



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2236 OF 2015

HERMAN RACHAMI ABUYA.....CLAIMANT

-VERSUS-

DEVKI STEEL MILLS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as a Security Officer from January 2013 till March, 2015 when his services were allegedly terminated unlawfully and unfairly. His salary was Kshs. 28,528.00 as at the time of separation. He brought this suit seeking the following reliefs:-

- (a) The sum of Kenya Shillings Five Hundred Nineteen Thousand Nine Hundred and Fourteen only (Kshs. 519,914/-) in accordance with paragraph 7 of the Memorandum.**
- (b) Interest and costs incidental to this suit**
- (c) Certificate of Service**
- (d) Any such other or further relief as this Honourable Court may deem fit and just to grant.**

2. The Respondent denied the alleged unfair termination and averred that the Claimant fought with another employee and disappeared from work. It averred that it tried to reach the Claimant by phone to report back to work but in vain and as such it removed him from the payroll and paid his terminal dues through his bank account. It, therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 5.11.2020 and 26.11.2020 when both parties gave evidence and thereafter filed written submissions.

EVIDENCE

4. The Claimant testified as CW1 and he reiterated that he was employed by the Respondent as a Security Manager in January 2013 starting with a gross pay of Kshs. 17,000 per month which was later increased to Kshs. 28,528. He worked continuously as such without any disciplinary issues until 28.3.2015 when he was unfairly dismissed. His working time was from 5 p.m. to 6 a.m.

5. CW1 further testified that in March 2015, he reported to work at 5 p.m. and heard a commotion at the gate and went to check. He found an employee from Maisha Mabati section trying to exit the gate without a gate pass from his supervisor and he intervened. However, the employee refused to be searched and beat him and escaped after he fell down. Thereafter CW1 reported the matter to the HR Manager Mr. Stephen Musyoka who advised him to go to the hospital.

6. The following day he reported to work and spoke to the HR Manager but he took no action against the assailant and he went to report the matter to the police. The police arrested the assailant but the HR Manager told him to withdraw the case so as to deal with the matter at the office and he complied. However, after withdrawing the case, his assailant made his complaint to the police leading to his arrest but the police released him.

7. Thereafter he went to the office but he was told to stay away until he was called back. However, he was never called back to work and he was never paid salary thereafter. He was also never served with any dismissal letter or invited to any hearing.

8. On cross examination, he stated that he started working for the Respondent in 2013 but he was issued with a letter in April 2014. He contended that on 28.3.2015 he was beaten by the said employee who was refusing to follow the procedure of exiting the gate. He reiterated

that he reported the matter to the HR Manager Mr. Stephen Musyoka who withdrew his gate pass and thereby denied him access to work.

9. He denied that he absconded work after the assault on 28.3.2015 and maintained that he never absented himself from work during his time of service. He admitted that he was not given termination letter but he contended that it is the HR Manager Mr. Stephen Musyoka who verbally stopped him from attending work.

10. CW1 admitted that there was a clock-in machine for registering attendance but contended that, whenever the machine was defective, he used to sign an Attendance Register. He reiterated that he could not attend work after his gate pass was withdrawn since he would not clock-in. He contended that he called the HR Manager to allow him back to work as promised but in vain. He, therefore prayed for the reliefs set out in his Memorandum of Claim plus costs.

11. The Respondent called its HR Manager Mr. Erastus Mwanzia Musyoka who testified as RW1. He told the court that he joined the Respondent in January 2006. He produced Claimant's Appointment Letter dated 1.3.2013, his Contract of Employment, Attendance Sheet, Payslips and Bank Statement.

12. He stated that the Claimant fought with a fellow employee and they sorted the matter at the police station but thereafter he deserted work. RW1, further testified that efforts to call the Claimant back to work via his phone turned futile and his salary was paid through his bank account.

13. On cross-examination, he identified the employee who fought with the Claimant, Mr. Ibrahim who left the Respondent in 2018. He further admitted that Mr. Stephen Musyoka, is still working for the Respondent as HR Manager. He further admitted that he had the Claimant's contact being 0725010574 and contended that he called the Claimant back to work but he never reported back despite his promise to do so.

14. RW1 further contended that the Respondent has a Biometric Machine for clock-in and clock out from which the Attendance Sheets are printed out.

SUBMISSIONS

15. The Claimant submitted that the Respondent's allegation that he deserted work is not true and contended that Attendance Sheet produced was not authentic since it lacked Respondent's letter head or official stamp. He, further contended that even if the Attendance Register was to be relied upon, the same shows that his absence from work was from the date of the assault by the fellow employee.

16. On the other hand he submitted that the allegations that he was called by the employer to report back to work was also not true and that, if that was the case, the Respondent could have produced the call logs as evidence. He further contended that if indeed he had refused to heed to the alleged calls to resume work, then Respondent could have served a warning letter through his postal address contained in his appointment letter.

17. The Claimant submitted that his employment was unfairly terminated by the Respondent and placed reliance on **Fredrick Odong Owegi v CFC Assurance Ltd[2014]eKLR** and **Antony Mkaba Chitavi v Malindi Water and Sewerage Co. Ltd[2013]eKLR** where the court held that for termination of employment of an employee to be fair, the employer must demonstrate a valid and fair reason and follow a fair procedure by according the employee a fair hearing before the termination.

18. He prayed for judgment in terms of reliefs sought in the claim plus costs and interest from the date of filing the suit.

19. The Respondent, on its part submitted that it followed a fair procedure before terminating the Claimant from employment after he persisted on absenting himself from duty without or any justification despite numerous calls requiring him to report back to work. The Respondent contended that the Claimant has not rebutted the evidence adduced regarding his absence, namely the Biometric Attendance Sheet. It maintained that the reason for dismissing the Claimant was justified under Section 44(4) of the Employment Act.

