



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 500 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

PATRICK LUMUMBA WAKHUSAMA.....CLAIMANT

VERSUS

EDWARD NDUNGU.....1ST RESPONDENT

ZETORT COMMUNICATION LTD.....2nd RESPONDENT

JUDGMENT

Vide his memorandum of claim dated 26th March 2014 and filed on 27th March 2014, the claimant avers that he was unlawfully/wrongfully dismissed from employment by the respondents and prays for orders against the respondent as follows:-

- i) The claimant's dismissal be declared wrongful and unfair
- ii) The claimant be paid terminal benefits as follows
 - Salary for June..... Kshs.16,500/=
 - Salary in lieu of notice.....Kshs.16,500/=
 - House Allowance.....Kshs.178,200/=
 - Severance.....Kshs.49,500/=
 - Leave allowance.....Kshs.99,000/=
 - 12 months Compensation for
wrongful termination..... Kshs.198,000/=
- iii) Certificate of service
- iv) Costs of the suit
- v) Interest at court rate

The Respondents filed their Memorandum of Reply on 1st December 2015 where they denied the claimant's allegations in toto.

Claimants Case

The claimant in his witness statement dated 26th March 2014 avers that he was employed by the respondents in the year 2007 and worked as a night guard for the Respondents' shop at ground floor of Cagen House along Harambee Avenue. His starting gross pay was Kshs.9,400 and increased to Kshs.16,500 per month by the time he left employment of the Respondent.

The Claimant further avers that he was neither given a contract of employment nor was he housed or paid house allowance. That he used to report on duty at 5:30 PM and work till 6:00 AM the following day and worked for seven (7) days a week.

The Claimant further avers that he diligently and honestly performed his duties until the 21st June 2013 when the 1st Respondent called him and directed to report on duty. At around 10:15 am he reported for duty only to be handed over to the police who took him to KICC Police Station and later arraigned him in court where he took plea and was released on bail. That he thereafter reported for duty but was informed that his contract had been terminated.

The Claimant also avers that he was not paid for the 21 days worked in the month of June 2013. Further that the Respondents did not make contributions to the NSSF and NHIF and he was not issued with a certificate of service. He claims that his dismissal was carried out contrary to the principals of natural justice and the provisions of section 41 of the Employment Act 2007.

To support his case, the claimant annexed a demand letter, a provisional NSSF statement, payslips for the months of April and May 2013 and a charge sheet.

Respondents Case

The Respondents responded to the claim via a Memorandum of Reply dated 30th November 2015.

In the response, the Respondents deny the claimant's averments in toto.

The Respondents deny the claimant's allegation that he was unfairly dismissed and aver that the claimant was summarily dismissed for gross misconduct and in particular breaking into the premises of the 2nd Respondent on the 21st June 2013 and stealing 80 Samsung Mobile Phones, 36 Nokia Phones, 16 LG Phones, 15 Sony phones, 16 Techno Phones, 2 Alcatel phones, 1 Motorola phone, 2 Blackberry Phones, 4 Casio watches, Safaricom Airtime of Kshs.85,167.50 and cash totalling Kshs.30,000.

The Respondents further claim that after the above incident, the Claimant wilfully absconded from duty and only showed up after he was arrested and charged in court. They aver that based on the above grounds the Memorandum of claim is baseless, frivolous, vexatious and does not disclose a cause of action against the Respondents. In summary, the respondents maintain that there was a valid reason for termination and pray that the claim be dismissed with costs.

Upon request by the claimant, the court directed the parties to proceed by way of pleadings, affidavit, evidence and submissions. The Respondent did not object. Both parties filed their submissions.

Claimant's Submissions

In his submissions, the claimant through his counsel maintained that the summary dismissal by the respondent was unfair and unlawful as it was contrary to the provisions of Sections 35 and 36 of the Employment Act. He submits that the reasons advanced by the Respondents were not proved and that the Respondents' actions amounted to Unfair Labour Practice which is outlawed by Article 41 of the Constitution.

He submits that the claimant has proved his case on a balance of probability and prays that his claim be allowed as prayed.

Respondent's Submissions

The respondents' counsel submits that the claimant was summarily dismissed in accordance with section 44 of the Employment Act.

The learned counsel urges the court to be guided by section 44(4)(g) which provides that summary dismissal of an employee is lawful and justifiable if an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

Counsel further submits that the Respondents suffered a substantial loss amounting to Kenya Shillings Two Million, Nine Hundred and Thirty Four Thousand, Five Hundred and seventy (Kshs.2,934,570) from the criminal offence suspected to have been committed by the Claimant. The Counsel cites the case of **Thomas Sila Nzio v Bamburi Cement Limited (2014) eKLR** where the court observed that an employer is not required to have conclusive proof of the claimant's involvement but is only required to have reasonable and sufficient grounds.

The learned Counsel prays that the claim be dismissed with costs.

Determination

Having carefully considered the pleadings, evidence, submissions and authorities cited by the parties, I find the issues for determination are: -

- i) Whether the termination of the claimant's employment by the Respondents was unfair and unlawful.
- ii) Whether the claimant is entitled to the reliefs sought.
- iii) Who should bear costs of the suit

Whether the termination of the claimant's employment by the Respondents was unfair and unlawful

The claimant contends that he was unfairly dismissed by the Respondent and was never accorded audience as he only learnt of the allegations at the police station. On the other hand, the respondent maintains that the summary dismissal was triggered by the fact that the claimant was suspected of breaking into the premises of the 2nd Respondent and stealing its property. Further that the claimant absconded his duties following his involvement in the breaking into and theft at the 2nd Respondent's business premises.

I will first address the allegation by the Respondents that the Claimant wilfully absconded from duty following the theft and only surfaced after being arrested by the police. It is not in dispute that the said theft happened on the night of 21st June 2013. An examination of the Charge Sheet annexed by both the Claimant and Respondents reveal that the Claimant was arrested on 21st June 2013. This corroborates the Claimant's narrative that he was summoned to work on the said date only to be handed over to the police. Accordingly, the allegation that the claimant absconded duty following the theft incident and only surfaced after being arrested by the police fails.

The respondents seek to rely on the authority of Section 44 of the Employment Act, 2007 which lays down the law on summary dismissal as follows;

(1) Summary dismissal shall take place when an employer terminated the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contractual of service.

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (32) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

b.

g. an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

I agree with the Respondents that the relationship between the Claimant and the Respondents demanded high degree of trust and confidence; that the claimant was in a position of responsibility which demanded that he uphold values of trust, responsibility and confidence, the cornerstone of an employer-employee relationship. Being a watchman, the Respondents entrusted him to guard and take care of their property. It is not in dispute that the Respondents suffered a substantial loss amounting to Kenya Shillings Two Million, Nine Hundred and Thirty Four Thousand, Five Hundred and seventy (Kshs.2,934,570). This theft took place under the claimant's watch. These facts prove that there were valid reasons for summarily dismissing the claimant. However, it is now trite law that even where there exist valid reasons for summary dismissal, the employer is bound by law to give a fair hearing as provided for under section 41 of the employment Act, 2007. I am guided by the finding in the case of **Paramount Bank Limited v Vaqvi Syed Qamara & another [2017] eKLR** where the learned Judge said;

"It is accepted Kshs.9 million was stolen from there. On the face of it, these facts would tend to show there was justification in dismissing the Claimant. The Court should however look at the actions of the Claimant and the Bank, the circumstances surrounding this theft, before making a pronouncement on the fairness and validity of the summary dismissal.... There is adequate evidence to conclude the summary dismissal of the Claimant was not based on valid and fair ground, under Section 43 and 45 of the Employment Act 2007. Procedure was in fundamental departure from the minimum statutory procedure prescribed under Section 41 of the Act. The Claimant merits compensation for unfair termination, under Section 49 of the Employment Act and Section 12 of the Employment and Labour Relations Court Act."

In the case of **Raymond Cherokewa Mrisha v Civicon Limited (2014) eKLR** the Learned judge stated;

"The Respondent has not proved that the claimant had breached a lawful contractual obligation to warrant summary dismissal. It was not within the Claimant's obligation to undertake corrupt transactions on behalf of the Respondent and to render accounts to the Respondent. Even if that was the case, which was not, the claimant was entitled to a fair hearing as provided for in section 41 of the Employment Act"

In the instant case, there were sufficient grounds to warrant a summary dismissal. However, the Respondents did not give the claimant a fair hearing Accordingly, I find that the termination was procedurally unfair.

Whether the claimant is entitled to the reliefs sought

The claimant claims that he was not paid his salary for June 2013. In their submissions, the Respondents state that the claimant only worked for twenty one days and is therefore only entitled to a total sum of Kenya Shillings Eleven Thousand, Five hundred and Fifty. This confirms the claimant's allegation that he did not receive his salary for this month. There is no letter of dismissal or indication of the date on which the claimant's employment was terminated. Accordingly the prayer succeeds and the Claimant is awarded Kshs.16,500.

Having found the termination unfair, the Claimant is awarded a one Month's salary in Lieu of Notice, at Kshs.16,500.

The Claimant prays for Service pay as the Respondents never submitted the mandatory contributions to NSSF and NHIF. The Respondents never filed any evidence to prove that they had indeed submitted the contributions. However, the Claimant never pleaded for Service pay in the Statement of Claim and this prayer only was only made at submissions stage. Parties are bound by their Pleadings. This prayer therefore fails.

The claimant also prays for leave pay. In their response, the Respondents submit that equity assists the vigilant and not the indolent and that since the Claimant never requested for leave, he is not entitled to leave pay. The law is now settled that the onus shifts to the employer to prove that their employees proceed on leave. It is not enough to claim that the employee never requested for leave. Section 28 of the Employment Act places the onus on the employer to manage the leave. This prayer therefore succeeds and the Claimant is awarded Kshs.79,961.50 being annual leave for 6 years at 21 days per year based on monthly salary of Kshs.16,500/=.

The prayer for House allowance fails as the Claimant was paid above the basic minimum wage of a night watchman which at the time was Kshs. 10,911.70. The salary he was paid was higher than his basic salary plus 15% house allowance.

The prayer for damages for unlawful dismissal succeeds. Although the claimant worked for the respondents for seven years, taking into account the circumstances under which the Claimant's employment was terminated especially that the premises he was guarding were broken into and the Respondent lost property of great value, I award the Claimant only one month's salary as compensation for unfair termination of his employment.

I thus award the claimant a total sum of **Kshs.129,461.50** made up as follows: -

1. Salary for June 2013.....Kshs.16,500.00
2. Pay in lieu of notice.....Kshs.16,500.00
3. Compensation for unfair termination.....Kshs. 16,500.00
4. Leave..... Kshs. 79,961.50
- Total.....Kshs.129,461.50**

The Claimant to be issued with a certificate of service as provided under Section 51 of the Employment Act.

I award costs to the claimant together with interest from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF FEBRUARY 2021

MAUREEN ONYANGO

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 Civil 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.

MAUREEN ONYANGO

JUDGE