2013 about the incidence which he produced as exhibit 1. He denied the allegation that the dismissal of the claimant was due to his role of representing other workers. He produced the dismissal letter dated 14/2/2013 as exhibit 2 showing the reason for the dismissal as theft.

He contended that after the dismissal, the claimant reported to the labour officer who demanded ksh.30000 from the respondent but the respondent offered ksh.13050 as the compensation due to the claimant. RW1 produced letter dated 22/10/13 as exhibit 3 and receipt for ksh.13050 from the labour officer as prove that the claimants dues were deposited with the labour officer.

He denied claim for notice pay because the claimant was summarily dismissed. He admitted the claim for leave on pro-rata basis plus 16 rest days which was part of the money deposited to the labour officer. He however denied the claim for overtime on ground that the company operates only during normal working hours. He was denied the claim for compensation for unfair termination because of the reason for dismissal.

On cross examination RW1 admitted the CW1 attended site Agent meeting as the workers representative. RW1 however did not know of the workers grievances regarding salary, NSSF or NHIF because he did not attend the meetings. He also did not know whether CW1 worked extra time and Sundays. RW1 could not produce any evidence to show that the claimant received cement from the store. He confirmed that one cannot be given goods from the store without signing for it. He also confirmed that there were guards at the site.

He admitted that he was not present when the claimant was dismissed and further admitted that no termination notice was served on the claimant. RW1 did not know whether a disciplinary hearing was given to claimant before dismissal but he knew that no one was taken to police for the theft. Lastly he admitted that CW1 never went for any leave during his service.

After the hearing both parties filed submissions.

ANALYSIS AND DETERMINATION

After perusing the pleadings and upon considering the evidence and submissions filed, the following issues for determination arose:

- 1. whether claimant was casual or a term contract**
- 2. whether the summary dismissal of the claimant amounted to unfair termination.**
- 3. Whether the relief sought ought to issue.**

Causal or term contract

The evidence on record is that the claimant joined the respondent on 24/9/12 and worked continuously until 18/2/2013 or 14/2/2013. Whichever date one takes as the dismissal date, the fact remains that the claimant served continuously for over 4 months. Under Section 37(1) of the Employment Act such a contract is deemed to be a contract of service where wages are paid monthly and Section 35(1) (c) applies.

Section 35(1) (c) on the other hand provides that where the contract is to pay wages or salary periodically at intervals of or exceeding over month, the contract shall be terminable by prior written notice of 28 days. Section 37(3) of the said Act then entitles an employee whose contract is converted to all the terms and conditions of service as if he was not initially employed as a casual employee.

The court has considered the foregoing provisions of the law and proceeds to find and hold that the claimant was engaged on a term of contract with the full benefit of an employee engaged for monthly wages. The defence allegation that the claimant was only a casual employee is therefore dismissed.

Unfair dismissal

The uncontroverted evidence by the claimant is that he was dismissed for championing workers rights as their elected representative. There are minutes produced and admitted by RW1 that they recorded the claimant as attending in his capacity as workers representative. CW1 contends that he was dismissed on 18/2/2013 verbally. The RW1 produced a letter to show that CW1 was dismissed on 14/2/2013 for continuous gross misconduct culminating in theft of cement. No other misconduct was mentioned in the said letter. The RW1 was not present during the dismissal and therefore without referring to the dismissal letter he is a total stranger to the whole process of dismissal. He is therefore not capable of rebutting the claimant's evidence on the exercise of his dismissal.

The said letter was never served on the claimant until the reply to his suit. At least the burden of prove of service was on RW1 but he did not discharge it. Likewise the burden of proving the reason of dismissal as stealing of cement was not discharged by RW1 in his evidence. He only read about it in the dismissal letter and the written statement of Mr. Simon Mwangi dated 15/7/2013. No reason was given as to why Mr. Mwangi did not testify. His written statement was also hearsay because he did not state that he personally gave the claimant the cement in issue. The court therefore finds that the reason for dismissal was not proved in evidence in this case. At least the person who gave the cement to the claimant should have testified. Similarly the Site Guards on duty should have been called to confirm who received and stole the cement.

As regards the procedure followed, the claimant's evidence is uncontested. RW1 was not present during the termination and never produced any proceedings for disciplinary inquiry against the claimant before dismissal. The court is therefore persuaded by the claimants testimony on a balance of probability that he was summarily dismissed verbally and without any disciplinary hearing being accorded to him. The reason was for the championing of the workers grievances as their lawful representative and not stealing of cement.

The summary procedure was therefore a breach of Section 41 of the Employment Act which require in mandatory terms that an employer should accord a disciplinary hearing to an employee before dismissing him or her on grounds of misconduct. The summary dismissal was therefore tantamount to unfair termination.

Relief Sought

The claimant gave no evidence in favour of reinstatement, and the prayer for reinstatement is therefore dismissed. In view of the findings that the claimant was on a term contract of service, he is awarded one month salary in lieu of notice. The allegation that he is entitled to one week notice or wages in lieu is dismissed being a misconception of the meaning of Section 35(1) of the At. The latter provision should be interpreted subject to Section 37 of the Act. Section 37(1) recognizes Section 35(1) (c) only and not subsection (1) (a) and(b). The reason fur such a scenario is obviously that th legislature wanted to

accord casual workers certain minimum statutory benefits and protections to insulate them from certain labour malpractices. Consequently, the court awards him ksh.13500 as prayed. The respondent admitted the claim for 16 rest days and court awards him the same being 7200/-. The claimant is also given prorata leave for the period served being approximately 4 months. The law provides for $\frac{3}{4}$ leave days per month which works to 7 days leave X ksh.450 per day = ksh.3150/.

There was no evidence to prove overtime and pending wages and as such the claims are dismissed. The court is however persuaded to grant a compensation for unfair dismissal being 3 months gross salary being ksh.40500/-. The reason for not awarding the maximum is that the nature and the rank of the claimant was such that with good effort one could get a similar employment within the period of 3 months. The purposes of compensating for unfairness is meant to cushion the discharged employee during the period of searching for another employment.

The claimant is to get a certificate of service as required under Section 51 of the Employment Act.

DISPOSITION

For the reasons above the court enters judgment for the claimant for:

1. Ksh.64,350
2. certificate of service.
3. Costs and interest.

Singed dated and delivered this 9th May 2014.

O.N. Makau

Judge