



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 899 OF 2017

RAJKARAN GIDDIE.....CLAIMANT

VERSUS

SUPERFOAM LIMITED.....RESPONDENT

JUDGEMENT

1. Through a statement of claim dated 9th May, 2017, the claimant avers that he was employed by the respondent as a Dispatch Supervisor but was verbally terminated by one of the respondent's directors on or about 28th July, 2016. That as he was informed then, his termination was occasioned by financial difficulties being experienced by the respondent at the time and this had forced it to cease further business operations. He averred that he was not issued with any notice prior to the said termination. He sought the following orders;

- a) **A declaration that the respondent's action in dismissing the claimant from employment was unlawful and unfair.**
- b) **A declaration that the claimant was entitled to a contract of service.**
- c) **The sum of Kshs 1,333,493.76.**
- d) **Costs of the suit.**
- e) **Interest on the amount awarded at court rates.**

2. The Claim was opposed by the respondent vide its response dated 18th September, 2017. The respondent further put in a counterclaim of even dated and through which it claims the sum of Kshs 64,343/= being one month's salary in lieu of notice and an outstanding amount in respect of a mattress bought by the claimant on credit. The respondent further prayed that the Claim be dismissed with costs and its counter claim be allowed.

3. The matter proceeded for hearing on 29th July, 2021 with the claimant testifying in support of his case. He sought to rely on his witness statement and list of documents as part of his evidence in chief. He produced the said documents as exhibits before court. On its part, the respondent called one witness, the Human Resource Manager, Mr. Reuben Nyaberi who also sought to rely on his witness statements and bundle of documents filed by the respondent as part of his evidence in chief. The said documents were also produced as exhibits before Court.

Claimant's case

4. The claimant avers that he was employed by the respondent on or about 15th February, 2016 as a Dispatch Supervisor. He averred that he was never issued with an employment contract and any attempts to follow up on the same were rebuffed by the respondent's human resource manager, Mr. Nyaberi. The employment relationship was short-lived as he states that on or about 28th July, 2016, he was called by one of the respondent's directors by the name Mr. Hamit Dodhia who informed him that the respondent was facing financial difficulties hence being the last employee to join the company, he would be the first to leave.

5. It was his testimony that he requested for one month's notice period and in lieu thereof, one month's salary pay, a request Mr. Hamit agreed to.

6. The claimant averred that on the same day, he was forced by one Mr. Sagar Dodhia to sign a salary voucher in the sum of Kshs 15,000/= which also stated "full and final payment". He said that he did this under protest as he was informed that he would not be paid the amount if he failed to do so. The claimant further averred that he was promised a salary increment of Kshs 15,000/= by Mr. Hamit but the same was never effected.

7. In cross examination, the claimant admitted that he bought a mattress from the respondent and that he paid for the same. He testified in cross examination that he was never issued with a letter dismissing him from employment. He also testified that he was not aware whether the respondent had ceased operations.

Respondent's case

8. The respondent admitted that the claimant was its employee with effect from 13th February, 2016 and that upon his employment, he was issued with an appointment letter which he was required to append his signature so as to signify acceptance to the terms and conditions set out therein. That the claimant refused to sign the offer letter immediately and instead, requested for time to study the same and consult on several issues for instance, allocation of a personal vehicle by the company, the probationary period, duration of the contract etc.

9. The respondent through Mr. Nyaberi denied that it had ceased operations as alleged by the claimant. He further denied that the claimant was ever promised a salary increment as there exists a formal procedure through which such employees' salary increment is effected. That the said review cannot be done verbally.

10. The respondent further averred through Mr. Nyaberi that the claimant absconded duty with effect from 29th July, 2016 when he did not turn up at the place/stage where he would ordinarily be picked by the company driver. That he was unreachable on phone on the material day and in the subsequent days hence the respondent contacted his aunt who had referred him for employment. That the said aunt informed the respondent that the claimant may not be reporting to work ever. This sequence of events led to the claimant's summary dismissal. Mr. Nyaberi further testified on behalf of the respondent that the claimant had bought a mattress in the sum of Kshs 21,543/= and which he had not paid for. Consequently, the respondent counterclaimed for this amount as well as one months' salary in lieu of notice from the claimant.

Submissions

11. Each party filed written submissions. The claimant submitted that the respondent was bound by law to issue him with a show cause before termination and that if he indeed absconded duty, the respondent did not demonstrate the steps it took to reach him. He further submitted that the respondent did not provide any reasons for his summary dismissal as provided by law. He sought reliance on the case of **David Nyanjui Mburu vs Sunmatt Limited (2017) eKLR**.

