



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO. 576 OF 2014

JUDGMENT

ERASTUS KIRAGU KAMAU

VERSUS

ARK CONSTRUCTION LIMITED

DELIVERED BY

HON. LADY JUSTICE MAUREEN ONYANGO

REPUBLIC OF KENYA
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CAUSE NO. 576 OF 2014

ERASTUS KIRAGU KAMAU.....CLAIMANT

VERSUS

ARK CONSTRUCTION LIMITEDRESPONDENT

JUDGMENT

Erastus Kiragu Kamau the Claimant instituted this suit against Ark Construction Limited, the Respondent alleging unfair, illegal and unreasonable termination of his employment by the Respondent. In his Memorandum of Claim dated 4th April 2014 and filed in court on 7th April 2014 the Claimant a Quantity Surveyor alleges that he was employed by the Respondent, a limited liability company operating a building and construction company at Nairobi at a salary of Kshs.140,000/= in June 2009. He worked diligently and was promoted to the position of head of department, a position he held until he was unfairly terminated on 6th March 2014 without even having issued any warning letter. Upon termination the Respondent failed to pay his salary, pay in lieu of notice and unutilized annual leave thereby subjecting him to inconvenience and psychological torture.

The Claimant prayed for the following reliefs:

- a. Reasonable one (10 month salary in lieu of notice Kshs.140,000/=
- b. 4 and 9/12 years service pay equivalent to one month salary for each year worked at a salary of (Kshs.140,000/-) = Kshs.665,000/=.
- c. Unpaid leave for the last year (9 months) worked (30 days x 9/12 x Kshs.4,666.66) = Kshs.105,000/=.
- d. Damages for unfair termination.

The Memorandum of claim was filed through the firm of M.P. Mwangi & Company Advocates.

On 29th April 2014 the Respondent filed a Memorandum of Response through P.J Kakad and Company Advocates. The Respondent denied the claim and averred that the Claimant was employed in September 2009 and was severally warned verbally for professional misconduct. The Respondent avers that the Claimant left employment on his own volition without notice. The Respondent further averred that the Claimant willfully disobeyed reasonable rules and regulations given by the Respondent in the ordinary course of his employment and regularly absented himself from work without prior notice. The Respondent averred that the Claimant was paid all his dues. The Respondent prays that the claim be dismissed with costs.

When the case came up for mention to fix hearing date on 19th June 2014, Mr. Mwangi appearing for the Claimant and Ms. Makanya for the Respondent informed the court that they had agreed to proceed by way of written submissions. The parties subsequently filed and exchanged submissions.

The Employment Act provides for the manner in which employment should be terminated. From the submissions of both parties it is not clear whether the Claimant absconded duty or was terminated by the Respondent.

The Respondent has submitted that the claimant was on several occasions verbally warned for non-attendance of work and that the Respondent tried to contact the claimant through the only known contacts. None of this is documented. Section 41 of the Employment Act provide that an employee is notified in writing about intention to terminate his employment. This having not been done, the termination of the claimant's employment was unlawful.

I however find that the claimant has not established that he is entitled to any of the benefits prayed for except notice. Having chosen to elect to proceed by way of written submissions it was incumbent upon the Claimant to make elaborate submissions on each of the reliefs sought explaining how he became entitled to such relief. That is lacking in the submissions. Section 47(5) of the Employment Act provides that the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the unfair termination of employment or wrongful dismissal shall rest on the employer.

From the submissions of the parties all I can establish is that there was a separation. How it occurred has not been stated in the written submissions of the parties.

On the basis that the Respondent admitted not sending written warnings or letter of termination to the claimant, I shall grant the Claimant only one months salary in lieu of notice in the sum of Kshs.163,418.00 based on the pay slip for June 2014 annexed to the Memorandum of claim.

The rest of the prayers have not been proved and are dismissed accordingly.

Each party shall bear its costs. I must add that the casual manner in which both parties approached this case is a matter of concern.

Orders accordingly.

Read in open Court this 16th day of December, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Mwangi for Claimant

Ms. Makanja for Respondent