



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 730 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

NJOLI ABDI & 2 OTHERS.....CLAIMANTS

VERSUS

CHANDARIA INDUSTRIES LMTIED.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Claimant brought his claim vide his memorandum of claim dated 29th April, 2016.

He brought his claim as well as a claim on behalf of his colleagues **ABRAHAM MUSEE OLAI SI AND JOHN ONDIEKI OYARI**.

The Respondent put his response dated 9th June, 2016.

CLAIMANT'S EVIDENCE

2. The Claimant says he was employed by the Respondent as a loader from January, 2011 to 28th May, 2015. He says he was earning Kshs.570 per day payable weekly.

The other Claimants are John Ondieki Onyari who was also a loader at a salary of Kshs.787/= per day payable in weekly basis.

He was also employed in January, 2011 upto 28th May, 2015. The other was Abraham Musee Olaisi who was a driver and was earning Kshs.787/= per day payable on weekly basis. He was employed in January, 2011.

3. The Claimant Njoli Abdi testified on his behalf and on behalf of the other two Claimants. He said that they worked for the Respondent diligently from 2011 to 2015.

4. On 28th May, 2015 however the Claimants were taken to Ruaraka Police Station and were accused of theft. He says he was interrogated about some deliveries.

He says they were then charged in Makadara Court and he pleaded not guilty to charges of theft.

5. He says he managed to raise cash bail and got out of remand. He went to the Respondent's premises and asked about his employment. He was informed he was under suspension. He says during that period of suspension he was not paid his salary.

6. He further says after about two years the court acquitted him. He says he took the court ruling to the Respondent but still he was told he was dismissed.

7. The Claimant avers his dismissal was unjustified as well as that of his colleagues and also breached provisions of labour laws and principles of natural justice.

8. He prays for a compensation of Kshs.547,599/= for himself and John Ondieki total of Kshs.547,599/= and Abraham Musee Kshs.756,071/= as itemized in their respective memorandum of claim.

RESPONDENT'S EVIDENCE

The Respondent was arrested and arraigned in court and then he absconded from duty. He says he wrote to him on 14/6/2013 but he never responded.

9. He denies therefore that the Claimant is entitled to any terminal benefits having deserted duty. He prays the claim dated 29th April, 2016 be dismissed with costs.

ISSUES FOR DETERMINATION

1. Were the Claimants unlawfully terminated and was valid reason given for their termination.
2. Are the Claimants entitled to the reliefs sought?

DETERMINATION

10. This is a case where the three Claimants were arrested for charges of theft on 30th May, 2013.

They pleaded not guilty and were remanded in custody. They on diverse dates managed to raise the bond/cash bail and were released.

They allege they reported to the employer and requested to be reinstated in their positions but were informed they were suspended. They were not paid their salaries during the suspension.

11. The Claimants state they were finally discharged by the court on 28th July, 2015 that is two years later. They went to their employer and inquired about their employment and were informed by Mr. Mbulika the Personal Manager that they had been dismissed.

12. The court discharging the Claimants observed that the complainants did not turn up in court to give evidence and hence the Claimants were discharged.

13. The Claimants therefore pray for a declaration that the dismissal of the Claimants was unlawful and unfair and they are entitled to their terminal dues as follows:-

1. Njoli Abdi Kshs.547,599/=
2. John Ondieki Onyari Kshs.547,599/=
3. Abraham Musee Olaisi Kshs.756,071/=

14. The Respondent defence is that the Claimants after being arrested and charged in court absconded duly despite demand from Respondent made on 14th June, 2013 to report back to work.

15. I have painstakingly considered the evidence adduced by the respective parties during trial, the pleadings and submissions.

16. The Respondent's averment that the Claimants absconded duty cannot be supported by any evidence as the Respondent were aware the Claimants were in Remand Prison. So by the time they were sending them a dismissal letter dated 14th June, 2013 it was premature and uncalled for.

17. There are several authorities that provide that where an employer claims desertion for the employee from duty and use the allegation for desertion to terminate the employment the employer must demonstrate he made efforts to contact the employee without success.

The case of **SIMON MBITHI MBARE VS INTERSECURITY SERVICES LIMITED (2018) eKLR** the Judge observed that an allegation that an employee absconded from duty calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.

18. In the case of **RONALD DAUDI VS TORNADO CARRIERS LIMITED NO.236 OF 2016** it was held by the learned judge that desertion of duty is a grave administrative offence which if proved would render an employee liable for summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made to the employer and putting them on notice that termination of employment on this ground is under consideration.

