



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1997 OF 2012

DAVID MUTEMI.....CLAIMANT

VS

HEBATULLAH BROTHERS LIMITED.....RESPONDENT

AWARD

Introduction

1. The Claimant's claim brought by way of Statement of Claim dated 4th October 2012 and filed in Court on even date is for unfair termination of employment and failure to pay terminal dues. The Respondent filed a Statement of Defence on 6th November 2012 but when the matter came up for hearing on 17th February 2014, which date had been taken in Court by consent of the parties, there was no appearance for the Respondent. The Court therefore proceeded to hear the Claimant *ex parte*.

The Claimant's Case

2. The Claimant was employed by the Respondent as a storekeeper in the automobile glasses division effective 12th November 2003. He was not issued with a written contract of employment. The Claimant was initially paid a daily rate of Kshs. 188 which was increased to Kshs. 500 and finally to Kshs. 635 as at the time he left the Respondent's employment.

3. On 23rd August 2012, the Respondent terminated the Claimant's employment without lawful cause and without notice. Upon termination, the Claimant was paid Kshs. 15,000. The Claimant pleaded that during the entire period of his employment with the Respondent, he never went on leave.

4. The Claimant claims the following:

- a. A declaration that the termination of his employment was unlawful and wrongful
- b. 1 month's salary in lieu of notice.....Kshs. 16,510
- c. Service pay at the rate of 15 days' pay per year.....Kshs 85,725
- d. Leave pay at 21 days per yearKshs 120,015
- e. Salary arrears.....Kshs 13,230
- f. 4 days worked.....Kshs 2,000
- g. 12 months' salary in compensation for unfair termination.....Kshs 198,120
- h. Less amount paid on account.....Kshs. (15,000)
- i. Certificate of service
- j. Costs and interest

k. Any other relief the Court may deem just to grant

The Respondent's Case

5. In its Statement of Defence filed on 6th November 2012, the Respondent pleads that the Claimant was a casual employee earning weekly wages. The Respondent further states that the Claimant was involved in theft of the Respondent's property. According to the Respondent, the Claimant was paid his full and final benefits being Kshs. 15,000.

Findings and Determination

6. The Respondent's line of defence in this case stems from the nature and status of the Claimant's employment. In this regard, the Respondent maintains that since the Claimant was a casual employee, he is not entitled to any of the reliefs sought.

7. The law on casual employment is clear and unequivocal. Section 2 of the Employment Act, 2007 defines a casual employee as:

“a person the terms of whose employment provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time”

8. The Respondent did not adduce any evidence to prove its claim that the Claimant was a casual employee as defined in law. Section 9 of the Employment Act, 2007 places the responsibility of documenting the terms and conditions of an employment relationship on the employer and as was held by **Mbaru J** in the case of **Robai Musinzi Vs Safdar Mohamed Khan [2012] eKLR** where an employer fails to discharge this mandate, it is left to the Court to interpret the terms of the employment relationship.

9. According to the Claimant, he worked for the Respondent for 9 years and apart from a general statement in the Respondent's defence that the Claimant was a casual employee, there was no evidence that the Claimant worked intermittently. I therefore invoke Section 10(7) of the Employment Act and adopt the Claimant's testimony that he worked for the Respondent for 9 years. I also adopt the figure of Kshs. 16,510 as the Claimant's monthly salary for purposes of this claim.

10. I will now examine the substance and procedure of the termination of the Claimant's employment. Section 43(1) of the Employment Act provides that:

(1) 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.

11. Section 45 itself provides as follows:

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) That the reason for the termination is valid;

(b) That the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility ;or

(ii) based on the operational requirements of the employer and that

(c) That the employment was terminated in accordance with fair procedure.

12. The letter of termination dated 23rd August 2012 states as follows:

“The management has decided to terminate your services with immediate effect.

You may collect your terminal dues before noon on 24th August 2012.

Yours faithfully

SHOEB MOHMEDALI”

13. While the Respondent's Statement of Defence alluded to some accusations of theft against the Claimant, no particulars were provided and no evidence was led in support of these allegations. Moreover, there was no evidence that these allegations were put to the Claimant in order for him to respond.

14. The Court therefore finds that the Respondent has failed to establish a valid reason for termination of the Claimant's employment. With regard to the procedure adopted by the Respondent in effecting the termination, there was no evidence of any semblance of compliance with the provisions of Section 41 of the Employment Act 2007. The upshot is that in terminating the Claimant's employment, the Respondent failed both the substantive justification and procedural fairness tests. I consequently award the Claimant the equivalent of 9 months' salary in compensation for unfair termination of employment. I also award him 1 month's salary in lieu of notice.

15. The Claimant told the Court that he was not a member of the National Social Security Fund (NSSF) and there was no evidence that he was a member of a registered pension or provident fund or a gratuity or service pay scheme under any collective agreement. I therefore award him service pay at the rate of 15 days' pay for every year of service. The Respondent did not produce any leave records to counter the Claimant's claim for leave pay. This claim therefore succeeds and is allowed. The claims for salary arrears and 4 days' pay were not proved and are dismissed.

16. The net effect of this award is as follows:

- a. 9 months' salary in compensation for unfair termination..... Kshs. 148,590
- b. 1 month's salary in lieu of notice.....Kshs. 16,510
- c. Service pay (16,510/30x15x9).....Kshs. 74,295
- d. Leave pay (16,510X21x9).....Kshs. 104,013

Total.....Kshs. 343,408

Less amount paid.....Kshs. (15,000)

Amount due.....Kshs. 328,408

17. I further award the Claimant the costs of this case. He is also entitled to a certificate of service, which the Respondent is directed to issue within the next 21 days from the date of this award. The award amount will attract interest at court rates from the date of the award until payment in full.

18. This award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF MAY 2014

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*