



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 342 OF 2016

RENSON IDDI NYAMBU.....CLAIMANT

VERSUS

MINI BAKERIES (MOMBASA) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for unfair termination of employment and refusal to pay terminal dues. The Respondent has denied liability for unfair termination and averred that the Claimant was fairly dismissed for absents himself from work without leave or lawful cause and after being accorded a fair hearing. The suit was heard on 28.9.2017 when the Claimant testified as Cw1 and the Respondent called M/s Consolata Kabau as Rw1. Thereafter the parties filed written submission which I have carefully considered.

Claimant's Case

2. The claimant stated that he was employed by the respondent as a Mixer Attendant in August 1998. He started as a casual worker but in 2011, he was appointed on permanent basis as a Mixer earning Kshs.18,105 per month. He worked until 15.2.2015 and on 16.2.2015, he fell sick and he could not attend work. He went to hospital and he was given sick off. On 17.2.2015, his supervisor, Mr. Ndaa visited him at home to find out why he had reported to work. He then explained to the Supervisor how he fell ill and gave him the sick sheet.

3. On 18.2.2015, Cw1 reported to the office that he was going to resume work on 19.2.2015. However on the same day he was served with a letter suspending him for 7 days and asking him to show cause why he should not be dismissed for the absenteeism. He responded to the show cause letter on 21.2.2015 and he was invited to a disciplinary hearing at the Respondent's head office in Mombasa. After the hearing, he was dismissed verbally but instructed to come for a letter the following day.

4. Cw1 denied that he was a perennial absentee and contended that he was signing Attendance Register which if produced in court can prove him right. He therefore prayed for salary in lieu of notice, compensation for unfair termination, service gratuity plus all the other reliefs sought in the suit including leave for the period 1998 - 2012.

5. On cross examination Cw1 admitted that he did not have documentary evidence that he worked for the Respondent from August 1998 to 2011 when he got appointment letter. He also admitted that in his written statement he gave a different story about his sickness by stating that, on 10.2.2015, he reported to work late and he was told by the Manager to go back home and on 11.2.2015 he fell sick and went to hospital and went to hospital where he was given a sick off for 7 days. He further admitted that he never reported his sickness to the management until his supervisor went to look for him. He gave the reason for the failure to report the matter as lack of a phone. He maintained that he was also too weak to reach the office but insisted that he gave the sick sheet to the supervisor when he visited him at home.

Defence Case

6. Rw1 is Personnel & Administration Manager for the Respondent. She stated that the Claimant was employed by the Respondent from 1.11.2011 and not 1998 as alleged. She explained that the Claimant was dismissed on 3.3.2015 for absents himself from work on diverse dates including 10.2.2015 to 21.2.2015. She explained how the Claimant reported to work late on 10.2.2015 and he was told to go back and return the following day. He however never reported back until 17.2.2015 when his Supervisor Mr. Ndaa was sent to check on him when Cw1 gave him a Sick sheet from the hospital dated 17.2.2015.

7. Rw1 further stated that the Claimant reported back on 21.2.2015 but he was suspended by the letter dated 18.2.2015 which also asked him to show cause why he should not be dismissed for the absenteeism. She confirmed that he responded the same day and thereafter he was

invited to a disciplinary hearing on 3.3.2015 and asked to be accompanied by a witness. He attended with Mr. Ndaa who was also the Supervisor/Shop Steward but he did not produce the sick sheet for 11.2.2015 – 16.2.2015.

8. Rw1

contended that the Claimant had become a perennial absentee and produced Muster rolls to support to support that allegation. She therefore stated that a decision was reached that his services should be terminated for absenting himself from work without leave from 11.2.2015-17.2.2015. She maintained that if at all Cw1 fell sick and got sick off from the hospital, he was supposed to notify the office through phone or sending somebody. She concluded by stating that the Claimant was paid all his terminal dues after the termination.

Analysis and determination

9. There is no dispute that the Claimant was employed by the Respondent as a Mixer until 3.3.2015 when he was summarily dismissed. The issues for determination are:

- (a) Whether the Claimant was employed from 1998 or 2011;
- (b) Whether the Claimant's employment contract was unfairly terminated; and
- (c) Whether she is entitled to the reliefs sought.