19. In this case there is no evidence oral or documentary that any such provision were complied with.

Actually the Respondent prematurely issued the Claimants a dismissal letter on 14th June, 2013 and being well aware that they were under arrest from 28th May, 2013.

There would be no justification why the Respondent rushed to dismiss the Claimants a few days after their arrest and without prove that they had stolen any items from the Respondent.

20. The Respondents did not present any proof to this court of the items stolen by the Claimants, the value of the same or any proof of the same or at all.

21. Indeed in the case of **COSMAS N. NZAU & 2 OTHERS VS THE ATTORNEY GENERAL CIVIL SUIT NO.714 OF 2000** the court held that where imputation of criminality in what were clearly work discipline issues was a clear manifestation of malice on the part of the Plaintiffs who decided to criminally prosecute the defendants.

22. The present case the Claimants say they were arrested without being informed of their wrong doing and were taken to court. They only knew of their charges in court. The Respondent has not established what efforts he took to comply to Section 41 of the Employment Act.

Section 41 provides that before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity the employer should 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 the explanation.

23. The law is candid that before termination of employment the employer must adhere strictly to the provisions of the law. He cannot just wake up and issue a dismissal letter without giving a valid reason as provided also in Section 45 of the Employment Act and following the procedure set out clearly in the above Section 41 of the Employment Act.

24. In the often cited case of **WALTER OGAL ONURO VS TEACHERS SERVICE COMMISSION CAUSE NO.955 OF 2011** court observed that the termination to pass the fairness test it ought to be shown that there is not only substantive justification for termination but also procedural fairness.

Further Section 43 of the Employment Act obligated an employer to prove the reasons for termination of employment and where the employer failed to do so, the termination was deemed to have been unfair.

25. In the present case the Respondent despite having caused the Claimants to be arraigned in criminal court failed to testify in the criminal court for two years and so the Claimants were discharged. They further failed to conduct their in-house investigations following the provisions of Sections 41, 43, and 45 of the Employment Act. They merely issued a dismissal letter without complying with the law.

26. The court has examined the circumstances of this case and find the conditions set for dismissal or termination of employment have not been established.

I therefore declare the termination of the Claimants employment unfair and unlawful and proceed to enter judgment in their favour.

RELIEFS

27. Having entered judgment in favour of the Claimants, I proceed to award the following;

(a) NJOLI ABDI

1. one month salary in lieu of notice Kshs.14,820/=

2. Accrued salary for the period under suspension not proved otherwise by the Respondent Kshs.177,840/=.

3. Payment in lieu of unpaid leave from 2011 to 2013 Kshs.29,640/=.

4. House allowance during the employment period as the Respondent did not prove it was part of the salary Kshs.117,819/=.

5. Compensatory damages for wrongful dismissal given for 2 months equivalent Kshs.29,640/=.

6. Interest is awarded at court rates from date of Judgement till payment in full.

7. Having succeeded in the suit Claimants is awarded costs.

CONCLUSION

28. The total award hereto due to the Claimant is Kshs.369,759/= plus costs and interest.

So it is ordered.

29. **JOHN ONDIEKI ONYARI**

1. one month salary in lieu of notice Kshs.14,820/=.
2. Accrued salary during suspension Kshs.177,840/=.
3. Payment of untaken leave for 2 years from 2011 to 2013 Kshs.29,640/=.
4. House allowance during the employment period as Respondent did not prove the salary include house allowance Kshs.117,819/=.
5. Compensatory damages for unlawful termination awarded at 2 months Kshs.29,640/=.
6. Interest awarded at court rates from date of Judgement till payment in full.
7. Having succeeded in his claim the Claimant is awarded costs.

CONCLUSION

30. The total due to the Claimant is Kshs.369,759/= plus interest and costs.

It is so ordered.

31. **ABRAHAM MUSEE OLAISI**

1. one month salary in lieu of notice Kshs.20,462/=.
2. Accrued salaries for 24 months Kshs.245,544/=.
3. Payment in lieu of leave for 2 years from 2011 to 2013 Kshs.40,924/=.
4. House allowance during the employment period as Respondent did not demonstrate it was compounded with the salary Kshs.162,673/=.
5. Compensatory damages for wrongful dismissal at two months equivalent Kshs.40,929/=.
6. Interest at court rates from the date of Judgement till payment in full.
7. Having succeeded in his claim the Claimant is awarded costs.

CONCLUSION

32. The total award to the Claimant is therefore Kshs.510,527/= plus costs and interest.

It is so ordered.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 15TH DAY OF FEBRUARY 2022.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE