



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRC.C/213/2018

CITATION: MOSES WATAMBAMALA

VS

NEWNHAM SERVICES LTD

JUDGMENT

ON 2021-07-16 BEFORE HON. JUSTICE J. N. ABUODHA

1. The Claimant in his statement of claim pleaded that he was employed by the respondent in 2016 as an operations officer earning Kshs. 18,068/= per month.
2. According to the Claimant he served the respondent with loyalty and diligence until 6th June, 2017 when the respondent without any lawful justification arbitrarily suspended him. The Claimant alleged that he had never been guilty of any gross misconduct nor received verbal or written warning from the respondent before he was suspended.
3. The Claimant further averred that as a result of the unfair dismissal he has been subjected to great loss and hardship. He therefore sought compensation for unfair termination and terminal dues as set out in the statement of claim.
4. The respondent on its part averred that it did not unlawfully terminate the claimant's employment. According to the respondent, the Claimant was in blatant breach of the provisions of the Employment Act, Human Resource Manual and the employment contract signed on 22nd August, 2016.
5. At the trial the Claimant adopted his witness statement filed on 4th June, 2018. It was his evidence that he was employed on 14th July, 2016 through a letter of appointment which was before Court. He was the Head of Security (Operations Officer). According to him, he worked well until 5th June, 2017 when he was suspended. It was his evidence that he was not heard before suspension and that he was never served with a notice of disciplinary hearing and further that he never attended any disciplinary hearing. He was only served with a suspension letter. He further stated that he was never paid for the month of May and June, 2016.
6. In cross-examination he stated that he was never accorded a chance to explain himself before he was suspended. He further denied knowledge of any on going investigations at the respondent's company. He denied knowledge of any notice for a disciplinary hearing. He only received the suspension letter.
7. The respondent's witness Mr. Saul Munalo stated that he was the Director Human Resource for the respondent. He filed his witness statement on 6th November, 2018 which he adopted as his evidence in chief. He also relied on the documents filed with the claim. According to him the Claimant was employed as Operations Officer at Nzoia Sugar. He was in charge of Light Security Operations. The Claimant was employed on 15th July, 2016 and placed on probation for three months. His contract was supposed to be for 24 months and that his role was to protect client's property and ensure guards report on duty and cover areas assigned. The Claimant was required to ensure service level agreements were adhered to and submit reports.
8. By a letter dated 30th November, 2016 the respondent deferred Claimant's confirmation. According to Mr. Munako, the Claimant had prior record of reporting, late for work and had challenges in the supervision of guards. He submitted reports irregularly and at time inaccurate.
9. It was his evidence that he instructed the Regional Manager to suspend the Claimant on 5th July, 2016. The Claimant was suspended on

suspicion that molasses belonging to a client had been siphoned at night. When the matter was investigated by John Mui (the Project Manager) it was suspected that it could have been an internal matter involving the respondent's guards. He therefore dispatched the Regional Manager Western Mr. Philip Lumuli and requested Joseph Atira a private investigator to commence investigations. A report was compiled on 20th July, 2017 and the report found the Claimant culpable. He therefore instructed Philip Lumuli to suspend the Claimant for 14 days to allow further investigations. The Claimant handed over respondent's property and proceeded on suspension. He remained in the respondent's premises during investigations. Several guards and dog handlers were also suspended and some arrested and taken to police but it turned out they were whistle blowers for the theft. When the Claimant was required to face the investigations and record a statement he left the respondent's premises the previous night. He never notified the respondent about his departure and further that he never responded to the suspension letter. He was not required to respond to the same.

10. It was further his evidence that the Claimant did not cooperate during the investigations and that his contract had not expired and that he had not been terminated.

11. Mr. Munalo further stated that after the incident, there was a meeting chaired by the project manager and the meeting resolved that investigations be conducted and those found culpable be disciplined. The Claimant knew what was likely to happen hence the termination was not abrupt.

12. In cross-examination he stated that the Claimant's contract was for 24 months and that he was suspended as a result of the theft of molasses. The suspension letter in the Claimant's bundle of document was the correct one. The one dated 16th July, 2017 was not meant for the Claimant. The letter did not state the reasons for suspension.

