



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1459 of 2012

DAVID GETARE NYANGAU.....CLAIMANT

VS

HOUSEMAN GENERAL CONTRACTORS LTD.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 18th July and filed in Court on 27th August 2012, the Claimant sued the Respondent for wrongful and unfair termination of employment and failure to pay terminal benefits. The Respondent filed a Memorandum of Reply and Counterclaim on 21st September 2012 and the Claimant filed a Reply to the Respondent's Memorandum of Reply and Counterclaim on 10th October 2012. The matter was heard on 21st January and 26th February 2013 with the Claimant appearing in person and Odera Were, Advocate appearing for the Respondent.

The Claimant's Case

2. According to the Claimant, he was employed by the Respondent on 17th October 2007 in the position of Welder at a monthly salary of Kshs. 19,500. He was not issued with a letter of appointment. Initially, the Claimant was paid weekly and later monthly. The Claimant worked for the Respondent until 3rd February 2012 when his employment was terminated without notice and without lawful cause. The Claimant testified that the Managing Director of the Respondent asked him to stop working.

3. The Claimant therefore claimed the following:

- a) One month's pay in lieu of notice.....Kshs. 19,500
- b) 3 days salary (1st-3rd February 2012).....1,950
- c) Leave for 4 years.....54,600
- d) Service pay.....39,000
- e) 12 months' salary in compensation for unfair termination
- f) Costs and interest

The Respondent's Case

4. In its Memorandum of Reply and Counterclaim the Respondent denied terminating the Claimant's employment and stated that the Claimant had deserted duty without any notice or justifiable cause. The Respondent further stated that the Claimant had shown a negative attitude towards his work and had formed a habit of failing to report to work without excuse or justifiable cause.

5. By way of counterclaim the Respondent claimed damages for the loss suffered as a result of the Claimant's desertion of duty plus Kshs. 19,500 being one month's salary in lieu of notice.

6. The Respondent's witness, Evans Onyancha testified that he had received complaints from other workers against the Claimant to the effect that the Claimant had refused to discharge tasks assigned to him. Onyancha further testified that he wrote several letters to the Claimant asking him to rectify his conduct. The Claimant had previously been suspended but was reinstated on the intervention of the Union. Onyancha added that the Claimant went on leave and that no leave application made by him was declined.

Findings and Determination

7. The first question for determination is whether the Claimant deserted duty or was terminated by the Respondent. The Claimant told the Court that the Respondent's Managing Director simply told him to stop working after which he left and asked for his terminal benefits. Conversely, the Respondent stated that the Claimant deserted duty without any notice. For good order, I will deal with the Claimant's claim for unfair termination and the Respondent's counterclaim for damages for loss suffered as a result of the Claimant's desertion of duty concurrently.

8. Section 47(5) of the Employment Act, 2007 provides that:

(5) For any complaint of unfair termination of employment or wrongful dismissal 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 termination of employment or wrongful dismissal shall rest on the employer.

9. A party seeking relief from the Court must prove that they are entitled to the relief sought. In the case of **Stephen Wasike & Another Vs Security Express Ltd** Mugo J(as she then was) held that:

A party seeking justice must place before the court all material evidence and facts which considered in light of the law would enable the court to arrive at a decision as to whether the relief sought is available. Hence the legal dictum that 'he who alleges must prove.'

10. In this case, the Claimant failed to prove whether his employment was actually terminated and under what circumstances the alleged termination took place. Likewise, the Respondent failed to prove desertion of duty by the Claimant. Consequently both the Claimant's claim for unfair termination and the Respondent's counterclaim for damages for loss suffered as a result of the Claimant's desertion of duty fail and are dismissed. The Claimant's claim for one month's salary in lieu of notice also fails and is hereby dismissed.

11. With regard to the claim for annual leave, the Respondent failed to provide leave records to prove its claim that the Claimant took his leave. Section 10 of the Employment Act requires the employer to keep all such records and in their absence, the Court is bound to take the Claimant's evidence. I therefore award the Claimant 4 months' pay in lieu of leave for 4 years. I also award him salary for 3 days in February 2012.

12. From the payslips produced by the Claimant, it was evident that the Respondent did not make NSSF payments on the Claimant's account. I therefore award the Claimant service pay at the rate of 15 days pay for each completed year of service in accordance with Section 35 of the Employment Act.

13. The final effect of this Award is as follows:

- a) 4 years leave..... Kshs. 54,600
- b) 3 days salary in February 2012.....1,950
- c) Service pay.....39,000

Total.....95,550

Each party will bear their own costs.

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF APRIL 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**