



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CASE NO. 451 OF 2014

CALEB LIBWEGE EBOYI.....CLAIMANT

VERSUS

JOHN KASHANGAKI.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking terminal dues for the wrongful dismissal from employment. He sought 3 month's salary in lieu of notice – Kshs. 42,000/-, service pay for 13 years – Kshs. 182,000/-, overtime for 13 years – Kshs. 182,000/-, general damages for unlawful dismissal – Kshs. 168,000/- as well as costs of the suit plus interest.

2. The Respondent filed a defence in which he averred that the Claimant was engaged intermittently once a week between 2003 and 2007 that the Claimant worked twice a week between 2007 and 2008 after which he left on his own volition. The Respondent denied that he employed the Claimant between August 2008 to March 2013 and averred that the Claimant was engaged full time from March 2013 till September 2013. The Respondent averred he summarily dismissed the Claimant for gross insubordination having previously issued the Claimant with 2 verbal warnings. He denied that he had employed the Claimant for 13 years. He averred that he paid the Claimant the full salary for September 2014 – Kshs. 14,000/-, overtime for 8 days worked – Kshs. 2,400/-, leave allowance for 10.5 days @ 466/- per day – Kshs. 4,893/- all totaling to Kshs. 21,293/- less Kshs. 6,000/- for medical expenses. The Respondent averred that the Claimant failed to obey a lawful and proper command and his refusal to wear the proper apparel and engaging in a confrontation with the employer amounts to misconduct for which summary dismissal under Section 44 of the Employment Act could ensue. The Respondent thus sought the dismissal of the suit with costs.

3. The Claimant testified and the Respondent did not attend the hearing. The Claimant reiterated that he had worked diligently for the Respondent and was surprised by the sudden dismissal in late September 2013. He stated that the Respondent did not give him any safeguards before the dismissal. The Claimant thus sought the reliefs per his memorandum of claim. He filed submissions in which he submitted that under Section 41 of the Employment Act, the Respondent was bound to give the Claimant a hearing prior to dismissal for misconduct. He submitted that the reliance on Section 44 did not absolve the Respondent from undertaking the dismissal in compliance with the law. He submitted that the dismissal was wrongful and unfair within the meaning of Section 45(5) and because the Respondent had failed to prove the reasons for the termination were valid the court should find in his favour. The Claimant cited the cases of **Fredrick Were v MK Jeffrey's Hauliers [2013] eKLR** and **Michael Aloyo Ulage v Gitonga Stanley [2013] eKLR** where the courts held that dismissal in similar circumstances was unlawful. On quantum on the compensation due, the Claimant cited the cases of **Joseph Sitati v Kenya Ports Authority [2010] eKLR**, **Moses Kaunda Moro v CMC Motors Group Ltd [2013] eKLR** and **Peter Gichana Mwamba v M/s Easy Coach Ltd [2012] eKLR**. On gratuity he submitted that because the employer never paid NSSF dues there was a basis for the grant of gratuity.

The Claimant was undoubtedly the employee of the Respondent as the Respondent admitted as much. The Respondent availed employment records in which it was indicated that the Claimant was paid for the period he worked. The records did not detail whether NSSF dues were paid. There were endorsements on the payroll entries that leave days (over 21) were due. This was on

three different sheets and it is not clear if these were settled or actual leave taken. The Respondent admits he summarily dismissed the Claimant after several verbal warnings for misconduct. Section 41 of the Employment Act provides as follows:-

41.(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

4. The Claimant was entitled to some modicum of fairness through the hearing that is provided for as per the provisions of Section 41 of the Employment Act above. The Claimant was therefore dismissed unlawfully. His claim however valid can only be for 3 years preceding the accrual of the cause of action. The Claimant was entitled to claim in terms of Section 90 of the Employment Act. The Claimant is therefore entitled to the following:-

- a. One month salary in lieu of notice – Kshs. 14,000/-
- b. Leave pay for 3 years Kshs. 42,000/-
- c. Service pay for 12 years @ 15 days for each completed year of service Kshs. 84,000/-
- d. Compensation for unlawful dismissal for 6 months – Kshs. 84,000/-
- e. Costs of the suit

It is so ordered.

Dated and delivered at Nairobi this 17th day of December 2018

Nzioki wa Makau

JUDGE



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