20. In addition, the Respondent submitted that the Claimant was advised through numerous phone calls to appear before the management to address his behavior but he failed to report to work. It therefore urged that fair procedure was followed before the termination because the Claimant was given an opportunity to be heard but he declined to attend his disciplinary hearing. Reliance was placed on **Lydia Wambui Wahome v 2NK Sacco Society Ltd & Another[2017]eKLR** where the court found that an employee was given a chance to be heard but declined to attend the disciplinary hearing was fairly dismissed within the meaning of section 45 of the Employment Act.

21. As regards the reliefs sought, the Respondent submitted that the Claimant is not entitled to the same because he was fairly dismissed and all his terminal dues paid to him through his bank account. Therefore, the Respondent prayed for the suit to be dismissed with costs.

ISSUES FOR DETERMINATION

22. There is no dispute that the Claimant was employed by the Respondent from March 2013 to March 2015, when he was dismissed by the Respondent. The issues for determination are:

(a) Whether the dismissal was unfair and unlawful.

(b) Whether he is entitled to the reliefs sought.

UNFAIR DISMISSAL

23. Under Section 45 of the Employment Act, termination of employee's employment contract is unfair if the employer fails to prove that it was grounded on valid and fair reasons and that it was done in accordance with a fair procedure.

REASONS

24. In this case the reasons cited for the termination is desertion/absenteeism from work without leave or justification. The Respondent contended that the Claimant fought with a fellow employee and after sorting the matter over at the police station, he deserted work. It is further defendants case that despite numerous phone calls asking the Claimant to report back to work, he made promises to do so but in vain.

25. However, the Claimant denied the said allegations and averred that after being assaulted by a fellow employee, the Respondent failed to take action even after prevailing upon to withdraw his complaint from the police. It is the Claimant's case that the Respondent's HR Manager Mr. Stephen Musyoka withdrew his gate pass and directed him to stop coming to work until he was called back. The Claimant maintained that he was never called back to work despite making many calls to the HR Manager.

26. Having considered the evidence and submissions by both parties, it is clear that the Claimant stopped attending work after he fought with a fellow employee. The Attendance sheets produced by the Respondent indicates at entry no. 72 that, the Claimant attended work on 13.3.2015 from 7.30 a.m. to 5.00 p.m. and his employment were terminated. Thereafter, the Attendance Sheet indicates that his services had been terminated.

27. In view of the said Attendance Sheet, I find that the Claimant stopped attending work after his services were terminated. The termination was done suddenly and not after persistence absence after the assault case was resolved at the police station. Consequently, I hold that the Respondent has not proved on a balance of probability that the Claimant failed to attend work in March 2015 after resolving the assault case.

28. It further did not prove that it made calls to the Claimant or in any other manner contacted him before dismissing him from the alleged absence from work. Consequently I find and hold that the Respondent has failed to prove on a balance of probability that the reason for dismissing the Claimant was valid and fair, and it justified the dismissal.

PROCEDURE

29. Section 41 of the Act requires that, before terminating the services of any employee for misconduct, poor performance or physical incapacity, the employer must explain to the employee the reason in a language the employee understands, and in the presence of another employee, and thereafter accord the employee and his chosen companion a chance to air their defence which must be considered before the decision to terminate is reached.

30. In this case, RW1 alleged that he called the Claimant to report back to work and explain his absence but he failed after several calls, and his services were terminated,. No evidence of such calls was adduced to prove the allegation. Consequently, I find that the Respondent has failed to prove that it followed a fair procedure before terminating the services of the Claimant on account of misconduct.

31. Having found that the Respondent has failed to prove a valid reason for dismissing the Claimant, and that fair reason was followed, the court finds that the termination of Claimant's employment was unfair and unlawful within the meaning of section 45 of the Employment Act. In so finding, I dismiss the allegation that the Claimant deserted employment. The court notes that Mr. Stephen Musyoka who allegedly withdrew Claimant's gate pass and stopped him from attending work was not called as a witness to rebut the Claimant's evidence despite the fact that he is still a HR Manager in the Respondent company.

RELIEFS

32. Having found that the termination of the Claimant's employment was unfair, I award him one month salary in lieu of notice plus three months salary as compensation for unfair termination in making the said award I have considered that, he served the respondent for only 2 years but without any warning letters or other evidence of misconduct.

33. The Claim for service pay is dismissed because the pays slips produced show that the employer was contributing to NSSF. Under section 35(6) of the Employment Act, the Claimant is disqualified from service pay.

34. The Claim for house allowance is also dismissed because the Claimant admitted in his written and orals testimony that his starting gross pay was Kshs. 17000 but it was later increased to Kshs. 28,528 as at the time of the separation. The Claimant sought overtime pay at the rate of 1 ½ hours per day and computed a claim of Kshs. 83,016 for 2 1/6 years. However, the Attendance sheet produced by the Respondent indicates that the Claimant was absent during some days he was supposed to be on duty. He also did not indicate that he worked without ever going for his annual leave. Finally, he did not prove by evidence that he was working for more than 60 hours per week which is the number of working hours for protective security guards under the regulations governing terms and conditions of service for security guards. Consequently, I dismiss the claim for overtime for want of particulars and evidence.

35. The claim for Certificate of Service is grounded on section 51 of the Employment Act and I therefore grant it as prayed.

36. In the end I enter judgment for the Claimant in the following terms:

(a) NoticeKshs.23,849.00

(b) CompensationKshs. 85,584.00

Total... Kshs. 109,433.00

(c) Certificate of Service

(d) Costs and interest from the date hereof but (b) above is subject to statutory deductions.

Dated, signed and delivered in Nairobi this 8th day of April, 2021.

ONESMUS N. MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE