



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 135 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 20th November, 2014)

GEOFFREY SHAMOLA CLAIMANT

-VERSUS-

ELDORET GRAINS LTD RESPONDENT

JUDGMENT

The claimant herein filed his memo of claim on 30.5.2013 in person claiming he had been unlawfully terminated from employment.

The claimant in his evidence in court told court that he was employed by the respondents on 27.10.2009 at a salary of Kshs 9,000/= per month as a machine operator a position he held until 4.11.2012 now earning Kshs 11,800/= when he was terminated by the respondents.

On the 4.11.2012, the claimant contends that he had been from night shift. He was then called back to work and informed that the work he had done the previous night was badly done. The claimant's asserts that he was a machine operator and there was no problem with the machine. It then transpired that the machine had been assembled badly and so the bales the claimant had been working up were not tied up properly. It was not his work to tie up bales. The claimant was sacked at that point. He was not given an opportunity to defend himself. He reported the matter to his union who wrote a letter to the respondents (**App 1**). The respondents didn't reply. A reminder was made (**App 2**). When claimant went to the factory he was instead told to write an apology letter and sent away. The union tabulated his dues and sent to the respondents (**App 3**). The respondents also never replied. The claimant avers that the respondents never gave him an appointment letter but his NSSF statement is proof that he worked for respondents. He seeks to be paid his terminal benefits and also be compensated for unlawful termination.

In cross – examination, the claimant told court that he was being paid by vouchers which copy the respondents retained. He further stated that he worked 7 days a week without off and worked 4 hours overtime. He also never went on leave for the 3 years he worked. He states that in 2009, as per his statement, the respondents never remitted his NSSF payments.

CW2 – the branch Secretary of claimant's union told court how in November 2012, claimant approached him and informed him that he had been unlawfully terminated. He wrote to respondents concerning claimant's complaint and respondents didn't reply. On 4.12.2012 he wrote another letter tabulating what claimant was entitled to. He was also entitled to Kshs 12,290/= as per the general order of the time and he was being underpaid. CW2 stated that the claimant was a machine operator and was not responsible for sealing of bales.

RW1 told court that claimant was one of their casual workers. They aver that the claimant deserted work. He stated that claimant worked for them from 2010 to end of 2012 and he never worked overtime. In cross – examination he said that claimant was not given any warning letter. He also stated that he never reported to the labour officer that claimant had deserted duty.

Having heard both parties and upon considering their submissions, the issues for determination are:-

1. **Whether claimant was dismissed or he deserted duty.**
2. **Whether claimant is entitled to prayers sought.**

On 1st issue, the claimant informed court that he was dismissed by respondents for allegedly failing to tie up the bales of flour properly which he states was not his duty. The respondents on the other hand insist that the claimant deserted duty. When cross – examined by counsel for the claimant whether they reported the desertion to the labour officer, the respondents said no. The respondents had stated that the claimant was a casual employee but this is contrary to law – having worked for respondents for over 3 months. The respondents also never issued claimant with any employment letter. Under S. 10(7) of Employment Act 2007:-

“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

Without any employment letter which is a right, the respondents cannot be trusted to say the claimant absconded duty.

It is the finding of this court that the claimant was dismissed and this dismissal was unfair and wrongful.

Due process was never followed. It is apparent that the claimant was not given any notice to show cause nor a hearing as envisaged under S. 41 of Employment Act which states:-

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2)Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub – section (1) make.”

In view of this, the dismissal of claimant was unlawful and unfair and I convert it to a normal termination.

The claimant has tabulated his remedies in his claim. I find the remedies as tabulated viable and I ward him as follows:-

1. **One month salary in lieu of notice = Kshs 12,290.00**
2. **Leave due = 21 X 3 X 12,295.95/26 = Kshs 29,781.95**
3. **Compensation for wrongful termination = 12 X 12,290.95 = Kshs 147,492/=**
4. **Underpayments 12,290.95 – 11,800 = Kshs 491 X 12 X 3 = 17,676**

TOTAL due = KSHS 207,239.95

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The respondents shall also issue the claimant with a certificate of service.

Service pay is also not payable as claimant was an NSSF contributor. Respondents will meet costs of this suit.

HELLEN S. WASILWA

JUDGE

20/11/2014

Appearances:-

N/A for both parties

CC. Wamache