



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 431 OF 2013

JARED OWINO WANAGWECLAIMANT

VERSUS

KRYSTALLINE SALT LTDDEFENDANT

J U D G M E N T

INTRODUCTION

The claimant herein brings this suit seeking to recover ksh.208193 being accrued employment benefits plus compensation for unfair dismissal by the respondent on 7/11/2013.

The respondent has denied liability and averred that the dismissal was warranted because the claimant had grossly breached the contract of employment. The suit was heard on 30/6/2014 when claimant testified as CW1 and the respondent called Anne Karanja as RW1.

CLAIMANT'S CASE

CW1 told the court that he was employed by the respondent in February 2002 as a Machine Maintenance and Repairer. The engagement was verbal at first but on 9/3/2011 he was given a written contract lasting upto July 2012. The contract was renewed by letter dated 2/7/2012 to 30/6/2014.

Under the said written contract, his job title was General Labourer and his salary was ksh.11,347 gross. He produced payslips and the 2 written contract of employment. On 7/11/2013, he attended work as usual and at 2 pm, he was called to the HR office where he was given a summary dismissal letter. The reason for the dismissal was that on 28/10/2013, CW1 absented himself without permission, on 2/11/2013 he went on leave without permission and finally on 5th – 6th November 2013, he was found idling around.

CW1 denied the alleged misconduct by contending that on 28/10/2013, he was sent by the manager Mr. Vinu Bhai to register his Yu sim card. That on 2/11/2013, CW1 fell sick and notified Mr. Charo, Sales Officer and went to the hospital. He produced medical notes from the hospital dated 27/10/2013. As regards 5th and 6th November 2013, CW1 explained that he was not idling around the motor vehicles but rather he was preparing to wash the same because cleaning the vehicles was part of his general duties. He explained that he was not at his usual place of machine repair because other people had been recruited to

replace him from there.

He contended that he was not served with any warning letter or notice to terminate his employment prior to the dismissal. He was also not accorded any disciplinary hearing before the dismissal. According to CW1, he had a good defence to offer but he was denied a hearing. He prayed for salary in lieu of notice and annual leave for the period between 2002 and 2011 and for the year 2012/2013. He admitted that he only went for 14 days leave in 2011/2012. He also prayed for service pay for the period between 2002 and 2011 when he was not a member of NSSF. He prayed also for compensation for unfair termination. He contended that the procedure followed to dismiss him was not fair. He finally prayed for certificate of service.

On cross examination by the defence counsel, CW1 maintained that he worked for the respondent from 2002 to 2013. He produced letters written by the respondent to prove that he started to work for the respondent earlier than 28/3/2011 when a written contract was effected in his favour by the respondent. CW1 admitted that on 28/10/2013 he was absent from his work place because he had been sent away by the manager Mr. Bhai to register his Yu sim card.

On the other occasion he was not in his usual work place because new people had been hired to replace him at the machine repairs section. CW1 explained that between 2002 and 2004 he was earning ksh.140 per day and thereafter until the written contract he was earning ksh.220 per day. He contended that he worked continuously and payment was paid in arrears every Saturday.

CW1 explained that as a general worker his duties were scattered all over and included being send outside the respondents premises. He explained that he reported his sickness to Mr. Charo and when he reported back to work he gave the treatment notes to madam Beater because the HR Manager Mr. Lijoodi was absent. CW1 explained that he refused the dues offered to him on termination because it did not factor the period of service between 2002 and 2011.

DEFENCE CASE

RW1 is the HR and Administration Manager for the respondent. She joined the respondent on 15/5/2014 long after the dismissal of the claimant. She only relied on the office records to state that CW1 was employed by the respondent from March 2011 as a general worker and was dismissed on 28/11/2013. The reason for dismissal was absence from work without permission and another occasion being absent on account of illness but failing to produce a medical certificate. On another two occasions, CW1 was found by the director at the vehicle parking yard which was outside his work place.

RW1 contended that CW1 was offered ksh.14000 as his final dues by letter dated 7/11/2013. (Exh.D.1) but he rejected it. The respondent deposited the rejected money at the labour office by letter dated 12/11/2012 (exhibit d.2). RW1 maintained that NSSF was paid for the claimant since 2011 when he joined the respondent.

On cross examination by the claimant's counsel, RW1 was not sure whether respondent employed casual workers before 2011. She contended that the respondent had a disciplinary procedure for her workers which involved inviting the employee the offence charged and then inviting him to tender his defence. That during the said hearing, the employee is allowed to be accompanied by a fellow employee of his choice.

RW1 however admitted that the claimant's personal file did not show any record of any such hearing. RW1 contended that CW1 was not entitled to service pay except for the years he was not contributing to NSSF. RW1 maintained that CW1 was dismissed for wrong doing however she admitted that if the process of hearing the employee was not followed, the dismissal was unfair.

After the close of hearing, both parties filed written submission.

ANALYSIS AND DETERMINATION

The court having perused the pleadings and considered the evidence and the submission filed, the following issues arose for determination:

1. **whether the summary dismissal of the claimant from employment amounted to unfair termination.**
2. **Whether the reliefs sought ought to issue.**

Unfair termination

Under Section 45 of the employment Act, termination of an employee employment is deemed unfair unless the employer proves that it was founded on a valid and fair reason and that a fair procedure was followed in arriving at the decision to terminate. The procedure is fair if it complies with Section 41 of the Employment Act which basically involves explaining the reason for the intended dismissal to the employee in the company of a fellow employee of his choice and thereafter affording them an opportunity to tender a defence for consideration before the decision for dismissal is made. The foregoing is what is otherwise called a disciplinary hearing which must always be in a language that the employee understands.

That procedure is a kin to the respondent's disciplinary procedure as explained by RW1. The procedure was however never followed before the dismissal of the claimant. The dismissal was therefore unfair within the meaning of Section 45 *supra*. The respondent also did not rebut the evidence by CW1 that as a general worker he was supposed to do all manner of errands including being sent by Mr. Vinu Bhai to register his Yu sim card on 28/10/2013 and also washing vehicles at the parking yard on 5th and 6th November 2013.

As regards CW1's absence and failure to produce a medical certificate the evidence by CW1, that he gave the said certificate to Madam Beater because the HR Manager Mr. Lijoodi was absent was not rebutted. Consequently the court makes the considered finding that the reason for dismissal was not only invalid but also unfair thus rendering the dismissal of the claimant unfair as earlier stated.

RELIEFS

Section 49 of the Employment Act entitled the claimant to one month salary in lieu of notice being ksh.11347 as prayed. He will also get ksh.11347X21/26=ksh.9,164 being accrued leave days for 2012/2013 period. He is also awarded service pay for 9 years worked without NSSF contributions. The claimant used ksh.9867 as the applicable salary for the service pay calculation and the court awards him ksh.9867 x 9/2=44,401.50.

Lastly the claimant is awarded 3 months gross salary being Ksh.34,041/ as compensation for the unfair termination of his employment. In so awarding the court has considered the fact that the remainder of his fixed term contract was slightly above 7 months and that being a general labourer, CW1 would easily secure an alternative employment.

DISPOSITION

For the reasons above stated, judgment is entered for the claimant against the respondent as follows:

- a. Declaration that the dismissal of the claimant from his employment by the respondent was unfair, unjust and wrongful.
- b. Ksh.98,953.50
- c. certificate of service
- d. costs and interest.

Orders accordingly.

Dated, Signed and delivered this 5th September 2014

O. N. Makau

Judge