



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)

CAUSE NO. 353 OF 2013

KAZUNGU NGARI YAA

CLAIMANT

v

MISTRY V. NARAN MULJI & CO

RESPONDENT

JUDGMENT

1. Kazungu Ngari Yaa (Claimant), through J.K. Mwarandu & Co. Advocates lodged a Memorandum of Claim against Mistry V. Naran Mulji & Co (Respondent) on 24 December 2013 and the issue in dispute was stated as *non-payment of salaries, leave and unlawful termination of employment*.
2. The Respondent was served and an affidavit of service sworn by Tom Odhiambo on 21 November 2013 deposed that a Manager by the name of Mutua was served with Notice of Summons and copy of Memorandum of Claim but he declined to sign in acknowledgment.
3. When the Cause was placed before Court on 1 April 2014, I fixed the hearing for 26 May 2014 and directed the Claimant to serve the Respondent with a hearing notice.
4. On 26 May 2014 when the Cause was called up for hearing, Mr. Wandera for the Claimant informed the Court that a hearing notice had been served and an affidavit of service filed.
5. The affidavit of service sworn by Tom Odhiambo deposed that a Mr. Mutua, Respondent's Manager had been served but declined to sign or stamp the notice in acknowledgment. Being satisfied that service had been effected, I allowed the hearing to proceed.
6. The Cause proceeded as an undefended Cause since the Respondent did not file a Response or attend the hearing.
7. The consequence of the failure is that there are no real disputes of fact, as the Claimant's pleadings and testimony was not controverted or challenged.
8. The Claimant was employed initially by the Respondent as a shamba boy in 1986 and worked as such for 9 years. Through a letter dated 1 April 1986 (produced) the Respondent's General Manager informed the Claimant that he had been promoted to a security guard at a salary of Kshs 9,000/- per month (salary vouchers from 1996 to July 2011 were also produced).

9. On 6 August 2011 the Respondent wrote to the Claimant informing him that his employment was being terminated due to his inefficiency and directing him to surrender his uniform and gumboots and collect his salary.

10. The Claimant's case is that the termination was unlawful because no notice or reasons were given.

11. The Claimant stated he was seeking the reliefs set out in the Memorandum of Claim.

12. Like in any complaint of unfair termination, the issues arising for determination are, whether the termination was unfair and if so appropriate remedies.

Whether termination was unfair

13. The Claimant was being paid by the month. Pursuant to section 35(1)(c) of the Employment Act, he was entitled to written notice. There is no material before Court to suggest that the Claimant was given notice. On this ground, the Court finds that the Claimant has met the threshold of establishing that the termination was unfair.

14. Section 41 of the Employment Act obliges an employer to grant an employee a hearing before taking the decision to terminate, if the ground of termination is misconduct, poor performance or physical incapacity. The termination letter referred to inefficiency. This means the Claimant was being terminated because of performance.

15. There is no evidence that the Respondent granted the Claimant a hearing. The termination consequently was procedurally unfair.

16. Sections 43, 45 and 47(5) of the Employment Act, 2007 on the other hand require an employer to prove the reason(s) for termination, that the reasons are valid and fair and to justify the grounds for termination.

17. The termination letter referred to inefficiency. This means the Claimant was being terminated because of performance.

18. The Respondent was under a statutory duty to prove the reason(s) for termination. By failing to file a Response or attend the hearing, the only conclusion the Court can reach is that the reasons have not been proved as valid and fair. The termination was substantively unfair.

Appropriate relief

1 month salary in lieu of notice

19. Pursuant to section 35 and 36 of the Employment Act, the Claimant has made out a case for one month pay in lieu of notice.

August 2011 salary

20. The Claimant sought Kshs 15,000/- as August 2011 wages. But no evidential basis was placed before the Court for seeking Kshs 15,000/- and not part of wages based on the Kshs 9,000/- the Claimant was earning. The Claimant was terminated through letter dated 6 August 2001 (in testimony he stated 2011). The Claimant would be entitled for wages for 6 days which is Kshs 2,076/-.

Years worked

21. The Claimant sought Kshs 90,000/- on account of years worked. No formula used to arrive at the sum was given to the Court.