12. On its part, the respondent submitted that the claimant's summary dismissal was justified as stipulated under section 44 of the Employment Act. The respondent further submitted that it attempted to reach the claimant through his aunt who is his next of kin. That it was impossible to take the claimant through a disciplinary process as his whereabouts were unknown. It sought reliance on the case of **Victor S. Agesa vs Henkel Chemicals (EA) (2017)**.

13. Before, I delve into the issues for determination, I must address an issue which has been raised in the pleadings and submissions by both parties as well as the trial. The issue is in respect the claimant's contract of service.

14. It is not disputed that the parties were in an employment relationship. The respondent produced an application for employment form and which was filled by the claimant on 13th August, 2016. The respondent further produced an unsigned employment contract dated 22nd March, 2016 addressed to the claimant.

15. In his testimony the claimant averred that the respondent turned down any attempt on his part to sign the contract. On the other hand, the respondent contends that it is the claimant who refused to sign the employment contract despite several reminders.

16. From the record, it would appear that the employment relationship between the parties lasted for about 5 months or so. Section 9(1) (a) of the Employment Act requires that an employment contract exceeding 3 months to be in writing. Subsection (2) places the responsibility of drawing up the contract on the employer.

17. In the instant case, the respondent produced an unsigned employment contract addressed to the claimant. The same is dated about 1 month or so from the date the claimant was employed. The respondent alleged that the respondent refused to sign the same while the claimant contends that he was never issued with one.

18. In the circumstances and in view of the fact that there is an employment contract on record, I would give the benefit of doubt to the respondent and find that it discharged the burden placed upon it by the law. I will also add that failure to have the same signed does not negate the fact that parties were in an employment relationship. In any event, this fact has not been disputed by either party hence I will not address this issue any further.

Analysis and Determination

19. Arising from the pleadings on record, the evidence before court, the testimonies of the parties and the rival submissions, the issues falling for court's determination are:

- a) Whether the claimant was unlawfully terminated or absconded duty?
- b) Whether the claimant's salary was reviewed?
- c) If the answer to (a) is in the affirmative, what remedies are available to the claimant?

d) Is the respondent entitled to the prayers in the counterclaim?

e) Who bears the costs of the claim and counterclaim?

Whether the claimant was unlawfully terminated or absconded duty?

20. As regards, the issue of whether the claimant was unlawfully terminated by the respondent, both parties have presented different versions as to how the employment relationship terminated.

21. The claimant avers that he was verbally terminated by one of the respondent's directors, Mr. Hamit on account that the company was facing financial difficulties hence being the last one to be employed, he would be the first to leave. On the other hand, the respondent contends that the claimant absconded duty and maintains that it still a going concern.

22. From the record, the claimant was summarily dismissed by the respondent on grounds of absconding duty. The letter of summary dismissal is dated 10th August, 2016 and is addressed to the claimant. The reasons for the dismissal are as follows:

“ (i) your deliberate action of absconding duty since 29/07/2016 to date without any lawful cause thereby, contravening sec. 44(4) & (a) of the Employment Act.

(ii) switching off your cell phone and therefore all efforts by the management to reach you to enquire about your whereabouts was futile”

23. Section 44 of the Employment Act provides for summary dismissal and that the same shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled to.

24. Subsection (4) provides for grounds under which summary dismissal may be justified. One of the grounds provided for under (a) is where an employee absents himself without leave or other lawful cause from the place appointed for the performance of his work.

25. The respondent has alleged that the claimant absconded duty and efforts to reach him were futile as he switched off his phone. Incidentally, the date the claimant alleges to have been verbally terminated is the same date he is alleged to have absconded duty.

26. The respondent produced the claimant's application for employment form through which he had disclosed his next of kin as his mother. There's a postal address provided as her contact address.

27. The respondent did not state that it attempted to reach the claimant through his mother who was his next of kin. In an employment relationship, the next of kin particulars are normally provided by an employee as a backup contact in the event an employee is unreachable or where there are circumstances making it impossible for an employer to deal with an employee.

28. It was therefore reasonable and prudent in the circumstances, for the respondent to contact the claimant's mother who was his disclosed next of kin in the event he was unreachable. The respondent stated that it reached the claimant's aunt who informed them that he may not be going back to work ever as it was not the first time he had deserted duty. However, from the record, it is the claimant's mother who was his named next of kin. There is no assertion from the respondent that it attempted to reach her.

29. The Court in the case of **Mary Mumbi Kariuki v Director, Pamoja Women Development Programme [2015] eKLR** which bore similar facts as the instant case, found as follows;

“...In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.

[24]. In the instant case, the Respondent has not disclosed any action it took, if its version that the Claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal.”

