Muthii v Athi River Shalom Community Hospital (Cause 1010 of 2017)
[2023] KEELRC 134 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 134 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1010 OF 2017

BOM MANANI, J

JANUARY 26, 2023

BETWEEN

JULIUS MUTHII ..... CLAIMANT

AND

ATHI RIVER SHALOM COMMUNITY HOSPITAL ..... RESPONDENT

JUDGMENT

1. The claimant was an employee of the respondent until June 21, 2016 when he was allegedly unlawfully terminated. As a result, he has filed these proceedings to claim compensation for unfair termination.

2. The respondent denies terminating the claimant's contract unlawfully. It is the respondent's case that the claimant was procedurally terminated from employment for misconduct. Consequently, the respondent prays that the claim be dismissed with costs.

Claimant's Case

3. According to the claimant, he was employed by the respondent on April 10, 2015 as a security guard. His monthly salary was Ksh 12,071.

4. It is the claimant's case that he served the respondent in this capacity until June 10, 2016 when the respondent terminated the contract of service between the parties. The claimant contends that the termination was without valid reason. Although his supervisor alleged that he was guilty of sleeping on duty, the claimant denies that this was the case.

5. The claimant further pleads that he was not granted an opportunity to be heard in his own defense against whatever case the employer had against him before the decision to terminate his services was arrived at. That all that the respondent's manager did on June 21, 2016 was to inform the claimant that investigations had confirmed his guilt and that a decision had been reached to terminate his contract.

6. During the term of his contract, the claimant asserts that he was not paid house allowance. And neither was he granted his leave days or pay in lieu of leave.

7. The claimant also avers that he was required to work from 6 pm to 6 am every day for six (6) days in a week. That, in addition he was required to work during public holidays without compensation.

8. Proceeding on the aforesaid premise, it is the claimant's case that he was unfairly terminated from employment and was not paid the requisite terminal dues following the illegitimate termination. Consequently, he prays for the several reliefs as more particularly set out in the statement of claim.

Respondent's Case

9. On the other hand, the respondent accuses the claimant of not having been diligent at work. It is the respondent's case that the claimant was guilty of: perennial lateness from duty; insubordination; disobeying lawful orders; using foul language against co-employees; and frequently sleeping whilst on night duty.

10. In the respondent's view, the totality of these transgressions by the claimant constituted gross misconduct for which he was fired. The respondent argues that despite issuing him with verbal warnings, the claimant never quite changed.

11. It is the respondent's case that before he was terminated, the claimant was afforded an opportunity to be heard. Consequently, the assertion that he was fired in total disregard of due process is without foundation.

12. The respondent denies that the claimant is entitled to the reliefs pleaded. For instance, it is contended that the salary paid to the claimant was consolidated to include house allowance. Besides, the salary was more than the minimum wage allowed under the applicable wage order. That this improved wage covered house allowance.

13. Further, it is argued that although the claimant may have worked overtime, he was allowed off days. That these off days compensated for any time spent at work outside his scheduled work hours.

14. In respect of leave, it is contended that the claimant was paid in lieu of leave. As a result, the claim for leave pay is misconceived.

15. It is the respondent's assertion that the claimant's terminal dues were computed at Ksh 25,000/=. That this amount was paid to the claimant at the point of separation.

Issues for Determination

16. It is not disputed that the claimant was an employee of the respondent until June 21, 2016 when he was terminated. What is in contention is whether the termination of the employment contract was lawful and if not whether the claimant is entitled to the reliefs sought in the Statement of claim. I consider these as the only issues for determination in the cause.

Analysis

17. The parties adopted their written witness statements as part of their evidence in chief. Besides, they tendered oral evidence to reiterate what is in the written statements. The parties also produced copies of their respective documents as exhibits.

18. In my decision, I have considered this evidence. In addition, I have considered the submissions on record.

19. The law on termination of a contract of employment on account of gross misconduct, physical incapacity or incompetence is set out under sections 41, 43, 44, 45 and 47 of the *Employment Act*. Where the employer proposes to terminate an employee's contract of service on either of the above grounds, he must: notify the employee of the charge against him in a language that the employee understands; allow the employee an opportunity to respond to the accusation; and allow the employee a chance to call witnesses in support of his case. This requirement applies to cases of summary termination as well.

20. The burden of proving the validity of the grounds for termination lies with the employer with the employee obligated to only place before the court prima facie evidence to establish the fact of termination and point to the unlawfulness of the decision to terminate. Where the employer fails to prove the validity of termination in terms of the reasons and procedure for termination, the resultant decision is considered unlawful (see*Cooperative Bank of Kenya Limited v Yator* (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR) and *John Rioba Maugo v Riley Falcon Security Services Limited* [2016] eKLR)).

21. The claimant avers in his evidence that on an undisclosed date in June 2016 he was on night duty at the respondent's premises in the company of three other security guards. That whilst he was patrolling the ward area to ensure patients with pending hospital bills did not leave the hospital premises without authorization, the other guards were elsewhere with some of them stationed at the hospital gate.

22. It is the claimant's case that at some point in the night, police officers brought in a corpse to be preserved at the hospital's mortuary facility. Apparently, efforts by the police to have the hospital gate opened proved futile as the guard at the gate was allegedly a sleep. This forced a member of the respondent's management to intervene and come to open the gate.

23. The claimant's case is that following this incident, he was accused of sleeping on duty and issued with a letter of suspension dated June 10, 2016. Yet, as he says, he was not at the gate. The claimant states that efforts to explain the incident to the respondent's management proved futile. On June 21, 2016, he was allegedly summoned to the respondent's office where he was issued with a letter of termination.

24. On the other hand, the respondent's witness states that the claimant willfully disobeyed orders that were issued to him by his superiors on June 6, 2016. That following this occurrence, the claimant was issued with a letter of suspension from duty on June 10, 2016. Curiously, the letter of suspension refers to an incident that allegedly happened on June 4, 2016: not June 6, 2016.

25. The respondent's witness insists that the claimant was given a chance to be heard before termination. However, the details of the alleged hearing remain scanty. Whilst in the statement of defense and written witness statement the respondent alludes to a disciplinary committee having been set up to hear the claimant's case, in the oral evidence, the respondent's witness suggests that the claimant's informal session with the respondent's manager on June 21, 2016 constituted the disciplinary hearing.

26. It is not clear whether the claimant was made aware that the alleged meeting of June 21, 2016 with the respondent's manager was a disciplinary session. It is not clear whether he was informed of his right to call witnesses.

27. The letter of suspension dated June 10, 2016 required the claimant to appear before a disciplinary committee: not the respondent's manager. Besides, the letter of suspension does not provide particulars of the alleged willful neglect of orders. The letter cannot by any reasonable stretch of imagination be considered as informing the claimant of the charge against him in terms of section 41 of the *Employment Act*.

28. During cross examination, the respondent's witness stated that she could not prove that the disciplinary session scheduled for June 21, 2016 indeed happened. Yet, this is an obligation that lies with the employer under section 43 of the *Employment Act*.

29. It is true that in his statement the claimant admits that he was summoned by the respondent's manager on June 21, 2016 and that he went to the said manager's office pursuant to the summons. However, it is also clear from the statement that when he reached the office, the claimant was immediately handed the termination letter. On the material before me, it is clear that the decision to terminate the claimant had already been made as at June 21, 2016 and that the explanation the claimant allegedly made to the manager on this date before being handed the letter of dismissal was merely window-dressing.

30. In view of the foregoing, I find that there is no cogent evidence to demonstrate that the claimant was taken through a meaningful disciplinary process as contemplated under section 41 of the *Employment Act*. The mere fact that he admits to having appeared before the respondent's manager on June 21, 2016 does not convert such meeting into a disciplinary session.

31. On whether the claimant is entitled to the reliefs sought, I take cognizance of the fact that the parties had worked together for slightly over one year. The period was not long. In the circumstances, I do not think that the claimant can claim to have suffered substantial loss as a result of the separation. Taking this factor into consideration, I do not think that this is a fit case to grant compensation beyond the claimant's gross salary for five months.

32. There is no dispute that the claimant was not provided with housing at the work place. What the respondent appears to argue is that the claimant's salary was consolidated to include house allowance. Yet, the contract of employment does not mention that what the claimant was receiving was a consolidated pay package. This court has previously observed that merely because salary is described as consolidated does not necessarily mean that it includes all allowances including house allowance. (see*Vipingo Ridge Limited v Swalehe Ngonge Mpitta* [2022] eKLR).

33. Importantly, in the instant case, there is not even the mention of the salary as being consolidated in the contract of employment. The parties having reduced their contract into writing and the letter of employment being the primary contracting document, it should at least have provided for the fact that the claimant's salary was consolidated (see *Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu* [2019] eKLR).

34. The court cannot read into the letter of appointment a clause that the claimant's salary was consolidated based on the oral testimony of the respondent. To do so would be to rewrite the contract between the parties. Similarly, such endeavour would amount to an attempt to use oral evidence to interpret a written document which is generally impermissible in law (see*Vipingo Ridge Limited v Swalehe Ngonge Mpitta* [supra]).

35. The other issue that the respondent raises in opposition to the prayer for house allowance is that the claimant was receiving more than the minimum wage under the applicable wage order. Therefore, the amount over and above the minimum wage reflects the house allowance element.

36. Again, this is a flawed argument. The mere fact that an employee is receiving more than the minimum wage does not necessarily denote that the excess sum is, without more, part of the allowances due to the employee. Such amount may, in the absence of evidence to the contrary, merely denote that the employee negotiated a better pay package (see*Vipingo Ridge Limited v Swalehe Ngonge Mpitta* [supra]).

37. In the premises, I find that the respondent does not deny that it did not provide the claimant with physical housing during the duration of their contract of service. I also find that the respondent has not demonstrated that it paid the claimant an allowance towards housing in lieu of providing him with physical housing. Accordingly, I award the claimant house allowance for the duration he served the respondent at the rate of 15% of his salary (see*Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu*[supra] and regulation 5 of the *Regulation of Wages (Protective Security Services) Order, 1998.*).

38. The claimant states that he was not paid leave dues for five (5) days. On the other hand, the respondent asserts that it paid the claimant in lieu of leave. Whilst the claimant has claimed for five (5) unpaid leave days, he does not disclose how much was paid to him in lieu of leave. In the absence of this evidence, it is impossible for the court to arrive at the conclusion that the claimant has outstanding unpaid leave days. Accordingly, the prayer for unpaid leave days is declined.

39. Regarding overtime pay, I refer to the*Regulation of Wages (Protective Security Services) Order, 1998* which applies to the sector where the claimant was working. Regulation 6 of the order provides for fifty two (52) hours of work per week spread over six (6) days. From the letter of appointment issued to the claimant, he was required to work from 6.30 pm to 7.30 am, a total of thirteen (13) hours per day. For six (6) days, this would convert to seventy eight (78) hours.

40. However, in his pleadings and evidence the claimant indicates that these hours had been adjusted to between 6 pm to 6 am every day for six (6) days in a week. This evidence was not challenged by the respondent. On the contrary, it is corroborated by the letter of appointment which emphasized that since the respondent operates on a twenty four (24) hour basis for seven (7) days of the week, the claimant was expected to put in more working hours.

41. From the uncontroverted evidence on record, the claimant was doing a minimum of twelve (12) hours a day totaling seventy two (72) hours a week as opposed to the fifty two (52) hours recommended under the applicable wage order. In effect, the claimant was doing an average of twenty (20) hours overtime per week which converts to eighty (80) hours a month.

42. Under regulation 7 of the wage order, the claimant was entitled to be paid one and a half times his hourly wage rate for every hour worked in excess of the prescribed time. For the period between when he was hired on April 10, 2015 and when he was terminated on June 21, 2016, the claimant had served the respondent for approximately thirteen (13) months. The cumulative overtime hours are therefore 80 hrs x 13= 1040 hrs.

43. The claimant's salary was Ksh 12,071/=. His daily wage rate was therefore Ksh 402/=. The hourly wage rate was Ksh 50/= for an eight (8) hour work day. The cumulative overtime pay will therefore work out to Ksh 75 x 1040 hrs= Ksh 78,000/=. I award the claimant this amount in overtime pay.

44. The argument that the claimant's overtime is compensated by the off days he was afforded does not make sense. Section 27 of the *Employment Act* requires employers to grant employees one off day every week. This requirement is also captured under regulation 6 of the *Regulation of Wages (Protective Security Services) Order, 1998*. This is a paid off day. Therefore, it cannot be used to discount overtime pay earned by an employee.

45. With regard to notice before termination, section 35 of the *Employment Act* entitles parties to notice that is equivalent to the period the employee has to serve before he qualifies to draw his periodic salary. In this case, the claimant was earning a monthly salary. He was therefore entitled to a notice period of twenty eight (28) days before his employment could be terminated.

46. The claimant appears to admit through his pleadings that the respondent paid some money to cover the claim for notice leaving a balance of Ksh 8,882/=. During his evidence, the claimant produced a demand letter he issued to the respondent in respect of this sum. From the record, the respondent did not lead evidence to controvert this claim. In the premises, the court considers it as admitted.

47. As for public holidays worked, the claimant did not provide details of which public holidays he worked. Consequently, this claim fails (see *Ngunda v Ready Consultancy Limited* (Civil Appeal 129 of 2019) [2022] KECA 577 (KLR)).

48. Finally, I note that the respondent made a case of having paid the claimant Ksh 25,000/= as his terminal dues. This evidence is consistent with the claimant's evidence that some money was paid to cover the notice period under section 35 of the *Employment Act*. It is also consistent with the admission that some money was paid to cover the unutilized leave days.

Summary Determination

49. In the premises, I make the following final orders:-

a) The respondent's decision to terminate the claimant's contract of service was unfair.

b) The claimant shall be paid compensation for unfair termination which is equivalent to the claimant's gross monthly salary for five (5) months totaling Ksh 63,355/=.

c) The claimant shall be paid Ksh 8,882/= being the balance on account of salary for one month in lieu of notice.

d) The claim for accrued leave days is declined.

e) The claimant shall be paid accrued overtime dues of Ksh 78,000/=.

f) The claimant shall be paid accumulated house allowance for thirteen (13) months of Ksh 23,528/=.

g) The claim for pay for public holidays worked is declined.

h) The claimant shall be paid interest on the amounts awarded at court rates from the date of institution of the case till payment in full.

i) The claimant shall be paid costs of the suit.

j) The amounts awarded are subject to the applicable statutory deductions in terms of section 49 of the *Employment Act*.

DATED, SIGNED AND DELIVERED ON THE 26TH DAY OF JANUARY, 2023

B. O. M. MANANI

JUDGE

In the presence of:

.....for the claimant

.....for the respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent,

the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI