



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.2312 OF 2016

WILBERFORCE KIMUNGUI.....CLAIMANT

VERSUS

UNITED ARYAN (EPZ) LIMITED.....RESPONDENT

JUDGEMENT

On 2nd February, 2007 the respondent employed the claimant and issued him with a letter of appointment until 23rd November, 2015 when he was issued with letter of summary dismissal.

The claim is that the summary dismissal was without good cause and lacked due process and no terminal benefits were paid. That the respondent failed to follow the CBA terms and is seeking the following dues;

- a) 3 months' notice pay ksh.97,183.08;
- b) Leave days Ksh.149,512.43;
- c) Severance pay Ksh.209,317.40;
- d) Unlawful deductions of NHIF Ksh.45,800;
- e) General damages;
- f) Certificate of service.

The claimant testified in support of his case that while at work he was called to the hospital to check on his sick sister who required blood donation and the respondent alleged that he had left without permission. He was issued with a notice to show cause which led to summary dismissal.

The claimant testified that he was dealing with an emergency and could not check off. After he was issued with notice to show cause he was not given a hearing or paid terminal dues.

Upon cross-examination the claimant testified that he left work without clocking out and later claimed overtime pay. He left work at 3PM but in the overtime form he noted that he had left at 7PM which was not true. His problem was said to be that he had claimed for overtime while not at work for 5 hours. He apologised which was accepted because he had made a mistake.

Response

In response, the respondent's case is that the claimant was employed as a supervisor but his employment was terminated for gross misconduct after being suspected of committing a criminal offence to the loss of the respondent and also failing to obey lawful and proper command.

On Sunday 8th November, 2015 the claimant reported to work at 8AM at the factory for overtime on which day he left the factory at 1PM without clocking out. He required for overtime payment which he claimed he had worked up to 7PM an additional 5 hours.

The claimant was summoned by the respondent in the presence of a shop steward on 16th November, 2015 where he denied the allegation and was issued with a notice to show cause. Upon investigations, the respondent discovered what the claimant had done leading to summary dismissal on 23rd November, 2015.

The claimant was found to be in breach of his contract for falsifying the overtime requisition form, failing to take lawful command submitting false documents and committing a criminal offence. He was paid his terminal dues amounting to Ksh.32, 000 through his bank account at Kenya Commercial Bank on 4th December, 2015 and the claims made should be dismissed with costs.

The respondent called Sammy Osala the human resource manager who testified that the claimant was a supervisor but he left his shift without notice or permissions and later claimed that to have worked overtime whereas he had not worked or clocked out. He issued him with a show cause notice and called him in the presence of a shop steward and made an apology.

The witness also testified that the respondent business is sensitive and when the claimant left without permission he exposed other employees to danger as they were not being supervised and it was without due process. Such danger potentially exposed the respondent to liability since absence from duty required clearance and approval. The claimant further claimed for overtime work for 5 hours while he knew he had left work early. This was dishonest and as a supervisor this may have affected other areas and staff without the knowledge of the respondent.

The claimant was issued with a notice to show cause and he offered an apology but due to the gross misconduct, he was issued with notice of summary dismissal and paid his dues.

At the close of the hearing both parties filed written submissions.

Determination

On 16th November, 2015, The respondent issued the claimant with a notice to show cause why his employment should not be terminated on the grounds of being absent from duty on 8th November, 2015 and for lying that he had worked overtime of 5 hours whereas this was not true.

In a letter dated 22nd November, 2015 the claimant apologised to the respondent for being absent from duty on 8th November, 2015 without permission on the grounds that he had a hospital emergency and was not able to clock out because he was confused. He did not mention anything with regard to the allegation of claiming overtime payment without having earned it.

Absence from work without permission or good cause is an act defined under Section 44(4) (a) of the Employment Act, 2007 (the Act) as gross misconduct and subject to summary dismissal.

Under Section 44(3) of the Act, an employee who is in breach of the employment contract and who performs his duties carelessly, is dishonest, is negligent is subject to summary dismissal.

The safeguard to the employee is to allow him defend himself pursuant to Section 41(2) of the Act.

In this case, the claimant admitted to have been absent from work without permissions on 8th November, 2015 and then failed to respond as to why he dishonestly claimed for overtime payment while he knew he was absent and did not work so as to justify his claim for overtime payment. As a supervisor, the claimant had great responsibility over the employees he was supervising and to the employer who had entrusted him with the sole duty to supervise and report to the employer. He carried a great responsibility backwards and forwards to his shift employees and to his employer. He failed both.

The court finds the summary dismissal of the claimant was justified. He was issued with notice and allowed a hearing before a shop steward.

The claimant is seeking notice pay and damages which are not due in a case of justified summary dismissal.

The claim for leave pay for years worked is not outlined save, the claimant attached his payment statement for October, 2015 and in the schedule of payments the pay for leave is noted at zero (0). The vote head for unpaid leave days is noted at zero (0).

The payment statement on its own demonstrates the claimant had no leave due or any pending leave days.

The claim for severance pay is not explained save such is only due under the provisions of Section 40 of the Act but this case did not stand out as one of redundancy. Such is not due in this case.

The claim for NHIF deductions, such are statutory payments to the statutory body and cannot issue to the claimant. A certificate of service is due.

Accordingly, the claim is hereby dismissed in its entirety save a certificate of service shall issue pursuant to the Section 51 of the Employment Act, 2007. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF MARCH, 2022.

M. MBAR?

JUDGE