



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1679 OF 2017

DICKSON ONYANGO ODUNGA.....CLAIMANT

VERSUS

CHANDARIA INDUSTRIES LIMITED..... RESPONDENT

JUDGMENT

The claimant filed a memorandum of claim dated 8th March, 2017 on 25th August 2017 seeking payment of terminal dues arising from an employment relationship with the respondent.

The claimant alleges that on or about 25th July 2016, the respondent suspended him from work pending investigations of some alleged activities at the work place but was not recalled to work, that his employment was wrongfully and unfairly, constructively terminated and seeks the following: -

- a) One (1) month's salary in lieu of notice at Kshs. 29,701.08.
- b) Unpaid house allowance of Kshs. 71,282.50
- c) Unpaid leave at Kshs. 29,701.08
- d) Service pay at 15 days per year at Kshs. 14,850.54.
- e) 12 months compensation for wrongful and unfair termination at Kshs. 356,412.96.
- f) Punitive and aggravated damages for breach of his constitutional rights.
- g) Costs and incidentals to the suit.

The respondent filed its memorandum of appearance on 21st September 2017 and response to the memorandum of claim on 13th December 2017.

The respondent asserted that the claimant was not suspended but absconded duty after being found to have committed criminal acts in the course of his duties as a driver of the respondent. The respondent averred that on 23rd July 2016, while in the company of one Boniface Muiruri and Pius Wainaina they unlawfully sold customers goods to third parties in the Central Business District of Nairobi, shared the proceeds and absconded duty. That the claimant did not respond to two letters dated 25th July and 3rd August 2016 requiring him to show cause why disciplinary action should not be taken against him.

Evidence

CW1, Mr. Dickson Onyango Odunga stated that he was employed by the respondents in its transport department on 26th February 2015 at a salary of Kshs. 29,701 per month. That on 25th July 2017 he was suspended pending investigation of alleged activities at the workplace. That since then, he had not received any information from the respondent regarding his employment and had no choice but consider himself terminated and was not accorded hearing. That his performance was beyond expectations.

On cross examination, CW1 confirmed that he was a driver of a medium sized motor vehicle. The employer was deducting NSSF contributions from his salary. He testified that on 23rd July 2016 an incident occurred in the course of delivery of goods to two customers, namely, One Way Cleaning Services at Times Towers and Saima Surgical. He confirmed that they were three in the vehicle that Saturday

morning. He confirmed that when he returned to the office, he was questioned about the incident by the two officers. Although he denied having signed any document, he acknowledged signing a statement about the incident on 23rd July 2016. The statement confirms that he changed his telephone line to Airtel when the goods were being offloaded from his vehicle. That he reported to work on 25th July 2016 but was not allowed in by the guards. He further testified that he had not given the respondent his home address but confirmed that the company discerned his postal address from his documents in its possession. That he did not receive any letter from the respondent. That the respondent did not summon him to the office.

RW1, Mr. Joash Mbulika adopted the written statement which confirmed that the respondent employed the claimant as a driver on 26th February, 2015. That on Saturday 23rd July 2016 the claimant, and his colleagues Boniface Muiruri and Pius Wainaina were scheduled to deliver items to M/S One Way cleaning Services, Times Tower and M/S Saima Surgical along Njugu Lane. He alleges that the vehicle Reg. No. KBS 012K was spotted offloading goods to a hand card. The customer who witnessed the offloading called the company. That when the three returned to the company, they were questioned about the incident by the financial controller in the presence of the transport manager. That although Dickson and Pius denied having sold the goods to a third-party Boniface Muiruri admitted to have benefited from the sale of the goods. The three were required to report to the personnel manager on Monday 25th July 2016 but did not do so. The claimant did not respond to the letters dated 25th July 2016 and 3rd August 2016.

