



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 2417 OF 2012

JOHN OTIENO MUKABI.....CLAIMANT

VS

KENYA BUILDERS & CONCRETE COMPANY LTD.....RESPONDENT

AWARD

Introduction

1. John Otieno Mukabi, the Claimant in this case worked for the Respondent as a Welder. While the exact date of his employment is in contention, the Claimant worked until July 2012 when his employment was terminated. Following his termination, the Claimant filed a claim on 29th November 2012, seeking compensation for unfair termination and payment of his terminal dues.
2. The Respondent filed a Memorandum of Defence on 26th August 2013 and the matter was heard on 20th May 2014. The Claimant testified on his own behalf and the Respondent's Human Resource Manager, Jeremiah Nzioka testified for the Respondent.

The Claimant's Case

3. According to the Claimant, he was employed by the Respondent as a Welder in 1999 initially as a casual. He was not given a letter of appointment until 2003. His monthly salary at the time he left employment stood at Kshs. 13,429. On 19th July 2012, while at work the Claimant began experiencing itching in his body and he therefore took a break to wash his hands and head. He returned to his work station after ten minutes upon which his supervisor, a Mr. Nanji told him not to report to work the following day before seeing Mr. Nanji together with the Human Resource Manager.
4. The following day, the Claimant met the Human Resource Manager and Mr. Nanji where he explained the reason for his having left his work station. His apology was not accepted and he was issued with a warning letter dated 19th July 2012. He was then directed to surrender the Company's helmet and overalls as his employment had been terminated. The Claimant denies having been asked to write a statement on the incident as alleged by the Respondent.
5. The Claimant pleads that he was not given a reason for the termination of his employment and was not afforded an opportunity to be heard. Further, he was not paid his terminal dues. He therefore claims the following:

- a. A declaration that the termination of his employment was unlawful and unfair
- b. One month's salary in lieu of notice.....Kshs. 13,429
- c. Damages for loss of employment calculated at 12 months'
SalaryKshs. 161,148
- d. Compensation for unfair termination calculated at 12 months'
salary.....Kshs. 161,148
- e. Costs plus interest

The Respondent's Case

6. In its Memorandum of Defence, the Respondent admits having employed the Claimant initially as a casual with the employment being converted to term contract on 1st March 2003. The Respondent admits the figure of Kshs. 13,429 as the Claimant's salary at the time he left employment on 19th July 2012.

7. In response to the Claimant's claim for unfair termination, the Respondent states that the Claimant declined to be subjected to the Respondent's disciplinary process leaving the Respondent with no option but to dismiss him. According to the Respondent, the Claimant had been issued with two previous warning letters on 7th September 2011 and 21st February 2012. On 19th July 2012, the Claimant left his work station unattended and on being asked to give an explanation, he left the Respondent's premises and declined to be subjected to any inquiry. Consequently, his employment was terminated.

Findings and Determination

8. The issues for determination in this case are as follows:

- a) Whether the Respondent had a valid reason for terminating the Claimant's employment;
- b) Whether in effecting the termination the Respondent observed due process;
- c) Whether the Claimant is entitled to the reliefs sought.

Reason for Termination

9. The reason for termination of the Claimant's employment was in contest. According to the Claimant, he was terminated on account of having taken a ten minute break to wash his head and hands. The Respondent on the other hand states that the Claimant absconded duty after being asked to give a written explanation regarding absence from his work station on 19th July 2012.

10. While denying having dismissed the Claimant, the Respondent was unable to explain the contents of its document prepared by the Personnel & Administration Manager, Jeremiah Nzioka on 31st July 2012 and approved by the Managing Director, Dhiraj Vekeria on 3rd August 2012 indicating the mode of the Claimant's separation as dismissal.

11. In addition, this document shows the Claimant's last day of work as 19th July 2012, the same day he was issued with a warning letter which letter also carries the Respondent's decision to dismiss the Claimant. In the absence of any evidence to the contrary, the Court has arrived at the conclusion that the Respondent dismissed the Claimant but did not issue a letter of dismissal. By this finding, the Court rejects the unsupported allegation by the Respondent that the Claimant deserted duty.

12. Section 43 (1) of the Employment Act, 2007 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.

13. In my view, an employer is required to provide the reason for termination of employment of an employee in the course of the internal disciplinary process which is triggered by a notice to show cause. Once an employer decides to take the ultimate disciplinary action of terminating the employment of an employee, the reason for the termination must be clearly stated in the letter of termination. By the time an employee exists from employment on account of termination, the reason for their termination must be clear.

14. An employer who fails to discharge its obligation to its employee in this regard will not be forgiven merely because they seek to demonstrate the reason for termination to the Court. It is not the role of the Court to preside over a re-enactment of internal disciplinary processes. The duty of the Court is to inquire into the legality of the process and its outcome and to make a determination thereon.

15. In light of the foregoing, the Court finds that the Respondent failed to demonstrate a valid reason for the termination of the Claimant's employment rendering the employment unfair for want of substantive justification.

Termination Procedure

16. Section 41 of the Employment Act, sets out the procedure for handling cases of misconduct, poor performance or physical incapacity as follows:

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;

17. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

18. An examination of the warning letter dated 19th July 2012 reveals that the decision to dismiss the Claimant was taken on the same day. By issuing a warning letter and then proceeding to dismiss the Claimant, the Respondent appears to have taken two disciplinary actions for the same offence.

19. Further, there was no evidence that the Claimant was subjected to the disciplinary process set out in Section 41 of the Employment Act, 2007. Consequently, the Court finds that the termination of the Claimant's employment was unfair for want of due process as well.

Reliefs

20. Having found the termination of the Claimant's employment unfair for want of substantive justification and procedural fairness I make the following award in favour of the Claimant:

- a) 6 months' salary in compensation for
unfair termination.....Kshs. 80,574
- b) 1 month's salary in lieu of notice.....Kshs. 13,429
- Total.....Kshs. 94,003**

21. In making this award, I have taken into account the Claimant's employment record and length of service. I further award the Claimant the costs of this case. The award amount shall attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF SEPTEMBER 2014

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF SEPTEMBER 2014

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Makokha for the Claimant

Mr. Masese for the Respondent