



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO.77 OF 2015

MACMILLIAN NJAGE NCIEMA.....CLAIMANT

VERSUS

GEORGE MWANGI GICHIMO T/A

T/A VINEYARD HOTEL 2000.....RESPONDENT

JUDGEMENT

1. The Claimant filed his Memorandum of Claim dated 10th March, 2015 on the 18th March, 2015 claiming to have been unfairly terminated by the Respondent. The Claimant prays for the following remedies: -

- a) One-month salary in lieu of Notice.**
- b) Gross underpayment.**
- c) Normal overtime.**
- d) Off duties/rest days.**
- e) Public holidays.**
- f) Leave.**
- g) Gratuity.**
- h) Salary for April, May and 18 days of June all of the year 2012.**
- i) Compensation under section 49(1)(c).**
- j) Certificate of service section 51 of Employment Act of 2007.**

2. The summary of the Claimant's case is that he was employed by the Respondent on 10th March, 2010 as an accountant at a monthly salary of Kshs.7000. He was then given mere responsibilities of managing the hotel and his salary raised to Kshs 9,000 from June, 2010, Kshs, 10,000 from January, 2011 and Kshs 11,000 as from 2012 until his termination in June, 2012.

3. The Claimant avers that the reporting hours was from 8am to 10pm every day of the week including weekends. Despite working over weekends and overtime during the week the Claimant was not compensated.

4. The Claimant also avers that the Respondent did not deduct and or pay the statutory deductions such as NHIF and NSSF throughout his employment.

5. The circumstances leading to the termination was that, on the 18th June, 2012 at around 1pm the Claimant was arrested by CID officers and taken to Bahati North Academy where the secretary of the said school was equally arrested and were chained together then taken to CID officers in Nakuru and remanded. They were later informed that they reason for the arrest was on alleged loss of funds at the Respondent.

6. The Claimant was later arraigned in Court and criminal charges were preferred against him under criminal case number 2108 of 2012.
7. As soon as the Claimant was arrested, he avers that his employment services were terminated by the Respondent. He contends that no disciplinary hearing was conducted by the Respondent before reporting the alleged theft to the police.
8. The Claimant avers that he was not paid his April, May and 18 days of June salary before the termination.
9. The Respondent entered appearance on the 8th May, 2015 and filed a response to the claim on the 19th May, 2015. The Respondent admitted to employing the Claimant however that he never served as an accountant/ manager at any point rather that he was contracted as a casual worker on piecemeal work and paid promptly on the contracted work.
10. It is the Respondent's case that the Claimant was employed on casual basis pending submissions of his academic certificate which were never submitted to the employer to enable the employer issue an employment letter.
11. The Respondent then stated that the Claimant was indeed arrested and charged with stealing by servant under criminal case number 2108 of 2012 in Nakuru Chief Magistrates Court.
12. The Respondent stated that the Claimant was lawfully arrested in connection with criminal acts and therefore was not terminated by the Respondent as alleged and is not entitled to notice as per the circumstances.
13. The Respondent denied owing the Claimant any salary arrears or dues.

Hearing

14. During hearing the Claimant testified as CW-1 and reiterated his claim and in addition testified that his duties were to serve as an accountant, manager and book keeping. He testified further that he was arrested on 18.6.12 while at work and charged with the offense of stealing by servant and later acquitted on 19.2.2019. He testified that he was terminated without notice. That he worked overtime without pay, that he was underpaid and that he never took his annual leave.
15. He testified that he was terminated without reason since the alleged disparity in accounts was not backed with any evidence. He also stated that he was not tasked with depositing money to the bank rather that his work was to merely take records.
16. Upon cross examination, the Claimant testified that he cleared form 4 and studied accounting and book keeping which qualification he used to orally apply for the job at the Respondent. He admitted that the documents produced are not his certificates but results notifications. He maintained that he was employed as an accountant and not a casual employee.
17. He stated that he was employed on permanent basis and paid as per the payment vouchers annexed to the claim.
18. He also testified that after the arrest he was never taken back by the Respondent and on further cross examination he admitted that he never went back to the Respondent to claim his position after he was acquitted.
19. The Respondent on the other hand called one witness George Orina as RW-1. RW-1 testified that he is an agent and a consultant for the Respondent who was tasked with sourcing casual employees for the Respondent. He then adopted his witness statement dated 24.2.2020 and testified that he was contacted by the Respondent to look for casuals for it and was the one that hired the Claimant for the Respondent. He also stated that he was the one that paid the Claimant.
20. Upon cross examination, he testified that he was a consultant for the Respondent and that he was the one paying the Claimant. He then testified that the Claimant's services were terminated when he was arrested and arraigned in Court.

Claimant's Submissions

21. The Claimant submitted from the onset that he was an employed as an accountant on permanent terms and was paid every month from the time of employment till his termination. It was argued that the allegation by the Respondent that the employment terms of the Claimant was on casual basis was not proved in accordance with section 107 and 108 of the Evidence Act.
22. The Claimant further submitted that the cause of his termination was on the basis that he had stolen funds from his employer and instead of first conducting disciplinary hearing to ascertain the allegations, the Respondent reported the issue to the Police and the matter was preferred to Court then criminal charge were preferred against him. He argued that, he was discharged of the criminal offense. The Claimant argued that having been acquitted of the charges, the reason informing his dismissal, were not valid and therefore the dismissal was unfair both in substance and procedurally and cited the cases of **National Bank of Kenya V Samuel Nguru Mutonya [2019] eKLR** and the case of **Florence Wambui Gitau V Eclipse international [2019] eKLR**.
23. The Claimant then prayed for the claim to be allowed as prayed

Respondent's Submission.

24. The Respondent on the other hand submitted that the Claimant was a casual employee who was contracted on a need basis and never

worked continuously. It was argued that the Claimant had been employed by Rosget Management consultant, an agent of the Respondent who had been tasked with employing casuals for the Respondent and who was mandated with paying the said casual. It is the Respondents' submissions that the Claimant was a casual who was employed and paid by Rosget management consultant and not their employee as pleaded.

25. On whether the Claimant was unfairly terminated. It was argued that the Claimant was not terminated at the instance of the Respondent rather that when the Claimant was arrested and charged with the Criminal offense he ceased working to attend to the criminal case. It was then argued that summary dismissal in any case is justified under section 44(4) of the Employment Act when an employee is suspected to have or commits a criminal offense which was the case in this matter.

26. Accordingly, it was argued that the Claimant was not fired by the Respondent as alleged rather that he absconded duty to prosecute the criminal case against him.

27. The Respondent then prayed for the claim to be dismissed with costs and cited the case of **Elizabeth wangare Gathoni and 2 others V Andrew Nightngale and Kembu E.A LTD [2014] eKLR**.

28. I have examined the evidence and submissions of the parties herein. The issues for this Court's determination;-

1. Whether the Claimant was an employee of the Respondent.

2. Whether the Respondent terminated the Claimant unfairly.

3. Whether the Claimant is entitled to the remedies sought.

29. On the 1st issue, the RW1 admitted that he is the one who employed the Claimant for the Respondent.

30. The claim by the Respondent that the Claimant was not their employee is therefore negated by the evidence of RW1.

ISSUE NO. 2 Whether the termination was unfair.

31. The Claimant has averred that he was arrested by CID officers on 18/6/2012 at 1pm. He was then arraigned before Court and charged with offences of stealing by servant.

32. This criminal case was finally closed in 2018 due to the failure to call witnesses. Despite the fact that the Claimant was charged with criminal offences there is no indication that he was taken through any internal disciplinary processes by the Respondent before his dismissal.

33. It is a settled principal of Law see **Clement Karuri Vs KPA (2018) eKLR COA at Mombasa Visram, Karanja & Koome JJA (as she then was)** that institution of criminal proceedings is not a bar to civil proceedings or disciplinary hearing on similar facts.

34. Despite the fact that the Claimant was facing criminal charges, the Respondents never proceeded to subject him to a fair hearing to determine the reasons that may have led to a dismissal.

35. The Respondent never issued the Claimant with any dismissal letter. It is therefore left to guess work to determine the reason for which he was dismissed.

36. That being the position, this Court finds that the Respondent failed to establish the validity of reasons leading to the Claimant's termination and also failed to subject the Claimant to a fair disciplinary process.

37. In the circumstances of this case, the Respondents terminated the Claimant unfairly and unjustly as provided for under Section 45 (2) of the Employment Act 2007 which states as follows;-

"45. (1).....

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

ISSUE NO. 3 Remedies

38. Having found that the Claimant was unfairly and unjustly terminated I find for him and award him as follows:-

1. 1 month's salary in lieu of notice being 11,000/=.

2. The Claimant be paid 6 month's salary as compensation for the unfair and unlawful termination

6 x 11,000 = 66,000/=

3. Service pay for 2 years = 15 days salary for each year worked

= $\frac{1}{2}$ x 11,000/= x 2 = 11,000/=

4. Leave for 1 year = 11,000/=

5. Salary for April, May and 18 days for June 2012 = 11,000 x 2 = 22,000/= + 18/30 x 11,000

TOTAL = 28,600/=

TOTAL AWARDED = 127,600/=

Less statutory deductions

6. Claim for overtime, underpayment, public and rest days not proved for lack of supporting evidence.

7. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 17TH DAY OF MARCH, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for parties

Court Assistant - Fred