



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU
CAUSE NO. 300 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 25th November, 2014)

ERICK OTIENO ODUOR CLAIMANTS

-VERSUS-

UKWALA SUPERMARKET LTD RESPONDENT

JUDGMENT

The claimant herein Eric Otieno Oduor filed his memo of claim on 1.11.2013 in person claiming he was unlawfully terminated from employment. He told court that he was employed by the respondents on 1.10.2010 earning a salary of Kshs 6,000/= per month as a shop assistant the position he held until 15th May 2013 while earning a salary of Kshs 7,920/= and a house allowance of Kshs 1,188/= per month. He stated that he was also a shop steward representing the workers in the union.

On 4.5.2013, he was helping to offload goods and separating them into 2. In the process of doing the work an Assistant Manager one Sandeep was with them and another worker called Ramesh who was a supervisor. Ramesh apparently pushed the claimant ordering him to do his work quickly. Claimant turned to ask him why he was pushing him. It is then that Ramesh ordered him to go and take his identity card and go away. One director Amir intervened asking what was wrong. The claimant explained the position. Later, the story was changed and it was alleged that he had wanted to beat up Ramesh. That same evening, he was summoned by the Human Resource and questioned as to what had happened and he explained in writing (**APP-3**). He was then told to go home for 7 days. After the 7 days on 13.5.2013, he came back to work as usual. That same afternoon, he was chewing gum and the director came and asked him why he was eating on duty. He then ordered the Human Resource Manager to write to him a termination letter (**App-4**). He was not given his salary for that month. He was given the termination letter at 8 pm that evening. He protested about the termination as per his **APP-1** but the respondents didn't reply. He then reported to his union. The union wrote a letter to respondents (**App-3**). **App-E** of his claim shows calculations of his dues amounting to Kshs 207,262.90 which he now claim.

In cross examination, he told court that he was employed in 2009 and confirmed in 2010. He was however given an appointment letter on 1.5.2012 stating that he was a general labour. He denies causing chaos at the shop nor fighting Ramesh. Ramesh has since resigned and gone to Australia. He denies arguing with Ramesh nor eating in the supermarket. He stated that on overtime, they started being paid recently in 2003. He said he was given an appointment letter in 2012 after agitating for it with the union.

CW2 who is a union official told court that the claimant was a member of the union and it was brought to his attention that the claimant had been dismissed. He wrote to respondents asking for a meeting. The respondents refused to have the meeting stating that one of the directors who quarreled with claimant had threatened to resign if the matter was discussed as he was a family member of

respondents director. CW2 then assisted claimant to prepare his schedule of terminal benefits (**App-E**).

In cross examination he said claimant worked 12 hours per day from 2010 to 2012 and had overtime of 21 hours per week and 84 hours per month which figure translates to Kshs 207,000/=.

The respondents filed their response on 28.11.2013 through the firm of Kariuki Mwaniki & Co. Advocates. They deny terminating the claimant's services unfairly and unlawfully. It is their position that claimant was given an opportunity to mend his ways but he proved to be an indisciplined person incapable of working with other employees.

They called 2 witnesses who stated that claimant's services were terminated as he was involved in a fracas with his supervisor Ramesh on 4.5.2013. He was asked to apologize and he refused. His services were then terminated and he was invited to take his terminal dues which he refused. The witnesses didn't bring the muster rolls of 2010 in court - only for 2013 were filed in court. The witness RW1 told court that the claimant was appointed on 1.10.2010 but was given an appointment letter on 1.5.2012.

After hearing the parties herein and upon considering their submission, the issues for determination are as follows:-

- 1. Whether there was any valid reason to terminate claimant's services.**
- 2. Whether claimant was given due process.**
- 3. What remedies if any, the claimant is entitled to.**

On 1st issue, it is alleged the claimant was involved in a fracas with his supervisor Ramesh. In a letter dated 14.5.2013, the claimant wrote explaining what happened on 4.5.2013 and was even suspended from duty for 7 days. That seemed to settle the problem. However in the termination letter, he is accused of eating meals in a place not assigned for such. Is this a valid reason for termination. If the incident complained of earlier was sorted out and claimant was suspended for 7 days, it was not to be used against him again. The new reason that crops up is the incident of eating at the work place which reason is not as gross misconduct that would warrant a dismissal.

On 2nd issue, on due process, it is apparent that the claimant was not given any hearing. He was just dismissed and told to go away. He was denied his right to a hearing provided under S.41 of Employment Act. This therefore translates this termination in an unfair and unlawful termination.

The claimant has tabulated his remedies. I do find that the claimant is entitled to certain remedies as follows:-

- 1. 1 month pay in lieu of notice = Kshs 9,108/=**
- 2. Leave due of 21 days = Kshs 14,712.90/=**
- 3. Service benefits = 15 days for each year worked = $9,108 \times 0.5 \times 3$ = Kshs 13,662/=**
- 4. Salary earned for May 2013 for 15 days = Kshs 4,554/=**
- 5. Overtime for the period of 2010 to 2012 April = 45 hrs per week = Kshs 170,968/=**
- 6. 12 months salary as damages for unlawful termination = $12 \times 9,108$ = Kshs 109,296/=**

TOTAL = KSHS 322,300.9/=

Subject to statutory deductions, the claimant will also be issued with a certificate of service.

HELLEN S. WASILWA

JUDGE

25/11/2014

Appearances:-

N/A for both parties

CC. Wamache