



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 430 OF 2012

(Before D.K.N. Marete)

DAVID KAHURA MBURU.....CLAIMANT/RESPONDENT

VERSUS

SHENGLI ENGINEERING CONSTRUCTION COMPANY LTD.....RESPONDENT

JUDGEMENT

By a Memorandum of Claim dated 15th March, 2012 and filed on the same date, the claimant approached this court. The issue in dispute is thereon cited as;

Wrongful and unfair termination of the claimant's services and failure by the respondent to benefits to the claimant.

The respondent on 14th August, 2012 filed a defense of the same date denying the claim and praying that the same be dismissed with costs to herself.

The claimant's case is that on 19th July, 2010 he was employed by the respondent company as a tyreman. He served his employer loyally and diligently until the 6th August, 2010 when he was wrongfully and unlawfully terminated by the respondent without notice or even payment of terminal dues.

He prays as follows;

1. The sum of Ksh.65,330.00 as particularized in paragraph 5 of the claim
2. Compensation for wrongful dismissal to a maximum of 12 months of wages amounting to Ksh.312,000.00
3. Costs of this suit
4. Interests in (i) and (ii) above.
5. Any other relief as the court may deem just.

He submits that the respondent in the termination of his services did not comply with the dictates of the Employment Act, 2007 nor did he give the claimant notice of termination or pay him terminal dues owed. The said termination was unprocedural and unfair.

The respondent in defense denies the allegation of unfair termination and avers that the claimant was

employed by the respondent between 19th July, 2010 and 6th August, 2010 when he voluntarily left employment by absconding from work. The issue of unfair termination of employment would in the circumstances not arise.

She further submits that the respondent was employed at Ksh,18,425.00 per month and only worked for nineteen(19) days and left employment without notice and by the time of such departure from work, his payslip had not been prepared.

Further, the respondent submits that the claimant left employment on 6th August, 2010 when he was found sealing tyres with fake puncture sealing pads though he had been issued with original ones. He ran away upon being confronted by Mr. Chan and the matter was reported to Juja Police Station and recorded as **OB/27/6/8/2010**.

The respondent admits that the claimant is entitled to payment for 19 days worked and while this was always agreed on *inter partes*, the claimant has refused to receive payment of the same from the respondent's offices. The respondent also counter-claims for seven days payment in lieu of notice by the claimant and submits that the claimant is entitled and should be paid his dues for 19 days less the amount of payment in lieu of notice counter claimed.

Further, the respondent submits that when the theft was reported to the Police Station, the claimant appeared there and pleaded for forgiveness whereupon it was agreed that he would be paid for the days worked which he has now refused to receive. He is therefore not entitled to twelve (12) months compensation, or at all.

The issues for determination therefore are;

1. Was there a case for termination of employment of the claimant?
2. Was the termination of the employment, if at all, of the claim wrongful and unlawful?
3. Is the claimant entitled to the relief sought?
4. Who meets the costs of this cause?

The 1st issue for determination is whether there really was a case for termination of employment of the claimant. The issue of wrongful and unfair judgement is elucidated by section 45 Employment Act, 2007. This is not in any way demonstrated in evidence by the claimant and I make a finding of no case of termination. This resolves the 1st issue for determination.

Section 45, Employment Act, 2007 provides as follows;

45.(1) *No employee shall terminate the employment of an employee unfairly.*

(2) *A termination of employment by an employer is unfair if the employer fails to prove-*

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

(3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

(4) *A termination of employment shall be unfair for the purposes of this Part where-*

(a) *the termination is for one of the reasons specified in section 46; or*

(b) *it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*

(5) *In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-*

(a) *the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*

(b) *the conduct and capability of the employee up to the date of termination;*

(c) *the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*

(d) *the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*

(e) *the existence of any previous warning letters issued to the employee.*

The claimant has also not in any way demonstrated in evidence any instances where the respondent acted in a manner to qualify the application of the said section 45. On unfair termination of employment, there is no documentary evidence of the terms of employment and even at the hearing the claimant did not find it necessary to demonstrate his claim.

That there was an employment contract is not disputed by the parties. Further, it is not disputed that the claimant only served in employment for nineteen (19) days only. The claim further does not deny or shed light on the respondent claim of impropriety on his part during the performance of his duties on 6th August, 2010 or even the report to Juja Police Station of such misdeeds and incidence.

I find that this is a matter which should never have been in court in the first instance and dismiss the same. There is no evidence of wrongful or unfair termination or even termination whatsoever of the claimant's employment and I so find. The claimant by automatism is not entitled to the relief sought.

The respondent vide paragraphs 5(a) of the defense makes a counter-claim for seven days payment in lieu of notice. However, this is not qualified in evidence but is left naked and hanging. The court would be at loss to make a finding on this in the absence of evidence. The counter-claim is therefore also dismissed.

The entire scenario leaves the claimant with only one option, collection of his salary for the nineteen (19) days worked during the continuance of employment and which the respondent employer is willing to pay. The circumstances of the case do not warrant a finding or condemnation as to costs and I therefore order that each party bears his own costs.

The claim and counter-claim do not see the light of the day and are both dismissed.

Dated, delivered and signed the 4th day of June, 2013.

D.K. Njagi Marete

JUDGE

Appearances

1.Claimant in person.

2.Mrs Ochieng instructed by Olotch & Company Advocates for the respondent.