13. Mr. Munoko further stated that the investigations were done by Mr. Atira however the report was not signed and only Lumuli and Atira could attest to the report. The Claimant was given a chance to be heard but went missing. He was called by the Regional Manager to come to the office and receive the charge but never came. The disciplinary hearing was to take place on 10th October, 2017 but did not take place because the Claimant did not attend.

14. He further stated that the Claimant was not paid for the month of May and that he took weekly offs on Sunday.

15. On the issue of leave, it was his evidence that for the period the Claimant had worked, he had not earned annual leave since he had not completed a year.

16. The Court has reviewed and considered the claim as filed by the Claimant and the response put forward by the respondent.

17. It was common ground that the Claimant was appointed on 15th July, 2016 as an Operations Officer for a period of 24 months. His monthly salary was Kshs. 18,000/= inclusive of house allowance. The Claimant was on 5th June, 2017 suspended from duty on allegation of failure to detect, deter and or escalate a theft plot to fleece the long container filled with molasses product which was packed overnight at Nzoia Sugar factory. The Claimant was therefore suspended for fourteen days to pave way for investigation.

18. According to the suspension letter attached with the Claimant's documents he was required during the suspension to among other things to cooperate with the investigation officers for fast tracking of the case.

19. The Claimant in his statement of claim and evidence in Court alleged he did not know the reason for his suspension. This far, it cannot be true that the Claimant did not know the reason for his suspension. The suspension letter clearly stated the reason for which the Claimant was suspended and the duration.

20. The respondent on its part alleged that contrary to the advice by the respondent that the Claimant remains at the respondent's premises during the investigations the claimant abruptly left for his rural home hence it became impossible to serve the Claimant with a notice for disciplinary hearing and the charges. The respondent attached the Notice of Disciplinary hearing containing the charges in its bundle of documents. The respondent therefore informed the Court that the disciplinary hearing scheduled for the 10th of October, 2017, did not take place due to the absence of the Claimant. Nothing seemed to have transpired thereafter with regard to the disciplinary hearing. The respondent alleged it did not terminate the Claimant's service and indeed no termination letter was produced.

21. Whereas the respondent averred that they were unable to proceed with the disciplinary hearing against the Claimant in his absence, no evidence was produced before the Court to show that tangible efforts were made to serve the Claimant with the notice for disciplinary hearing at his last known address. As an employer the respondent must have had the Claimant's personal details including his rural home address. Nothing was tabled before me to show an attempt was made to serve the Claimant with any letter or notice .

22. On an allegation of absconding duty, it is incumbent on the employer to show that reasonable attempts were made to contact the employee but without success. It was not enough to merely allege that the Claimant was called a number of times by the Project Manager but failed to turn up.

23. Whereas the respondent has denied terminating the Claimant's service, the Claimant himself considered his services terminated on 6th June, 2017 when he got suspended. The demand letter from his advocate dated 2nd April, 2018 called upon the respondent to pay to the Claimant his terminal dues which were tabulated in the said letter. The demand letter accused the respondent of suspending the Claimant without paying his terminal dues. It is on the basis of this letter that the Claimant brought the present suit seeking compensation for unfair termination of service.

24. Under the Employment Act, a termination of service will be considered unfair if there exist no valid reasons for doing so and or if the procedure followed in the termination is not a fair procedure.

25. The respondent may have had valid reason for terminating the Claimant as per the investigation report tabled before the Court but the Court is not persuaded that the separation from employment with the Claimant was done in accordance with a fair procedure. The respondent could have done more than they did to serve the Claimant with the notice for disciplinary hearing and thereafter proceeded to deliberate and decide his fate even if he failed to show up.

26. The award for compensation will however be normal considering the conduct of the Claimant noted above, the fact that he had not worked for the respondent for a year and further his conduct of considering his service terminated on mere issuance of the suspension letter.

27. In conclusion the Court will award as follows: Kshs

- (i) One month's salary in lieu of notice 18,000
- (ii) Accrued leave for 8 months @ 2 days per Months 9,600
- (iii) Nominal compensation for unfair

Termination of service @ one month's salary 18,000 45,600

(iv) Costs of the suit.

28. It is so ordered.

GIVEN under my hand and Seal of this Court on 2021-11-02 09:56:43

SIGNED BY: HON. JUSTICE J. N. ABUODHA (ADMINISTER JUSTICE)

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2021-11-02 09:56:43