



REPUBLIC OF KENYA



KENYA LAW
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**Barasa v Rozzika Garden Centre Ltd (Cause 275 of 2014)
[2022] KEELRC 1599 (KLR) (14 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1599 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 275 OF 2014
HS WASILWA, J
JUNE 14, 2022**

BETWEEN

PIUS BUTERE BARASA CLAIMANT

AND

ROZZIKA GARDEN CENTRE LTD RESPONDENT

JUDGMENT

1. The Claimant herein filed his Statement of Claim dated 2nd July, 2014 on the 3rd July, 2014 claiming to have been unfairly terminated and seeking compensation for the unfair termination. He prays for the following reliefs; -
 - a) That the termination of the Claimant was unfair, unlawful, wrongful and illegal.
 - b) That the Claimant is entitled to payment of;
 - i. 1-month salary in lieu of Notice.
 - ii. Public Holiday worked and not paid
 - iii. Severance pay
 - iv. Overtime
 - v. House allowance
 - vi. Compensation based on section 49(1) of the Employment Act No. 12 of 2007.
2. The Claimant's case is that he was employed by the Respondent in May, 2006 as guard earning a monthly salary of Kshs. 10,200. He avers that he worked diligently for the Respondent till 4th July, 2013 when he was fired without notice or reason thereof.



3. The Respondent entered appearance and filed a reply to memorandum of claim on the 25th July, 2014 denying all the contents of the claim and adding that the Claimant was not terminated as alleged rather that he absconded duty after stealing the Respondent's property and in fear of Criminal charges and action against him deserted work never to be seen.

Evidence

4. During hearing the Claimant testified as CW-1 and adopted his witness statement and in addition testified that he was initially employed as a shamba boy at a salary of Kshs 5400 and later taken up as a security guard at a salary of Kshs. 10200 per month. He testified that he worked for the Respondent till the 4th July, 2013 when he was summoned by the Respondent's manager and informed that he was not performing his duties as expected and directed to leave the Respondent's premises. He avers that after the termination he reported the issue at the labour office who summoned the Respondent to no avail. He afterward followed up the matter with his advocate. He denied ever deserting work as alleged by the Respondent and avers that he was terminated verbally. He also denied going for leave and that the leave forms annexed to the defence do not bear his signature.
5. Upon cross examination by Morigori Advocate, the witness testified that he was employed in May, 2006 and issued with appointment letter but that the same was not in Court. He avers that he was paid Kshs 5400 and upon termination his salary had risen to Kshs 10,200 exclusive of house allowance. He stated that he was a security guard tasked with guarding crops, pipes, machinery, cattle among others. He denied ever being involved in theft of the Respondent's property or even being aware of any theft and instead maintain that he was sacked and not absconded duty.
6. The Respondent called one witness, Evans Mokaya, The Respondent's manager, as RW-1 who adopted his witness statement dated 25/7/2014 which basically reiterated the defence to claim and produced his documents of even date as the Respondent's exhibits.
7. Upon cross-examination by Muthanwa Advocate, the witness testified that he suspected the Claimant together with other security guards of stealing. However that none wrote a statement with the police. He contends that the Claimant was never fired rather that he absconded duty when the issue of theft was raised. He also admitted that the Claimant was not subjected to any disciplinary process, neither did they give him notice of termination or certificate of service on termination.

Claimant's Submissions

8. The gist of the Claimant submission is that the Claimant was terminated unfairly in that his services were terminated abruptly without notice and disciplinary process as envisages under the [Employment Act](#) as such that the termination was unfair for all intents as envisaged under section 45 of the [Employment Act](#). It was further argued that the defence by the Respondent does not hold any water for the reason that the Claimant's alleged deserted was not proved and the reason given that the Claimant had stolen the Respondent's property was not established either. He prays for the claim to be allowed as prayed.

Respondent's Submissions

9. The Respondent on the other hand maintain that the Claimant deserted work after being suspected of engaging in theft of the Respondent property. It was argued that the issue was reported to Karagita police station on the 2nd May, 2013 under O.B Number 6/2/5/2013. He maintains that the Claimant thus absconded duty from 5th July, 2013 and never gave an explanation thereof.



10. It was submitted that the Claimant's act of stealing from his employment is an act of gross misconduct which an employee can be summarily terminated in accordance with section 44(4)(g) of the Employment Act.
11. It was also submitted that the Claimant has not tendered evidence to affirm his allegation that he was unfairly terminated when the law under section 47 of the Employment Act vest upon the employee to show that he or she was unfairly terminated. Additionally, that section 107 of the Evidence Act makes it the duty of any person who alleges to prove the said allegation. Similarly, that the Claimant herein was tasked to prove the unfair termination alleged which according to the Respondent was not proved. On the contrary, it was argued that the Claimant absconded duty as from 5th July, 2013 as seen in the register paginated no. 15 to 18 of the defence documents.
12. The Respondent in conclusion submitted that the Claimant has failed to prove his case to the required standard and therefore is not deserving of the Orders sought.
13. I have examined the evidence and submissions of the parties herein. On 16th June 2014, the Claimant's counsel wrote to the Respondents alleging that the Respondents had dismissed the Claimant from employment on 4th July, 2013.
14. Earlier on, on 25th July 2013 The Ministry of Labour, CIRO had written to the Respondent in relation to a Trade dispute in relation to the dismissal of the Claimant. The Union had earlier on written to the Ministry on 9th July 2013 reporting the dispute which was 5 days after the alleged dismissal of the Claimant.
15. The Respondents have averred that the Claimant absconded duty after stealing from the Respondent. They aver that they made a report about this issue in May 2013.
16. The Respondents other than just stating that they made a report of theft concerning the Claimant, the OB extract was not produced before this Court. It is not clear what became of the report if at all the alleged report was purportedly made in May yet the Claimant continued working for the Respondents till 4th July, 2013 which does not add up for a theft suspect who was afraid of being arrested and who they allege absconded duty.
17. The union also reported a dispute to the Ministry of Labour 5 days later and this is not indicative of a person who had absconded duty.
18. There is no evidence that if indeed the Claimant absconded duty, a NTSC was issued against him to show cause why he could not be dismissed for absenteeism.
19. Without any such evidence and without any evidence that the Claimant was subjected to a fair disciplinary process, I find the dismissal of the Claimant unfair and unjustified as per 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”.

20. As concerns remedies, having found the Claimant dismissal unfair and unjustified, I award the Claimant as follows:-

1. 1 month’s salary in lieu of notice = 10,200/=

2. 10 months salary as compensation for the unlawful termination
= 10 x 10,200 = 102,000/=

3. Leave pay for the year 2013
= 10,200/=

4. Service pay equivalent to 15 days pay for each year worked
= $\frac{1}{2} \times 7 \times 10,200$
= 35,700/=

TOTAL = 158,300/=

Less statutory deductions

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

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 14TH DAY OF JUNE, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muthanwa for Claimant – present

Murigou for Respondent – present

Court Assistant - Fred

