



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 23 OF 2016

1. ALOISE ABUNGU MAGO

2. BERNARD MUTINDA NDAMBUKI

3. ANTHONY MAINA KAGWI

4. JOSEPH WAITURU GATERI.....CLAIMANTS

VERSUS

JASWANT SINGH & BROTHERS.....RESPONDENT

JUDGMENT

1. The Claimants sued the Respondent after their dismissal from its employ on 1st October 2013. They were its employees working as watchmen at Othaya District Hospital in Nyeri County having been employed on diverse dates – 1984 for 1st Claimant, 2010 for 2nd Claimant whilst the 3rd and 4th Claimants were employed on 1st September 2012. It all begun when the Claimants were accused of preventing a theft at a site they were working at. They were charged at Othaya Magistrates Court in Criminal Case No. 281 of 2013 and were acquitted on 9th April 2015. The Claimants averred they were not paid any salary from the date of arrest till acquittal and they thus sought relief as follows:-

a. 1st Claimant

Unpaid salary from 1st October 2013 to 9th April 2015 i.e. 18 months – Kshs. 224,000/-

One month salary in lieu of notice – Kshs. 18,000/-

5 years leave when none was granted as allowance – Kshs. 90,000/-

b. 2nd Claimant

Unpaid salary from 1st October 2013 to 9th April 2015 i.e. 18 months – Kshs. 181,440/-

One month salary in lieu of notice – Kshs. 10,080/-

Unpaid wages salary for 24 weeks before arrest – Kshs. 60,480/-

c. 3rd Claimant

Unpaid salary from 1st October 2013 to 9th April 2015 i.e. 18 months – Kshs. 181,440/-

One month salary in lieu of notice – Kshs. 10,080/-

Unpaid wages salary for 24 weeks before arrest – Kshs. 60,480/-

d. 4th Claimant

Unpaid salary from 1st October 2013 to 9th April 2015 i.e. 18 months – Kshs. 181,440/-

One month salary in lieu of notice – Kshs. 10,080/-

Unpaid wages salary for 24 weeks before arrest – Kshs. 60,480/-

To their claim were attached the witness statements of the 4 Claimants in which they stated that they were charged with theft at Othaya District Hospital where they were working for the Respondent on the construction site. They asserted that they were charged with either being part of the thieves or for failure to prevent the commission of the offence of theft. They stated that they were acquitted and in the findings of the trial court were found not to have been involved in the theft. The Claimants also attached the Ruling which absolved them of any involvement as they were not put on their defence in the criminal trial. They also attached bank statements that showed payments from their erstwhile employer and NSSF statements for Alois indicating employment on 1st August 1986.

2. The Claimants obtained judgment but before satisfaction of the decree the Respondent managed to secure a stay and reopening of the case. The defence filed by the Respondent was to the effect that the Claimants were involved in theft at the Respondent's construction site at Othaya District Hospital. The Respondent asserted that upon independent investigations conducted by the Police the Claimants were found culpable and charged with the theft. The Respondent averred that in the premises the summary dismissal for gross misconduct was warranted. The Respondent denied that the Claimants served it with diligence and faithfulness and that no false information was furnished to the Police for the alleged crime. The Respondent disputed the claims enumerated for each Claimant and averred that all outstanding dues were paid in full before termination of services. The Respondent did not issue any termination letter as the Claimants' services were based on gross misconduct which culminated in their prosecution. The Respondent averred that the acquittal of the Claimants cannot form part of the dispute before this court whatsoever. The Respondent asserts the Claimants are not entitled to one month in lieu of notice or any relief sought as the termination followed due process and that the suit had no basis in law. The Respondent urged the dismissal of the suit with costs. To the defence, the Respondent attached the statement of Hardev Juttla a director of the Respondent. He stated that he denied the Claimants were unfairly terminated as they were involved in a theft at the construction site at Othaya District Hospital whereupon the Police conducted independent investigations and found the Claimants culpable hence their charges in the criminal case. He stated that the Claimants were paid in full upon termination of their services and that the acquittal in the criminal case has no bearing to this case.

3. The 1st Claimant testified on behalf of himself and the 3rd and 4th Claimants as the case by the 2nd Claimant had been abandoned. He stated that he was employed by the Respondent though no letter of appointment was issued. He said that he was arrested and charged alongside the other Claimants for the alleged theft of items at the site they were guarding. He testified that they were acquitted of the charges and despite their acquittal the Claimants were not reinstated. He stated that he never went for leave for the preceding 5 years before termination and he thus sought the grant of relief per the claim.

4. The Respondent did not participate at the hearing and the defence case was closed. The Claimants submitted that as no documents were filed or affidavit sworn for the 2nd Respondent the remaining Claimants submitted that it was apparent the 2nd Claimant had abandoned his claim. The 3 Claimants submitted that the Respondent was their employer. They submitted that it was not contested that they were arrested on 1st October 2013 and acquitted on 9th April 2015. They submitted that while the case was pending they were not paid a salary or wages and that no letter terminating their services was issued. The Claimants submitted that the Respondent's treatment of its employees after the acquittal by not informing them of the status of their employment was unfair. They submitted that having failed to reinstate the Claimants after the acquittal the Claimants considered themselves terminated from employment. They submitted that the termination without valid reason was unfair. The 1st, 3rd and 4th Claimants submitted that they had proved their case on a balance of probabilities and were thus each entitled to the reliefs they had sought in the claim.

5. The Respondent submitted that the date of the hearing was not communicated to them hence their absence at the hearing. The Respondent submitted that the Claimants did not comply with the requisite pretrial procedures. The Respondent submitted that the Claimants used documents that were not available to the Respondent post the ruling of the court on 23rd September 2019. The Respondent asserted no agreed issues were filed herein and that as a matter of good practice it was important for the Claimants to make necessary steps prior to the hearing of the claim to make sure that all the requisite procedures had been complied with. The Respondent submitted that the Constitution of Kenya 2010 lays great emphasis on the right to be heard and that there should be no vacuum in litigation that the other party is only informed of the end process. The Respondent submitted that it was not aware of the hearing of the suit and all other orders that were delivered by the Court.

6. The issues raised by the Respondent need to be determined before the judgment if any is delivered. The Respondent asserts it was not aware of the hearing of the suit. Upon the court resetting the matter by vacating the judgment that had been entered by the Court in 2016, the Respondent was granted leave to file a defence and upon reading of the ruling of the court I made the following directions in the presence of Mr. Kenyatta who held brief for Mr. Okao for the Respondent: - hearing on 31st October 2019. At the hearing on 31st October 2013 there was no appearance for the Respondent. The advocate who held brief is said not to have informed the Respondent of the hearing date. What did counsel for the Respondent do after reading the penultimate paragraph of the Ruling on 23rd September 2019? It would seem that there is a prayer for the court to reward indolence or a cavalier approach to litigation. As the Respondent opted not to participate in the suit and perhaps of the opinion that matters could be allowed to drag on endlessly as in some jurisdictions, the horse bolted from the stables and here is a judgment on the merits. The Constitutional right to be heard is not abridged if a party opts not to avail itself of the opportunity to be heard. The right is not absolute meaning that no case can proceed *ex parte* as they sometimes do.

7. The Claimants were dismissed for their alleged role in a heist at their workplace. Upon investigations by the Police they were charged before the Othaya Magistrates Court and subsequently were acquitted under Section 210 of the Criminal Procedure Code as they had no case to answer. They were dismissed without notice for their perceived role in the theft at the construction site. Theft is in the range of conduct that an employer can lawfully terminate the services of an employee. The Claimants were dismissed but in the dismissal the Respondent did not follow the requirements of Section 41 of the Employment Act. In Sections 43 and 45 of the Employment Act, provision is made as

follows:-

43. (1) 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.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45 (2) of the Act provides that:

45.(2) 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 reason for the termination is a fair reason -

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure (underline mine)

8. Having failed to accord the Claimants their rights under the law the dismissal for all intents and purposes was unlawful and unfair. The Claimants sought some reliefs that are not tenable firstly because no proof was availed for the portion of the claims that were not stale and secondly because for a continuing wrong such as non-payment of leave dues the maximum period they are valid for are 12 months in terms of Section 90 of the Employment Act. The Claimants never sought costs of the suit and there will be none save for the reserved costs on the Respondent's notice of motion application to set aside the judgment of the Court. The long and short of the judgment is that the Claimants proved unlawful dismissal for which they are entitled to the following reliefs:-

a. 1st Claimant – ALOICE ABUNGU MAGO

6 months salary as compensation for unlawful dismissal – Kshs. 108,000/-

One month salary in lieu of notice – Kshs. 18,000/-

b. 3rd Claimant – ANTHONY MAINA KAGURI

6 months salary as compensation for unlawful dismissal – Kshs. 60,480/-

One month salary in lieu of notice – Kshs. 10,080/-

c. 4th Claimant – JOSEPH WAITURU

6 months salary as compensation for unlawful dismissal – Kshs. 60,480/-

One month salary in lieu of notice – Kshs. 10,080/-

d. Interest on the sums awarded to each Claimant at court rates from the date of filing suit till payment in full.

e. Costs of the motion to set aside the Judgment and decree of the Court awarded to the Claimants.

It is so ordered.

Dated and delivered at Nyeri this 26th day of February 2020

Nzioki wa Makau

JUDGE