



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT ELDORET

CAUSE NO 220 OF 2017

AHMED ABDI KADIR ALI.....CLAIMANT

VERSUS

DAKAWOU TRANSPORT LIMITED.....DEFENDANT

J U D G E M E N T

1. The claimant alleged that he was employed on 19th October, 2012 by the respondent as a Security supervisor at a monthly salary for Ksh.8,000/= which was later increased to Ksh.10,000/= at the time of termination.
2. The claimant alleged that he served the respondent dedicatedly without any warning until 3rd August, 2016 when his services was terminated without any lawful cause of justification.
3. According to the claimant, the allegations against him about a lost generator were not true because on the material date he was off-duty besides no evidence of investigation was presented to him to enable him respond. He was further never issued with any show cause letter and never taken through any disciplinary hearing nor accorded a hearing to call witnesses.
4. The claimant further pleaded that the respondent upon termination declined to pay his terminal dues which he sought an order of the court that they be paid by the respondent.
5. The respondent on its part pleaded that it did not unfairly terminate the claimant's service. That indeed theft took place at its business premises on 2nd July, 2016 and not on 3rd August as alleged by the claimant.
6. In the theft, the respondent lost a generator, Ksh,1,000,000/= a laptop computer, two batteries, new motor vehicle spare parts and a welding machine.
7. The incident was reported to Eldoret Police Station which conducted investigations and the claimant was implicated as one of the suspects and consequently arrested.
8. According to the respondent, the claimant upon his arrest and subsequent release, chose to desert duty and never reported to work thereafter.
9. During the oral hearing the claimant informed the court that he would adopt his witness statement recorded on 27th July, 2017 as his evidence in chief. He also relied on his documents filed with the claim.
10. According to him he was employed on 19th October, 2012 as a security supervisor at a monthly salary of Ksh. 8,000/= and was increased to Ksh.10,000/= by the time he was terminated on 3rd August, 2016.
11. According to him he was accused of theft of a generator but was not at work on the material day. No investigations were conducted over the theft he was implicated in. He denied ever being arrested by the police over the incident.
12. It was his evidence that on the morning of the alleged theft, he called his colleague who was in night shift but was not picking his calls. He decided to visit his workplace when he was informed there had been a theft incident and his colleagues on the night shift had been arrested.
13. He denied being pardoned by the respondent and that it was the guards who were on duty on the material day that were pardoned.

14. Concerning dismissal, it was his evidence that he was never issued with notice or warning before dismissal and that they were informed they had been pardoned but would not return to work. He therefore asked the manager to provide him with a vehicle to carry his belongings from the yard.
15. In cross-examination he stated that he was employed on 16th September, 2012 and worked until 4th August, 2016. He further stated that he was given reason for termination. He was told there was theft of respondent's property including money. He further denied ever being arrested and that he went to the police station himself and was never taken into custody. He went there to see two of his colleagues who had been arrested.
16. Mr. Ali maintained that he was on off duty on the day of the alleged theft though he had no off chit from the employer. From the Police station he went to the yard and removed his things and took them home. They were told they had been pardoned but should not resume work. They were however issued with termination letters.
17. The claimant further stated that July was the month of Ramadhan and the director pardoned them in the spirit of Ramadhan.
18. The respondents witness Mr. Dahir Mohammed informed the court that he worked for the respondent and that he knew the claimant. According to him the claimant was employed on 19th October, 2012 and worked until 2nd July, 2016.
19. On the material there was theft. The claimant stole money, battery and other items. The claimant was on duty on the material day. The matter was reported to the police and investigations done and claimant arrested. The respondent's director was informed of the incident but pardoned the claimants in the spirit of Ramadhan but the claimant never resumed work for two years.
20. In cross-examination he stated that he worked for the respondent as a Manager, Western Region. He further stated that they had the claimant's contact address.
21. It was further his evidence that no letter was given to the claimant to show cause and that he was never summoned to a disciplinary hearing and that the claimant disappeared after the theft.
22. Regarding working hours, Mr. Dahir stated that the claimant used to report to work from 6.00am and leave at 6.00pm and that he was paid Ksh.15,000/= per month. The respondent however never provided a house nor paid house allowance.
23. In a claim for unfair termination, the burden of showing that unfair termination has taken place is on the employee while the burden to prove the reason or reason for termination is on the employer. The claimant herein alleges that he was unfairly terminated because the respondent alleged he was involved in a theft incident yet on the material day when the incident allegedly took place he was off duty. He however did not produce any document showing he was off-duty at the material time.
24. The claimant did not seem to have seriously denied the fact that there was theft at the respondent's premises all he said was that he was never involved but his two other colleagues who were implicated were arrested and were in police custody and that he visited them at the police station and was never taken into custody as well.
25. The respondent on the other hand maintained that the claimant was arrested as well but when they were released from custody after the respondent withdrew the complaint in the spirit of Ramadhan, they never resumed work.
26. The claimant on the other hand stated that he was never issued with termination letter but when they were pardoned, they were told they would not resume work. He therefore decided to remove his personal belongings from the respondent's premises and take them home.
27. From the foregoing it was not clear, the circumstances and manner in which the parties separated. The burden of proof in claims for determination of employment is distinct and separate between an employer and employee. The responsibility apportioned to each party is mutually exclusive and failure by one party to discharge the burden cast by law, does not mitigate or lessen the other's burden.
28. In the case before me, neither party has fully discharged the burden cast upon them by law. Whereas the claimant alleges he was terminated he also says upon being pardoned by the respondent he collected his personal belongings from the respondent's premise and left because according to him they were told that in spite of being pardoned, they would not resume work. The claimant never had any evidence of any efforts made to resume work but was refused by the respondent.
29. The respondent on the other hand claims the claimant deserted duty immediately he was released from custody but neither produced any evidence showing any effort made to summon the claimant back to work at the risk of termination if he fails to do so.
30. The claimant made other heads of claim in his statement of claim such as overtime, and underpayment but never led any evidence to support these claims.
31. The respondent admitted not paying the claimant house allowance. However, the claimant was registered for NSSF hence the claim for service pay will be disallowed.
32. In conclusion the court will award the claimant as follows.

Ksh

a) One month's salary in lieu for notice 10,000

b) House allowance at $\frac{15}{30} \times 10,000 \times 57$ months 285,000

295,000

33. The claimant shall further have costs of the suit.

34. It is so ordered.

DATED AND DELIVERED THIS 4TH DAY OF FEBRUARY, 2022

ABUODHA NELSON JORUM

JUDGE