30. The respondent in the instant case, did not produce any evidence to demonstrate that it attempted to contact the claimant either directly or through his mother who was his disclosed next of kin.

31. Besides, section 41(2) of the Employment Act provides as follows;

“Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under [section 44\(3\)](#) or [\(4\)](#) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within [subsection \(1\)](#), make.”

32. In light of the foregoing legal provision, it was a requirement that despite the assertion by the claimant that the claimant absconded duty thus justifying the summary dismissal, it ought to have gone an extra mile and accorded the claimant an opportunity to present any representation he may have wished to make. This it could have achieved by attempting to reach the claimant through the disclosed postal address or through his next of kin. In absence of such procedure, the respondent's disciplinary action can be faulted hence his dismissal is deemed as unlawful.

Whether the claimant's salary was reviewed upwards?

33. The claimant averred that his salary was increased by Kshs 15,000/= sometimes in the month of July, 2016 thus taking it to Kshs 94,675/=. He admits that this was a verbal increment by one of the respondent's directors. The respondent disputes this assertion and through Mr. Nyaberi, stated that there was a laid down procedure for implementation of salary increments hence a verbal increment could not suffice. It thus maintained that the claimant's net salary was Kshs 60,000/= throughout the employment period and at no time was it ever enhanced.

34. The claimant did not prove that his salary had been increased. He did not table any evidentiary material to that effect. Such material alteration to his contractual terms ought to have been reduced into writing. In any case, he produced his pay slip which indicated that his net pay was the sum of Kshs 60,000/=. I therefore find that there is no evidence that the claimant's salary was ever increased from Kshs 60,000/= to Kshs 94,675/= as claimed.

Remedies available to the claimant

35. Having found that the claimant was unfairly terminated, I now proceed to explore the remedies available to him.

One month's salary in lieu of notice

36. Section 44(2) of the Employment Act, prohibits summary dismissal without notice or with less notice. On the other, section 35 (1) (c) of the Act provides for a mandatory one month notice where an employee is on a monthly salary as the claimant herein. Subsequently, I find that the claimant is entitled to one month's salary for unlawful dismissal.

House Allowance

37. The claimant has prayed for house allowance at the rate of Kshs 11,951.25 for 5 months and at the rate of Kshs 14,201.25 for one month. His basis for this claim is section 31(1) of the Employment Act. The respondent has disputed this claim and maintained that the claimant's salary was paid as net hence was inclusive of house allowance. Indeed, the claimant by his own hand indicated in the Application for Employment form, that his salary was Kshs 60,000/= net.

38. It would therefore seem that the salary of the claimant was consolidated to include basic salary and allowances hence the net pay. Therefore, I will decline this award.

Unpaid leave days

39. The respondent conceded that for the period the claimant had been in its employ, he did not proceed on leave. His leave entitlement was 21 days. This when prorated, amounts to Kshs 17,500/=.

Compensatory damages for wrongful termination

40. The claimant has prayed for 12 months compensation for unlawful termination. An award under this head would be determined by various factors including the length of the employment relationship. It is not doubted that the claimant worked for the respondent for a period of 5 months or thereabout. Given the short period the employment relationship lasted, and this being a discretionary remedy, I will decline to award any compensation under this head.

Counterclaim

41. Having found that the claimant was unlawfully dismissed, the counterclaim by the respondent in respect of the one-month salary in lieu of notice is denied.

42. As regards the sum of Kshs 21,543/= being counterclaimed against the claimant, for a mattress he allegedly purchased on credit from the respondent, I will allow the same. This is on account of the fact that the claimant admitted purchasing the mattress on credit. He avers that Mr. Hamit told him verbally that he should not pay for the same. It is obvious that there was no meeting of the minds between the claimant and the respondent, hence the counterclaim. As a matter of fact, the claimant has not produced any evidence to prove that he paid for the mattress. It is therefore apparent that the debt is still outstanding hence I will allow the counterclaim to the extent of Kshs 21,534/=.

Orders

43. In the final analysis, I enter Judgement for the claimant in the following terms;

One months' salary in lieu of notice 60,000.00

Outstanding leave (1.75x2,000x5) 17,500.00

Total 77,500.00

44. In view of the fact that the respondent's counter claim has partially succeeded, the sum of Kshs 21,543/= will be set off against the

award of Kshs 77,500/=.

45. In view of the fact that the claim has been successful and the counterclaim partially successfully, each party shall bear its owns costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER 2021.

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STELLA RUTTO

JUDGE

Appearance:

FOR CLAIMANT MR. GOMBA

FOR THE RESPONDENT MS. MUTHAMA

COURT ASSISTANT BARILLE SORA

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 had 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.

STELLA RUTTO

JUDGE