



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1777 OF 2013

STEPHEN KAGOIYOCLAIMANT

VERSUS

FRANKA SCRAP METALRESPONDENT

JUDGMENT

By a statement of claim dated 29th October 2013 and filed in court on 1st November 2013 the claimant alleges that his employment was unlawfully terminated by the Respondent in September, 2013. He prays for the following orders:-

- a. An order compelling the Respondent to revoke the termination of employment of the Claimant.
- b. An order for the reinstatement of the Claimant with full benefits including the period he has been out of employment.
- c. Leave days worked.
- d. One month's salary in lieu of notice.
- e. Damages for wrongful/unfair dismissal.
- f. Interest on (e) above.
- g. Any other orders or directions that this honorable court may deem fit and just to grant in the circumstances of this case.
- h. The costs of this cause.

The claim is not defended. The case came up for hearing on 16th July 2014. The Claimant was represented by Mr. Gacharia instructed by Robi Kerato Partners, Advocates. There was no appearance for the Respondent.

After ascertaining that both the claim and the hearing notices were properly served upon the Respondent and affidavits of service duly filed, I allowed the claimant to proceed with his case in the absence of the Respondent.

The Claimant testified that he was employed by the Respondent as a welder. That the Respondent deals with fabrication of doors and lorry bodies. He started working in August 2007. His salary was Kshs.24,000/= per month. He was not a member of NSSF and NHIF and none of the contributions for NSSF and NHIF were deducted from his salary. He produced a staff identification card and an acknowledgement letter. The acknowledgement letter confirms that the Claimant was employed from 2007 in welding and filling. It is addressed "To whom it may concern" and is dated 23rd August 2013.

The Claimant testified that he never took any leave during his employment. He was entitled to 21 working days per year.

He testified that he reported to work on a Monday morning around 13th September 2013 when he was informed by the Managing Director Mr. Francis Kagiwo at around 8.30 am that he was no longer required to work as work had reduced. He was asked to leave the premises.

He reported to the Ministry of Labour and the Labour Officer called meetings 3 times but the Respondent failed to attend. He then decided to file this suit. He prayed for orders as stated in his statement of claim.

I have considered the statement of claim, the evidence adduced by the claimant in court, the documents produced and the written submissions.

There is no defence filed in this case and the only evidence I have is the Claimants. I have no reason to doubt his averments. The only issue I need to establish is whether the Claimant is entitled to the prayers sought.

1. The Claimant prays for revocation of the termination and an order for re-instatement with full benefits.

The Employment Act Section 49(4)(d) requires the court to consider the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances.

In both his testimony and in the written submissions the claimant has not asked for reinstatement.

I therefore find that there are no compelling reasons to order reinstatement and dismiss this head of claim.

2. Leave days

The Claimant alleges that he never took leave for the entire period he was in employment. Since there is no defence to the claim the Claimant's averments have not been controverted.

I therefore award him leave for the period August 2007 to September 2013 being 6 years at 21 days per year worked. That comes to 126 days at 24,000/30 x 126 amounts to Kshs.100,800/=. I award the Claimant Kshs.100,800/= in lieu of 126 days leave.

3. Salary in lieu of notice

Having been terminated without notice the Claimant is entitled to one month's salary in lieu of notice. I award him Kshs.24,000/=.

4. Damages for wrongful dismissal

The Claimant was not given a hearing before his termination in terms of the provisions of Section 41 of the Employment Act. He was also not given a letter of termination.

For these reasons the termination of his employment was unfair in terms of Section 45 of the Employment Act. He is therefore entitled to compensation for unfair termination as provided in Section 49(1)(c) of Employment Act.

Having worked for 6 years and considering the manner in which his employment was terminated, and further taking into account the failure of the Respondent to defend the claim, I award the Claimant 12 months salary as compensation in the sum of Kshs.288,000/=.

5. Costs and Interest

The Claimant will also be entitled to costs of his claim and to interest on decretal sum from the date of judgment at court rates.

Orders accordingly.

Read in open Court this 23rd day of September, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE