



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NO. 384 OF 2013

BEHOLD SHAKOCLAIMANT

VERSUS

SHIFA CHEM LIMITEDRESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for ksh.176,000 being employment benefits plus compensation for unfair termination for claimants employment by the respondent on 10/9/2013. According to the claimant he had served for 6 months with a clear disciplinary record but was abruptly dismissed without any notice and for no lawful cause. His salary was ksh.24000 per month.
2. The respondent has denied liability to pay ksh.176000 as prayed by the claimant because the termination was fair and lawful. According to the respondent the claimant was only employed on 3 months probationary contract which was renewed for a further 3 months and as such no dues are payable to him.
3. The suit was heard on 17/9/2014 and 14/10/2014 when the claimant testified as CW1 and Mr. Murtaza Muhammed Ali testified for the defence as RW1. Thereafter the claimant filed written submissions but the respondent did not.

CLAIMANT'S CASE

4. CW1 is a trained Accountant and a Business Consultant holding a Diploma in Business Management and Certified Public Accountant (CPA 1). He was employed by the respondent in April 2013 after signing a written sheet which spelt out his terms of employment. The said sheet was retained by the respondent and he was never given a copy. Initially he was based in the Agrovet Section where his duties included packing goods for the customers after purchase and arranging stock in the shelves. His agreed salary was ksh.35000 per month but he was only paid ksh.24000 per month. The payslips were retained by the respondent.
5. He worked without any complaint from the employer until 10/9/2013 when he was dismissed by a letter dated 10/9/2013. On that day CW1 resumed work after one day off which he had been granted by RW1 to go for an exam on 9/9/2013. He decried that he was serving on probation when he was dismissed. He also denied that he had absented himself from duty without permission on 15/8/2013. He maintained that his dismissal was unfair and prayed for one month salary in lieu of notice plus 6 months salary as compensation for unfair termination of his services. He withdrew the claim for salary for 10 days worked in September 2013.
6. On cross examination by the defence counsel, CW1 stated that he did not know whether he was a

- casual employee at the respondent. He confirmed that the respondent deals with pharmaceutical products where he was employed to help the ladies in the pharmacy while waiting for posting in the Accounts Section when a vacancy arose. His duties at the pharmacy were general included cleaning of shelves, arranging shelves and packing goods purchased by clients. In addition, he did quotations for goods requested by clients. According to CW1 he was to be posted in the accounting section within a day or two but he waited for 6 months. He admitted that he was no conversant with medicine and could not advise clients on medicines.
7. He admitted that he was pursuing studies while in employment but contended that he did not attend classes during working hours. He however explained that he required some time off to do exams like on 9/9/2013 when he got permission but for which he compensated by working on the Saturday 7/9/2013. He explained that when he was given the dismissal letter he was told by RW1 that he was in the habit of absenteeism.

DEFENCE CASE

8. RW1 is a Pharmacist and Director of the Respondent. He confirmed that his business deals with wholesale and retail in pharmaceuticals and Agrochemicals. He explained that he employed CW1 on 1-4-2013 in the Agroviet division to do store management because he had qualifications in accounting, filing and administration. He wanted CW1 to learn how to arrange store, manage stocks and slowly grow into sales. He gave him an agreement for 3 months probation which he signed in the payroll. He started with ksh.770 per day and the probation ended on 30/6/2013.
9. RW1 was advised by other staff members that CW1 was not interested in learning the work including the basic things like the names of the products. According to RW1, CW1 pleaded for extension of his probation which was agreed at 3 months at a salary of ksh.8000 per day. CW1 however, who was now under direct suspension of the RW1 never seemed to improve and kept absenting himself from work in June and July 2013. On 15/8/2013 CW1 absented himself from work without permission according to clock-in print out produced as Exhibit d.1. On that day CW1 had sought permission to go for an exam but RW1 denied and had wanted that CW1 reports to work and then be allowed only a few hours to go for the exam. According to RW1, CW1 never told him that he was a student when he was recruiting him.
10. RW1 maintained that he explained to CW1 the reasons for dismissing him on 10/9/2013 as frequent absenteeism. According to RW1, CW1 was still on probation and not yet permanent staff at the time of his dismissal and as such RW1 was entitled to dismiss him with a notice of 24 hours. RW1 further explained that in his company an employee is not allowed to explain his absence. Instead he is just dismissed once there is evidence of his absence just like the case of CW1 herein.
11. On cross examination by the claimant's counsel, RW1 maintained that on 30/6/2013, he discussed extension of probation with CW1 because he had problem with his performance. He explained that the extension of the probation was in writing and he increased the pay to ksh.80 in order to motivate CW1. RW2 further explained that on 10/9/2013 he called CW1 and told him that he had to dismiss him for having absented himself after he had denied him permission to go for his exams. According to RW1, he denied CW1 the permission because he sought it on the last minute.

