



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 269 OF 2018

JOSEPH OUMA OMBETHO.....CLAIMANT

VERSUS

RAS COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed on 19/7/2018 by the claimant against the respondent praying for the following reliefs:

- (a) KSH 12,507, being payment of one month's salary in lieu of notice.
- (b) Kshs. 72,000 being payment in lieu of unpaid leave allowance from the year 2008 to 2016.
- (c) Damages for wrongful dismissal.
- (d) Provision of Certificate of Service.
- (e) Costs of the suit.

2. The respondent filed a Statement of defence on 13/11/2018 in which it denies all the particulars of the suit and the reliefs sought and puts the claimant to strict proof thereof.

3. C.W.1, Joseph Ouma Ombetho testified that he was the claimant and was employed by the respondent in September, 2007 and worked continuously until 3/11/2017.

4. C.W.1 adopted a witness statement dated 19/7/2018 as his evidence in Chief and produced a list of documents dated 19/1/2019 marked exhibits '1' to '8' as part of his testimony.

5. C.W.1 stated he worked as a Security guard earning initially Kshs.3,500 per month which was later increased to Kshs.7,000, Kshs.9,000 and finally Kshs.12,507 per month as at the time of dismissal.

6. C.W.1 stated that on or about 26/10/2017 he was called by his wife and informed that his brother had been found dead in his house. C.W.1 went to report the incident to his boss at Kilimani area. C.W.1 did not find the boss but he telephoned him and the boss asked him to go home and find out what had happened to his brother. C.W.1 said he went home and came back the following day and asked for further permission from the husband of his boss to go and attend to the matter. That permission was duly granted.

7. C.W.1 said he requested for a salary advance of Kshs.12,000 to buy a coffin but the employer sent him Kshs.4,900.

8. C.W.1 came back to office after the funeral after two (2) days. C.W.1 noticed that the boss had changed and was not assigning him work.

9. On 28/7/2017, C.W.1 stated he received a notice to show cause alleging that C.W.1 was rude to a supervisor. C.W.1 responded to the Show Cause Letter by a letter dated 1/11/2017. On 3/11/2017, C.W.1 received letter of termination of employment on grounds that C.W.1 was not disciplined and was rude. C.W.1 denied these allegations stating that the termination was malicious, unlawful and unfair. C.W.1 stated that he was paid no terminal benefits upon termination and prays for the same as set out in the Statement of Claim and compensation for the unlawful dismissal. The claimant also prays for grant of Certificate of Service.

10. C.W.1 was cross-examined by Mr. Ayayo for the respondent and insisted he was verbally authorized to go home and attend to his late brother. That he was away for three days. C.W.1 said he could read and write a bit and was not called to a hearing before the dismissal.

C.W.1 said he was not paid service gratuity. C.W.1 admitted he was paid notice pay on 8/11/2017 and had signed for it. That it was one month's salary. C.W.1 denied he had no pending leave days and that he had been paid full terminal benefits.

11. C.W.1 denied he was rude and arrogant to a supervisor when he was given Kshs.4,900. C.W.1 said he had a good record and had no previous disciplinary case, including no letter of warning before the dismissal.

12. R.W.1 Rispa Atieno Origa testified that she was a Manager of the Respondent. R.W.1 testified that the employment of C.W.1 was terminated on 3/11/2017 after he was given a notice to Show Cause on 28/11/2017. That C.W.1 had absconded duty for 4 days. That C.W.1 was so arrogant when he called asking for some money. R.W.1 stated that she had instructed that C.W.1 be given Kshs.5000. That C.W.1 called later and quarreled her asking why she had given C.W.1 only Kshs.5,000. That C.W.1 told R.W.1 to ask the sender of the money to reverse the Mpesa payment. That C.W.1 did not report to work for 4 days. R.W.1 testified that C.W.1 had not written a request to be given compassionate leave. R.W.1 stated that she was not aware the brother of C.W.1 had died.

13. R.W.1 stated that she paid the claimant one-month salary in lieu of notice upon the termination.

14. R.W.1 stated that C.W.1 had exhausted his leave days and was owed none.

15. Under cross-examination, R.W.1 stated she was not aware that C.W.1 was attending a funeral of his brother. R.W.1 said C.W.1 called her asking for money. That C.W.1 had already been given Kshs.5,000 when he called her. That the money was sent by an accountant who had authority to give salary advance of up to Kshs.5,000. R.W.1 said she did not know that C.W.1 had requested for Kshs.12,000 advance. R.W.1 stated C.W.1 was arrogant. R.W.1 denied that the C.W.1 was dismissed for arrogance but was dismissed for absconding from work for 4 days.

Determination

16. The issues for determination are: -

- (a) Whether termination of employment of the claimant was for a valid reason and was done following a fair procedure.
- (b) Whether the claimant is entitled to the reliefs sought.

17. In terms of Section 43(1) of the Employment Act, 2007;

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”

18. In the present case C.W.1 testified that he received a report that his brother had been found dead in his house and he proceeded to seek permission from R.W.1 to attend to the matter which he proceeded to do. That the following day, C.W.1 came back to work to obtain further permission to go and bury his brother and to get advance payment of Kshs.12,000 to buy a coffin from his employer.

19. That he spoke to the husband of his boss who allowed C.W.1 to proceed accordingly. That R.W.1 admitted having authorized the accountant of the respondent to advance C.W.1 Kshs.5,000 which was duly done.

20. Upon return to work three days later, C.W.1 received a notice to show cause for absconding from work to which he responded in writing. C.W.1 was not called to a disciplinary hearing but received a letter of termination two days later.

21. C.W.1 told the Court that the termination was malicious, unlawful and unfair since he had permission to attend to the burial of his brother and had been facilitated by the respondent to do so.

22. R.W.1 on the other hand told the Court that she was not aware that C.W.1 had lost a brother and that C.W.1 had not sought written permission to be away from work for 4 days hence the termination. The demeanour and the testimony by R.W.1 was not credible at all, the respondent having advanced Kshs.5,000 to C.W.1 to buy a coffin for his brother. R.W.1 apparently was unhappy with a request by C.W.1 for more money to cater for the funeral expenses, the request deemed to be arrogant by R.W.1. R.W.1 testified that C.W.1 was rude and arrogant on phone when he spoke to her whilst at home requesting for more funds. These circumstances clearly depict an employee who was at home with permission to bury his brother. C.W.1 was clearly victimized. C.W.1 was not charged with the said allegations of rudeness and arrogance.

23. R.W.1 has in the circumstances failed to prove that it had a valid reason to terminate the employment of the claimant in adherence to Section 45(2) which provides: -

“A termination of employment by an employer is unfair if the employer fails to prove: -

- (a) that the reason for the termination is valid;
- (b) That the employment was terminated in accordance with fair procedure.”

24. In the present case, C.W.1 was not given opportunity to appear before the employer with a representative of choice in terms of Section 41 of the Employment Act.

25. The conduct of R.W.1 is to say the least, cold hearted and callous in Court's considered view.

26. The Court finds that the termination of the employment was unlawful and unfair within the meaning of Section 45(1) of the Employment Act, 2007 and the claimant is entitled to compensation in term of Section 49(1) (c) and (4) of the Employment Act, 2007.

27. In this respect the Court finds that the claimant had a good work record and did not contribute to the termination. The claimant was paid Notice pay upon termination. The claimant has not proved that claimant was owed payment in lieu of leave days not taken. The claimant lost his employment and means of livelihood unlawfully and unfairly and was not compensated for the loss. The claimant was not paid statutory gratuity due to security guards upon termination, calculated at 18 days' salary for each completed year of service. The claimant did not plead this claim and the Courts cannot therefore award it.

28. The Claimant had served the respondent for a period of ten (10) years and with a good record. The claimant was not given a Certificate of Service to help him get alternative employment. The circumstances surrounding the termination of the claimant's employment comprise an aggravating factor in that R.W.1 lacked empathy and respect to an employee who had just been bereaved. The conduct of R.W.1 is in the Court's considered view inhuman.

29. The Court has considered similar cases of **Kenfreight East Africa Limited –vs- Benson K. Nguti, Civil Appeal No. 31 of 2015** in which the Court of Appeal upheld an award of 12 months' gross salary for unlawful dismissal and the case of **Juliet Ndanu –vs- East African Growers Limited** in which Maureen Onyango J. awarded 12 months' compensation for unlawful dismissal.

30. The Court awards the claimant the maximum compensation of the equivalent of 12 months' salary in compensation for the malicious, unlawful and unfair termination of Employment of the claimant in the sum of Kshs.150,804.

31. In the final analysis judgment is entered in favour of the claimant against the respondent as follows: -

- (a) Compensation in the sum of Kshs. 150,804.
- (b) Certificate of Service to be granted to the claimant within 30 days of this judgment.
- (c) Costs of the suit.
- (d) Interest at Court rates from date of judgment till payment in full.

32. The Court notes the failure by the respondent to pay the claimant gratuity which is due and owing to him by dint of the Regulation of Terms and Conditions of Service in the Security Sector calculated at 18 days salary for each completed year of service which payment amounts to

$$\text{Kshs.} \underline{12,507 \times 18 \times 10} = \text{Kshs.} 75,402.$$

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33. The claimant failed to plead this amount which the Court cannot grant.

However, this matter is notified to the Labour Officer, in charge of Kisumu for any appropriate action by that office.

Dated and delivered at Nairobi this 14th day of April, 2021

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

M/s Willy for the claimant.

Mr. Ayayo for Respondent

Chrispo: Court clerk