



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 289 OF 2014

SIMON KURIA LOYAN

CLAIMANT

v

MARULA ESTATE LTD

RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as a general worker on 1st July 2010 until 16 January 2012. The Claimant pleaded that on that date, his services was unfairly terminated without being accorded a fair hearing or being given valid reasons.
2. The Claimant seeks a finding that the termination was unfair, wrongful and unlawful and payment of certain statutory and contractual dues/entitlements.
3. The Respondent filed a Response on 24 July 2014, asserting that the Claimant absconded duty without notice and that it did not breach any provision of the terms of employment, and praying that the Cause be dismissed with costs.
4. On 16 September 2014, the Court in the presence of Mr. Muthanwa for the Claimant and in the absence of the Respondent fixed hearing on 22 October 2014. The Claimant was directed to serve a hearing notice.
5. On 22 October 2014, when the Cause was called for hearing the Respondent was not represented. On record was an affidavit of service sworn by one Samuel N. Gekanana deposing that on 19 September 2014, he served the firm of Mburu F.I. & Co. Advocates on record for the Respondent. From the annexure to the affidavit of service it was clear that the said firm of Advocates accepted service of hearing notice albeit under protest.
6. Although the hearing notice was received under protest, the said firm was under a professional duty to attend Court or send a representative on 22 October 2014 to seek the necessary directions or adjournment. Receiving court process under protest cannot be a sufficient reason or excuse not to attend Court.
7. The Respondent did not attend Court or make arrangements for representation and the Court being satisfied with the service allowed hearing to proceed.

Claimant's case

8. In his evidence, the Claimant stated that he was employed by the Respondent on 1 July 2010 as a general worker at a salary of Kshs 4,348/-.

9. Regarding the separation, the Claimant stated that on 16 January 2012, while preparing to report on duty he received a call from his supervisor who informed him not to report to work because his services had been terminated. He asked the supervisor the reasons and he told him that was the instructions from the boss.
10. The Claimant denied that he absconded from duty.
11. The Claimant in response to the allegations in the Response/witness statements denied that he was dismissed because his brother had been visiting him despite having been sacked for illegal game meat trade.
12. On the process followed, the Claimant stated that he was not given a termination letter, was not given notice, was not paid for 16 days worked in January 2012 and did not collect the wages for January 2012. He also stated he was not given travelling allowance.
13. On contractual/ statutory obligations, the Claimant stated that he used to report to work at 6.00 pm and work until 6.00 am the next day and that the Respondent did not grant him offs.

Evaluation

Desertion of duty or termination

14. The Respondent's pleaded case is that the Claimant absconded duty. The Claimant's testimony was that he was informed by a supervisor that the boss had instructed that his services were no longer required.
15. The Respondent filed witness statements by Joseph Loshorua and Atanasio Mutegi. The thrust of the witness statement was that the Claimant was laid off because of involvement in illegal game meat trade.
16. For whatever the witness statements are worth and the pleading by the Respondent, there is an irreconcilable inconsistency in the statements and pleadings, one contending that the Claimant absconded from work and the other asserting the dismissal of the Claimant for misconduct. The two cannot stand together. In any case, even an employee who absconds from work would also be entitled to a hearing if possible.
17. The Court finds that the Claimant did not abscond duty, but had his services terminated.

Procedural fairness

18. Both absconding from duty and involvement in illegal game meat trade fall under misconduct. Pursuant to section 41 of the Employment Act, 2007, the Respondent was under a statutory obligation to hear the Claimant.
19. It was the statutory duty of the Respondent to show it complied with procedural fairness safeguards. It did not.
20. Unlike the regime under the Evidence Act and the Civil Procedure Rules, where the general rule is that he who asserts must prove, the Employment Act, 2007 has placed a statutory obligation upon an employer to demonstrate it granted an employee a hearing before dismissal and to prove the reasons for dismissal.
21. And to demonstrate that it complied, the employer or Respondent should clearly plead in its Response how it complied. In this regard, mere denials and putting to strict proof, in unfair termination complaints is not satisfactory.

22. Further, pursuant to section 35 of the Employment Act, 2007, the Respondent should have given written notice of termination to the Claimant. This was also not done.

23. With the foregoing, the Court is satisfied that the termination of the services of the Claimant was procedurally unfair.

24. Because of the conclusion, it is not necessary for the Court to examine the fairness and validity of the reasons for the termination.

Appropriate relief

Overtime

25. It is a general rule that watchmen work 12 hour shifts in this country. The Claimant's unchallenged pleadings and testimony was that he worked 6.00 pm to 6.00 am.

26. Pursuant to the evidence and the provisions of section 10(2)(g) and (7) of the Employment Act, 2007, the Court finds in favour of the Claimant as pleaded.

72 days off

27. Each employee is entitled to at least one rest day per week. For similar reasons to those discussed above, the Court would find in favour of the Claimant in the sum claimed.

Days worked

28. The Claimant's testimony was that he did not collect the wages for January 2012. Pursuant to section 49(1) (b) of the Employment Act, 2007 the Claimant is entitled to earned wages. The Claimant's pay slip for January 2012 annexed to the Response indicated the same were due. The Court would find in favour of the Claimant.

Travelling allowance

29. The January 2012 pay slip had a figure of Kshs 500/- as leave travelling allowance. Because the Claimant did not provide any contractual or statutory foundation for Kshs 1,130/-, the Court would award Kshs 500/-.

Service Charge

30. The Claimant sought Kshs 1,548/- on account of service charge. In the course of proceedings, an oral application was made and was allowed to amend the prayer to be severance pay.

31. Severance pay is only applicable in cases of redundancy. The Court would decline to grant this prayer.

One month pay in lieu of notice

32. The Respondent's calculations had provided for Kshs 4,348/- as one month pay in lieu of notice. Pursuant to section 35(1)(c) of the Employment Act, 2007 the Claimant was entitled to written notice and in lieu thereof pay in lieu of notice.

Compensation

33. Compensation of not more than twelve months gross wages is one of the primary remedies where the Court finds unfair termination. The award is however discretionary, and subject to the factors set out in section 49 of the Employment Act, 2007.

34. A party desiring an award of compensation should therefore lead evidence as to which of the factors are relevant.

35. The Claimant served the Respondent for only 2 years. Considering the length of service, the Court would award him the equivalent of 4 months gross wages assessed at Kshs 17,392/-.

Conclusion and Orders

36. The Court finds and holds that the termination of the services of the Claimant was procedurally unfair and awards him and orders the Respondent to pay him

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| (a) Overtime | Kshs 72,220/- |
| (b) 72 days off | Kshs 10,320/- |
| (c) 16 days worked | Kshs 4,348/- |
| (d) Travelling allowance | Kshs 500/- |
| (e) One month wage in lieu of Notice | Kshs 4,348/- |
| (f) 4 months wages compensation | Kshs 17,392/- |
| TOTAL | Kshs 109,128/- |

37. The claim for severance pay is dismissed.

38. Claimant to have costs of the Cause assessed at Kshs 35,000/-.

Delivered, dated and signed in open Court in Nakuru on this 21st day of November 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muthanwa instructed by Muthanwa & Co. Advocates

For Respondent Mburu F.I. & Co. Advocates (did not appear at hearing)