



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 391 of 2011

ALFONCE PASCAL MUTISO CLAIMANT

VS

TRICLOVER INDUSTRIES (K) LTD RESPONDENT

JUDGMENT

The Claimant herein Alfoncel Pascal Mutiso filed this claim on 16th March, 2011 through the firm of Anya Kalwa & Company Advocates. The issue in dispute is wrongful termination of the claimant's services and failure by the Respondent to pay him his terminal benefits.

The claimant gave oral evidence in court on 17th November, 2011 and he stated that he was an employee of the Respondent from April 1995 as a casual and later as a permanent employee from August 2002. He used to work in a store where he loaded and unloaded goods going to the supermarkets. He stated that on 8th January, 2010 he was assigned duties to clean a roof which had been repaired. As he was working as instructed the ladder he was using slid and he fell. He came to when he was at MP Shah Hospital. He stayed in Hospital for 3 days. After 2 weeks he returned to hospital and he was told he could resume work. He resumed work but after 3 days he found he had difficulties moving his leg.

He had been injured on his head and back and when he was attended to by a doctor at Kenyatta National Hospital, he was advised that the fracture in his back was the one causing malfunctioning of his foot. He used to cycle to work and report by 7 a.m. but with this injury after the accident, it became impossible to report at the usual time he was warned about late arrival but his employer stated deducting his pay for this late arrival despite knowing why he could not arrive in time. On 23rd November, 2010, he was dismissed from work. This was after he reported to his advocate the issue of deductions of his salary. The Human Resource Officer of the Respondent just came and read a letter to him and told him he should not report to work the following day. The letter is annexed to statement of claim as an appendix stating that he was being summarily dismissed for reporting to work late and refusing to sign pay slips. He says he was not given a show cause letter but had been given a warning on 3rd November, 2010. He says he had an overdrawn pay slip as he was being deducted salary due to lateness from July, 2010. He had to ask for advance pay to assist him meet any expenses.

He now seeks payment of his unpaid salary for September, October, November 2010, three months' salary in lieu of notice, annual leave for the years 2002 – 2010 (308 x 21) = 51,744 and service pay for 8 years (8 x 15 x 9919) = 54,780, TOTAL 152,000/=. He also seeks payment of his salary deducted but not remitted to the relevant authorities as follows:

NSSF deductions - 19,200/= plus

NHIF deductions - 19,200/=

In cross examination by Mr. Onyony for the Respondent, the claimant stated that 7 a.m. was reporting time but he used to report at 8 a.m. after he was injured. He says he had filed another case against the Respondent and Respondent never reacted to the medical reports. He says he used to work at the stores and he refused to sign the pay slips because of deductions in his pay.

He says the letter of 8th September 2010 was shown to him. He also admits he used to be late for about 45 minutes everyday after he was injured. He states that one Ibrahim Munyaro was his supervisor.

Claimant called one witness Alex Musili who informed court that he is the one who took the claimant to hospital after he had fallen down.

The Respondent filed their memorandum of Reply to this claim on 22nd June, 2011 through the firm of Onyony & Company Advocates. They stated that Claimant was summarily dismissed on 23rd November, 2011 due to gross misconduct as stipulated under the Employment Act and so he has no claim against them.

They called one witness Charles Mwangi who gave evidence and stated that claimant was one of the Respondent's employees and had been injured at work. He says he heard Claimant used to come to work late. He was later given a letter on 3rd November, 2010 by the Accountant who is in charge of Finance. DW I read the letter to claimant. He does not remember if the claimant signed this letter or not. Before injury, claimant used to work in the store. After the injury, he still worked in the store but DW 1 says he was not claimant's supervisor.

He says that when the Claimant came to pick the letter he did not come to defend himself. He says he did not write the letter but he saw it when claimant was called to pick it.

In the Respondents Memorandum of Reply, the Respondents further stated that the claimant was employed on 1st August, 2002 as a General Worker with a starting salary of Ksh.4260.90 and a house allowance of Ksh.639.10. This is as per Exhibit VVI dated 1st August, 2002. They state that it was never part of the contract of service that the Respondent was to pay the Claimant any severance pay at any rate pleaded through the memorandum of claim. They claim that they have paid the claimant all that he is entitled to and even paid all statutory deductions expected such as to KRA. They further aver that before the claimant was summarily dismissed, he had developed a perennial misconduct of absenting himself from work without any proper reason and/or feigning sickness as he never produced any medical reports and/or documents to prove he was unwell. They produced a bundle to documents showing warnings issued to him at divers dates.

The Respondent pleaded other issues concerning injury sustained by the claimant for which they state that the claimant caused his own injury by scaling up a ladder without any due regard to his personal safety and safety of those that work around him.

Having heard the evidence of both parties and having considered evidence submitted by the parties by way of their various memoranda, the issues for determination before the court are:

1. Whether the claimant's services were unlawfully and unfairly terminated.
2. If the answer to (1) above is yes, what remedies are available to the claimant if any.

In answer to (1) above, there is no denial that there is no denial that the claimant was an employee of the Respondent from the year 2002. This is evidenced from the appointment letter which is an exhibit before court. He was employed as a General Worker. The letter of employment does not however explain what

his duties and responsibilities were. The claimant told court that he used to work in a store where he loaded and unloaded goods going to supermarkets. It is not also in dispute that the claimant was also injured while on duty. To this, the Respondent aver that the claimant was injured whilst doing work he was not assigned to do. Whether this is true or not, the issue of injury of claimant at work was not canvassed in this case as it is subject to another suit pending before another court.

However, as a result of the injury sustained by the claimant, the claimant informed the court that he could not work effectively and could not report to work on time. This is what prompted the Respondent to dismiss him. From the evidence on record several letters were written to the claimant warning him of coming to work late and he was thereafter summarily dismissed.

Did the claimant's coming to work late warrant a summary dismissal? And did he actually come late. Section 44 (1) of the Employment Act states reasons which may warrant summary dismissal. One is,

“Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work ...”

The claimant was injured on 8th January 2010 and was dismissed on 22nd November, 2010, some eleven months later. Claimant acknowledges he came late to work as he had injury in his leg. That he was expected to report at 7 a.m. but reported at 8 a.m. This fact of the time claimant reported to work is not canvassed by Respondent but it just states that he reported late.

It would have been in order if the Respondent produced in court the attendance sheet to show the exact times the claimant used to report as compared to what his appointment letter states. In this letter the claimant was expected to report by 8 a.m. and Respondent changes this time to 7 a.m., this change ought to have been brought to the attention of claimant expressly in writing. Without evidence of the attendance register, I can only deduce that the claimant reported at 8 a.m. as he has indicated to court and this is as per his appointment letter. He did not therefore warrant summary dismissal as was done to him. I will therefore convert the dismissal into a normal termination.

What remedies is the claimant entitled to in the circumstances? The claimant had sought orders for payment of his unpaid salaries for September, October and November 2010, equivalent to 24,948/=. The claimant has however not demonstrated that he was not paid his salary for the three months. In fact evidence from the Respondents indicate he received some advance payments for the same period and his pay slip for September and October is attached showing he earned some salary. However given the deductions from his salary termed ***“Absent amount”***.

I order that he be refunded these ***“illegal”*** deductions as follows:

October	-	4592.23
September	-	2445.87
August	-	838.20
TOTAL	-	7,896.30/=

I also order claimant be paid 1 month salary in lieu of notice

= Ksh.9,919/=

Claimant indicates that he did not proceed for leave for the 8 years he worked. This is not proved as claimant pay slips indicate he used to be paid “Leave Pay” and so this prayer must fail.

The claimant had also sought payment for service pay for the 8 years worked. Evidence adduced indicate that the claimant was a member of NSSF and his employer used to remit NSSF contributions to NSSF. This is as per the NSSF provisional member statement of account exhibit VV2. Contribution to NHIF were also made on behalf of the claimant as per NHIF member Data Summary exh VV3. Under Section 35(5) of the Employment Act, service pay for employees who are members of NSSF is not

permitted. The claim for payment of service pay and deductions not remitted to NSSF and NHIF is not payable and so the prayer must fail. In the premise, I find for claimant and enter judgment for:

1. Month salary in lieu of notice - Ksh.9,919/=
2. Absent pay deducted - Ksh.7,896.30
3. 6 months salary compensation for
Unlawful termination Ksh.9919 x 6 - Ksh.59,514/=
- TOTAL - Ksh.77,329.30**

4. Claimant be issued with a certificate of service.

5. Costs of this suit will be borne by Respondent.

Dated and delivered in Court this 30th day of October, 2012.

LADY JUSTICE HELLEN WASILWA

JUDGE

Appearances

Mr. Odawa of

Anya Kalwa & Company Advocates for Claimant

Cyprian Onyony of

Onyony and Company Advocates for Respondents

Rachael Gichuki Court Clerk