RW1 testified that the claimant was not terminated but absconded duty on 25th July 2016 when he did not report on duty as directed on 23rd July 2016. That one loader Mr. Muiruri confessed to the respondent that they had sold the goods to 3rd parties. The witness confirmed that he issued the show cause letter when the three did not turn up on 25th July 2016 and the address used had been provided by the claimant. The letter required the claimant to show cause within 7 days why disciplinary action should not be taken against him. The termination letter was dispatched to the same address and the ground for termination was absconding duty. He denied that the claimant was entitled to the one month notice.

He confirmed that the pay slips on record showed that the claimant was being paid daily wages weekly and the same included house allowance. He confirmed that he had no objection to unpaid leave. On service pay, RW1 confirmed that the company was deducting and remitting the claimants NSSF contributions.

On cross-examination he confirmed that he had worked for the respondent for 17 years, that he did not file the WhatsApp photos of the goods being offloaded on Njugu Lane in the CBD and that the incident was not reported to the police. He further confirmed that the claimant had his phone number and could have reached him. He testified that he got his postal address from details provided by the claimant. That the claimant was to be paid for the days he worked if he had presented himself. The witness explained the procedure the company employed in terminations.

Finally, he informed the court that he was scheduled to interrogate the claimant and his colleagues on Monday 25th July 2016 but none of them appeared.

Submissions

The claimant submitted that the issues for determination were whether the claimant's termination was wrongful and unfair, dues payable, one month salary in lieu of notice and compensation for unfair termination.

Counsel submitted that the claimant was suspended by word of mouth on 25th July, 2016 and awaited further communication from the respondent to no avail and thus considered his employment terminated.

Reliance was made on section 43 of the Employment Act on the burden of proof on the part of the employer and the employee.

Counsel contended that the respondent had relied on desertion but did not tender any evidence of having made any effort to contact the claimant. It did not discharge its burden of proof as required by the Act.

On dues payable to the claimant, it was submitted that because the respondent denied the claimant due process as provided for by section 42 of the Employment Act and did not file a record of minutes of the disciplinary hearing before the claimant's termination, the termination was unfair. Counsel further submitted that the claimant had testified that he reported on duty on 25th July 2016 but was denied entry.

On the reliefs set out in the memorandum of claim, counsel submitted that the respondent had not disputed the claimant's monthly salary on the date of dismissal i.e. Kshs. 29,701.08. Counsel contended that since the respondent did not issue a termination notice in consonance with section 35 of the Employment Act, the claimant was entitled to payment in lieu of notice of Kshs. 29,701.08.

On unpaid leave, it was submitted that the respondent availed no evidence to show that the claimant had proceeded on leave. The claimant seeks Kshs. 29,701.08 for unpaid leave.

On house allowance, the claimant relied on the decision in *Jane Njeri Wanyoike & 23 others v= Pan Africa Insurance Co. Limited & 2 others [2017] eKLR* on the right of an employee to house allowance and the options available to the employer on housing. Counsel submitted that the claimant was entitled to house allowance for one (1) year; amounting to Kshs. 71,282.59.

On compensation for wrongful termination, counsel relied on section 49 (1) of the Employment Act, wrongly stated as 49 (2) and compensation amounting to 12 months' salary of Kshs. 356,412.96. Reliance was made on the decisions in *Pamela K. Butalany, v= University Council for the Kenya Polytechnic University College [2015] eKLR* and *John Mwanzia Mbithuka v= Mukesh Malde (Managing Director) & another [2014] eKLR*.

Costs of the suit and interest at court rates.

The respondent did not file submissions even after the court extended the duration by a further 2 days after the mention on 16th September 2021 whose purpose was to confirm the filing of submissions and take a judgment date.

Analysis and determination.

After careful consideration of the pleadings, evidence, submissions and the law, the following are the issues for determination.

- a) Whether the claimant's termination was wrongful and unfair.
- b) Whether the claimant is entitled to the reliefs sought.

Section 35, 40, 41 43 and 45 provide the various ways in which a termination may be effected fairly. The sections provide for the notice, as well as other substantive and procedural requirements. The reason for termination must not only be valid but fair and a fair produce must be employed.

The claimant testified that arising from an alleged mis- delivery of goods on 23rd July 2016 he was suspended pending investigations but the respondent never communicated the outcome of the alleged investigations. The claimant did not provide any evidence of the suspension. On the other hand, the respondent alleged that the claimant and his two colleagues absconded duty on 25th July 2016 for fear of being arrested on account of the incident on 23rd July 2016 where it was alleged that they sold a client's goods to 3rd parties and shared the proceeds. RW1 testified that he was scheduled to interview the three employees on 25th July 2016 but none appeared. In his evidence, the claimant absconded duty and was not dismissed. Thereafter, the respondent did not attempt to contact the claimant though it had his mobile phone number.

RW1 testimony that the claimant was contacted by a 3rd party was inadmissible. On 25th August 2016 the respondent issued a show cause letter to the claimant through a postal address allegedly obtained from the claimant's records. The letter required the claimant to show cause why disciplinary action, should not be taken against him within 7 days of the letter. The letter was not responded to. On 3rd August 2016, the respondent wrote to the claimant requiring him to explain why he should not be dismissed for absconding duty. The letter was not responded to. On 8th August 2016, the respondent terminated the claimant for failing to report on duty with permission or lawful authority. The respondent dispatched the three letters to the same address.

For unexplained reason the respondent did not testify on whether the letters were received or had been registered. It led no evidence that the three letters were actually posted.

The emerging jurisprudence where an employer alleges that the employee absconded duty is that the employer must demonstrate that it took reasonable steps to contact the employee to found out the circumstances of the desertion. In *Boniface Mwangi =v= B.O.M. Iyego Secondary School [2019] eKLR* Nzioki wa Makau J. observed that;

“It is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and found out the reasons for the failure to present themselves for work.”

In *Simon Mbithi Mbane =v= Inter Security Services [2018] eKLR Abuodha J* stated that;

“an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that effort were made to contact such employee without success.”

A similar observation was made by Nduma J. in *Nzioka =v= Smart Coatings Limited [2017] eKLR*.

Applying the foregoing to the present case, it is clear that the respondent made no attempt to contact the claimant before writing the show cause and termination letter.

It is the finding of this court that the defence of absconding duty relied upon by the defendant is not established.

I will now address the issue of the reliefs sought by the claimant.

- a) One month's salary in lieu of notice at Kshs. 29,701.08.

The respondent did not contest this claim by the claimant. I therefore award the claimant Kshs. 29,701.08.

- b) Unpaid house allowance at Kshs. 71,282.59.

The claimant led no evidence to demonstrate that his monthly salary did not include house allowance. He made no reference to it in his written statement and oral testimony in court. RW1 confirmed that the salary was inclusive of house allowance.

The claim is rejected.

c) Unpaid leave – Kshs. 29,701.08.

The respondent did not contest this claim.

RW1 testified that he had no objection to the claim. I award Kshs. 29,701.08 for unpaid leave.

d) Service pay for 1 year Kshs. 14,850.54.

The claimant provided no evidence to establish this claim. RW1 confirmed that the respondent was deducting and remitting the claimants NSSF contributions.

The claim is rejected.

e) 12 months' salary as compensation for wrongful and unfair termination – Kshs. 356,412.96.

Having found that the claimant's termination was unfair, and in view of the fact that the claimant served the respondent for about one (1) year and five (5) months coupled with the fact that the claimant contributed to the termination, one (1) month's salary equivalent is sufficient compensation.

I award Kshs. 29,701.08.

In conclusion, Judgment is entered for the claimant for Kshs. 89,103.24.

Interest at court rates from the date of Judgment till payment in full.

Costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF OCTOBER, 2021

DR. JACOB GAKERI

JUDGE

Delivered in the presence of

Waiganjo for the claimant.

No appearance for the respondent.