



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1897 of 2011

ALEX LUVAHA AFANDA

.....CLAIMANT

VERSUS

RAMCO HARDWARE LIMITED

DEFENDANT

JUDGEMENT

This is a claim dated 11th October 2011 by Alex Luvaha Afanda seeking judgement against the defendant for wrongful dismissal from employment and unfair termination of employment. The respondent was served with the claim and the return filed in court on 17th May 2012. The matter was in court for directions on 12th June 2012 where a Mr. Alex Maina, the personnel manager appeared for the respondent whereby he sought leave to file a response which leave was granted for 21 day and the matter placed for mention on 6th July 2012. There was no reply and or defence to the claim neither lodged in court nor were the respondents presented on the date taken mutually in court. This matter came up for hearing on 9th October 2012, the respondents were served with the hearing notice and returns filed in court but there was no appearance. The court being satisfied that the respondent had failed to offer a defence and that they had failed to make an appearance during the hearing, proceeded with the evidence of the claimant.

It was the evidence of the claimant that he was employed by the respondent as a casual worker on 1st March 2005. He was however not issued with a letter of employment and it was therefore verbally agreed that he should be paid Kshs.365.00 per day payable at the end of every week on Saturday. That this salary and or wage would be reviewed on a yearly basis. That he continued with his employment as a casual worker for six years and three months until the wrongful summary dismissal.

That the claimant's nature of work with the respondent was at a hardware store where he would run several errands, carrying cement and mixing colours and ensuring that all customers were served and their needs attended to. He also performed other general duties as indicated by the respondent staff. That his work was of the nature that could not reasonably be expected to be completed within a period or on a number of working days amounting in the aggregate to the equivalent of a day. Therefore for all intents and purpose, the claimant was on a term contract and was covered by provisions of Section 35(1)(c) of the Employment Act.

That on 13th June 2011, the respondent without any due cause or reason summarily and wrongfully dismissed the claimant without any written communication as to the reasons of dismissal. That this is illegal, without justification and same meant to make him loose his work benefits which he now claims

for one month salary in lieu of notice, leave days not taken, unpaid overtime and damages for one year. That the respondent has also refused to give the claimant a certificate of service.

In evidence, the claimant submitted that on the 12th of June 2011, being employed as a person running general duties at the respondents work premises, he was sent to the bank to get change. That he had Kshs. 20,000 in 1000 bills which were to be reduced in small currencies at the bank. That the claimant did this task and returned to the respondent where they discovered that he had been given excess money by the bank all amounting to Kshs.40, 000, double the amount he had taken to the bank. That around 3 pm when the bank manager discovered the anomaly, he called the respondent premises and the claimant admitted that indeed there was an error and offered to return the excess money against the wishes of the respondent who had asked the claimant not to admit that there was excess money from the bank.

That on 13th June 2012, when the claimant reported on at his place of work he was summarily dismissed and told that he was no longer required to work there. All his efforts to seek and negotiate for his terminal dues have been rejected by the respondent who advised him to come to the industrial Court. It was the evidence of the claimant that he has since his wrongful dismissal tried to get a new job but has failed to get one forcing him to go back to his village in Western Kenya. Most prospective employers have been asking him to produce his certificate of service with his last employer, a document that the respondent has failed to issue to the claimant.

Court notes that under the Employment Act a casual employee is the one defined as:

... a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.

The claimant, even though initially employed as a 'casual employee' has been working with the respondent for six years and three months continuously without a break, leave or payment of overtime. His status under the law therefore becomes a full time employee eligible for all benefits and legal dues.

Further Court notes that even though the respondent failed to give the claimant a written contract, the provisions of the Employment Act apply for both oral and written contracts vide Section 8 of the Act. It was the duty of the respondent to regularise the employment status of the claimant once the relationship with him ceased being that of a casual worker to a full time employee with benefit and eligible to pay the statutory deductions. Therefore, on the basis of the finding that the claimant was a full time employee with benefit and eligible for all legal dues awards the claimant for his overtime, annual leave.

On the claim for wrongful and unfair termination, the Court notes that an employer has the legal duty where applicable to give an employee notice before terminating employment. That notice must be in writing giving cause of the termination as recognised by law. Such termination attracts service pay for each year worked by the employee. The reasons for the termination must be indicated to the employee who has the right to dispute the lawfulness or fairness of such termination.

In this case, the claimant was summarily terminated without any written notice or being given the reasons for termination. It was the evidence of the claimant that even though the respondent has not been happy with him for admitting that he had received extra money from the bank the previous day causing the same to be returned to the bank, in his mind this was an honourable thing to do and should not have been used against him to terminate his employment. Even if this was not the case, his termination was without any written notice indicating the reasons for the termination and he was not given an opportunity to dispute his termination noting that he had diligently served the respondent for over six years.

Within the period of employment, the claimant submitted that he never took any leave days at all and now claims for the same. Court having found that the claimant was eligible to take leave every year will grant the same as claimed. Further, the claimant submitted that he worked overtime without due compensation for the extra hours which the Court now awards as claimed.

For the above reasons the Court finds that the Claimants termination of his employment was wrong and

unfair. No notice was issued or the reasons for summary dismissal indicated or written out to the claimant. The respondent has failed to advance a defence and or appear in court or submit evidence justifying the grounds upon which the termination of the claimant's employment was based on. For these reasons, Court orders as follows:

- a) That the summary dismissal of the claimant was unfair.**
- b) The respondent is directed to pay the claimant the following final dues**
 - i. One month pay in lieu of notice amounting to Kshs. 10,950.00**
 - ii. Leave days not taken for six years all amounting to Kshs.65,700.00**
 - iii. Overtime hours worked unpaid all amounting to Kshs. 25,920.00**
 - iv. Severance pay at $10,950/30 \times 15 \times 6$ all amounting to Kshs.32,850.00**
 - v. For the unfair termination Court grants an amount equivalent to three months pay all amounting to Kshs. 32,850.00**
 - vi. Respondent to issue the claimant with a Certificate of Service**
 - vii. Costs of the suit.**

Delivered at Nairobi this 12th day of October 2012

M. W. Mbaru
JUDGE
INDUSTRIAL COURT OF KENYA

In the presence of:

Court clerk.....

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