ANALYSIS AND DETERMINATION

12. The Court has carefully read the pleadings and considered the evidence and the submission filed. There is no dispute that CW1 was employed by the respondent as a General Labourer in his pharmacy/Agroviet shop in Mombasa from 1-4-2013 for a monthly salary of Ksh.24000. There is also no dispute that CW1 worked continuously until 10/9/2013 when he was summarily dismissed for absenting himself from work without permission.
13. The issues for determination are whether the dismissal was unfair and whether the reliefs sought should be granted.

UNFAIR TERMINATION

14. The claimant believes that his dismissal was unfair because he was not given any notice before termination and was never allowed to defend himself. The respondent believes that the dismissal was fair because CW1 absented himself from work after being denied permission and that before his dismissal he was explained the reasons for his dismissal. Where as the reason for dismissal was valid and fair reason to warrant summary dismissal, the court is not satisfied that the respondent followed a fair procedure as required under Section 41 and 45 of the Employment Act. Section 41 of the Act in mandatory terms that before summary dismissal of an employee for misconduct or poor performance or incapacity, the employer must accord to the employee an oral hearing in a language he understands and in the presence of another employee of the choice of the accused employee. In this case RW1 only called CW1 and told him that he was dismissing him for absenteeism. He did not allow him to defend himself or call a companion from among the other workers. For that default the dismissal was rendered unfair within the meaning of Section 45 *supra*.

RELIEFS

15. Under Section 49 of the Act an unfairly dismissed employee is entitled to salary in lieu of notice, accrued employment benefits plus compensation for unfair dismissal. In the present case, there is no accrued benefits sought after the claim for salary arrears was withdrawn. The claimant is however awarded one month salary in lieu of notice being ksh.24000. The allegation that he was on probation and therefore not entitled to more than 24 hours termination notice is dismissed for lack of evidence and legal basis. There is no written evidence on record to show that CW1 was to serve a probation period from 1-4-2013 to 30/6/2013. There was also no written evidence produced to prove that the said probation period was extended for 3 months from 1/7/2013. Consequently the court finds on a balance of probability that CW1 was serving on a permanent basis from 1-4-2013. He could therefore not be terminated with a notice of 24 hours like a casual worker.

16. CW1 is also awarded ksh.48000 being two month salary as compensation for unfair termination. In the court's view, CW1 was the author of his own misfortune by deliberately disobeying his employer's orders that leave of absence on 9/9/2013 had been denied. As much as an employee has the right to pursue education while in employment, such right does not extend to the working hours. If permission is denied, the employee absents himself at the risk of losing his employment. This however does not entitle any employer to violation of the law by dismissing workers without any hearing as contemplated under Section 41 *supra*.

DISPOSITION

For the reasons above, judgment is entered for the claimant in the sum of ksh.72,000 plus costs and interest.

Dated, signed and delivered this 10th December 2014.

O. N. Makau

Judge