Employed in 1998 or 2011

10. The Claimant contended that he was employed in 1998 as a casual and worked continuously until 2011 when he was given a written contract appointing him on permanent basis. He however did not call any witness or produce any documents to prove that commencement date. He also never bothered to serve any request that his employment records for 1998-2011 be produced either before or during the hearing. I therefore find that he failed to prove on a balance of probability that he was employed by the Respondent in from August 1998 on casual basis and worked continuously until 2011 when he was appointed on permanent basis.

Unfair termination

11. There is no dispute that the termination of the Claimant's employment was done by the Respondent. Under Section 45(2) of the Employment Act, termination of employment by the employer is unfair if he fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure.

Reason

for the termination

12. In this case, the Claimant was absent from work for one week due to sickness and he was given a sick off for 5 days which was later extended by 3 days. He however failed to notify the employer about the illness and the sick off until 17.2.2015 when his Supervisor was sent to look for him at his home. On being asked the reason for not reporting the sickness and the sick off, he explained that his phone had been lost. After considering the claimant's history of absenteeism, the Respondent was not satisfied with the reason given for the failure to report the sickness and dismissed him.

13. After careful consideration of the evidence and submissions by the parties, I find that the Respondent has not proved a valid reason to warrant summary dismissal of the Claimant's services. The employer can only summarily dismiss his employee for the reason stated under section 44(4) including if:

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

14. If I

understood the defence case well, which I obviously did, the Respondent has not denied that the Claimant was sick and was given sick off by the doctor from 11.2.2015 to 20.2.2015. All what she complained of was the failure by the Claimant to notify her that he was sick and had been given a sick off. With due respect, however the failure to notify the employer amount to the offence contemplated by section 44(4) (a) of the Act. In my view sickness evidenced by a doctor's certificate of incapacity, is a good cause for an employee to miss work within the meaning of section 44(4) (a) of the Act.

15. Whereas I appreciate the duty by the employee to notify his employer about his inability to attend work, in my view the main reason for the said notice under section 30(2) of the Act, is so that the employee to benefits from salary during the days of his sick off. The said Section 30(2) provides that:

“For an employee to be entitled to sick leave sick off with full pay under subsection(1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reason for it.”

16. In

view of the finding that the respondent has failed to prove that the Claimant absented himself from work without any lawful cause from 11.2.2015 to 20.7.2015, I now find and hold that she has failed to prove on a balance of probability that she terminated the services of the claimant for a valid and fair reason as required by section 43 and 45(2) of the Act and as such the summary dismissal of the claimant on

3.3.2015 was unfair. Section 43(1) of the Act provides as thus:

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45”

Procedure followed

17. As regards the procedure followed before the dismissal, I am satisfied that it was fair within the meaning of Section 41 of the Act. Under the said Section before the employer terminated the services of his employee on ground of misconduct, physical incapacity or poor performance, the employer must first explain the reason for the intended termination to the employee in a language he understands and in the presence of fellow employee or shop floor union representative of his choice, and thereafter invite the employee and his chosen companion to air their defence for consideration before the termination is decided. In this case, the Claimant admitted that he was invited to oral hearing and the written proceedings were produced as exhibits by the Respondent.

Reliefs

18. Under section 49 of the Act, I award to him, Ksh.18,105 being one month salary in lieu of notice plus Kshs.181,050 being 10 months' salary as compensation for the unfair termination. In awarding the said compensation, I have considered the fact that the Claimant served the Respondent for over 4 years and the only offence he committed was to fail to notify his employer of his sickness and sick off recommended by the doctor.

19. The claim for salary for February 2015 is dismissed because he did not notify the employer in good time about his incapacity in good time. The claim for annual leave for 1998-2011 was abandoned for being time barred.

Disposition

20. For the reasons that the summary dismissal of the Claimant was unfair, I enter judgment for him in the sum of Kshs.199,155 plus costs and interest from the date hereof. The said award will be subjected to statutory deductions.

Dated and signed at Nairobi this 19th day of March, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 12th day of April, 2018

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JUDGE