



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1409 of 2011

MR. JOSEPH OTIENO ONYANGO CLAIMANT

VS

M/S KAAJAL TEXTILES LTD 1ST RESPONDENT

MR. RAMESH SHAH 2ND RESPONDENT

JUDGMENT

The Claimant herein Joseph Otieno Onyango filed his Memorandum of Claim dated 12th August 2011 on the 17th August, 2011. He indicated that the issue in dispute is unlawful termination on account of redundancy of the Claimant.

The parties agreed to proceed by way of documentary evidence and they filed their respective memoranda accordingly. Through his memorandum of claim, the claimant told the court that he was a former employee of the Respondents whom he served as a house servant/gardener for two years. The Respondent Kaajal Textiles Ltd is a registered Company incorporated under provisions of the Companies Act, 486 and it trades within Kenya. The 2nd Respondent is the Managing Director of the 1st Respondent.

Facts of the case

The claimant informed court that he was employed on 16th October, 2009 through a verbal contract. He served in that capacity earning salary of 8,600/= per month until 1st August, 2011 when his services were terminated.

He indicated that he served the Respondents faithfully without any problem until he got information that his father was seriously sick. He sought permission to attend to him and was granted on 15th July, 2011. He resumed duty after this but on 20th July, 2011 his father passed on. He informed the 2nd Respondent who told him he would be granted 4 days compassionate leave. The claimant had requested for 10 days indicating he was the eldest son in the family and needed more time to make burial arrangements and traditional rites. He left for his home on 22nd July, 2011 to attend the funeral. The 2nd Respondent paid him Ksh.5000/= instead of 15,000/= which he had requested. After the burial, the claimant reported back to work on 1st August, 2011, but the 2nd Respondent informed him that his services were no longer needed and he should go away. On 2nd August, 2011, he went to the office and was told to go home and would be called when final dues are ready. Being aggrieved he reported his case to the Ministry of Labour, Industrial Area where the Labour Officer tried to solve the case but Respondent refused to attend the meetings where he was summoned.

The claimant now prays that the Respondent should pay him for days worked but not paid for to date. He also seeks payment of his final dues including days worked, accrued leave, public holidays, severance pay, house allowance, notice pay and full compensation for loss of employment all totaling Ksh.197,273.60. He also seeks for costs of this case.

The Respondent on the other hand filed their memorandum of reply dated 1st September 2011 on 2nd September 2011, through the firm of M/S Mugoye & Associates Advocates. They aver that indeed the claimant lost his father and was given leave for 5 days from 20th to 27th July 2011. That the claimant failed to report back to work on 28th July, 2011. That even on 29th July, 2011 claimant was sent 1500/= by 2nd Respondent through *Mpesa* transaction confirming the claimant will resume duty on 30th July, 2011 but still the claimant did not come to work. That claimant absconded duty and on 5th August, 2011 the Respondent received a letter from claimant's union raising issues before court.

The Respondent avers that the claimant's claim is unsustainable. The Respondents aver that the claimant was paid his full salary in advance of Ksh.8000/= on 10th July 2011. That claimant having absconded, the Respondents counter claim for one month's salary in lieu of notice. They also aver that the claimant had utilized all his leave days and is not entitled to leave pay. Further, the respondents contend that there is no provision for payment of severance pay, house allowance and compensation for loss of employment or at all. The Respondents further contest that the claimant is only entitled to payment of 600/= being balance of his salary for July 2011. They ask the court to dismiss this case with costs to the Respondent.

I have considered the evidence adduced by the parties plus their submissions as filed before this court. The issues for determination are:

1. Whether the Respondents terminated the claimant on account of redundancy.
2. If the answer to 1 above is Yes, what remedies, if any the claimant is entitled to.

In relation to question one, the claimant was verbally employed by the Respondent. The problem between claimant and Respondent set in when the claimant lost his father and requested for leave to prepare and attend the burial. The Respondent indicate that they gave claimant leave for 5 days and he was to resume work from the leave on 28th July, 2011 but he apparently came back on 1st August, 2011.

The Employment Act, 2007 envisages that leave is a right to every worker with Section 28 setting the minimum to 21 days for each year. The Respondent indicated that the claimant had utilized his leave for the period of that year but there is no proof of this assertion. At the time the claimant went to bury his father even if he was not taking his annual leave, he would have been entitled to some leave on compassionate basis. I believe the dismissal of claimant for turning up 2 days later after burying his father was callous and unwarranted. Though the claimant contends that he was dismissed on account of redundancy, the issue here is not redundancy as the procedure for dismissal on account of redundancy is well set out in Section 40 of the Employment Act. However, I would treat the action of Respondent as unfair and treat the termination of claimant as normal termination.

In answer to question No.2, the claimant had made certain prayers. I find for claimant and enter judgment for him as follows:

1. Salary for days worked in July and not paid.
He was paid 5000/=, balance – Ksh.3600/=
2. 1 month's salary in lieu of notice - Ksh.8600/=
3. On issue of leave, it is not proved that
Claimant proceeded for leave in his 1st year

of service. However he went for leave in July 2011. Balance of days is 21 days for the year 2009/2010

- Ksh.6020/=

4. On issue of overtime, claimant has not proved it and this is not awarded.

5. I also award claimant 6 months pay for

wrongful termination

= 8600 x 6

- Ksh.51,600/=

TOTAL AWARDED

- **Ksh.70,220/=**

6. Claimant to be issued with certificate of service.

7. Respondent will pay costs of this suit.

The Respondent's counter claim is also dismissed.

Signed, dated and delivered in court at Nairobi this 29th day of November, 2012.

HELLEN WASILWA

JUDGE

Appearances:

No appearance for Claimant

Miss Odera holding brief for

Mugoye & Associates Advocates

for Respondent

Rachel Gichuki

Court Clerk