



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.161 OF 2015

JAMES EOI LOPARIIKU.....CLAIMANT

VERSUS

MARULA ESTATES LIMITED.....RESPONDENT

JUDGEMENT

The claim is that the claimant was employed by the respondent estate in June, 1998 until June, 2013 when his employment was terminated. The claimant was earning ksh.5,607.

The claim is that there was unfair termination of employment as the claimant was not issued with notice, no reasons were given or a hearing.

The claimant is seeking for a finding that he was unfairly terminated from his employment by the respondent and that he should be reinstated and or his terminal dues be paid with compensation at ksh.67,284; 3 months' notice pay ksh.16,821 and leave days not taken for 15 years at ksh.168,210.

The claimant testified that he is illiterate and the documents issued to him by the respondent he did not understand them. he was employed by the respondent in the year 2007 to graze cattle but sometime in the year 2013 a cow was recovered by KCC who called the respondent to collect it. It was not clear whose cow was since the claimant had returned all his herd and confirmed all cows were accounted for. the respondent tried to give him a warning which he declined to sign because all his grazing herd were intact. On the basis of refusal to take the warning, he was termite in his employment. He would be grazing from 6am to 6pm with no lunch and earning ksh.9,000 per month.

The claimant also testified that he was housed by the respondent. he was unfairly accused that he allowed a cow to drown which was not the case.

The defence is that the claimant was employed to graze cattle and his employment was not terminated in June, 2013 as alleged.

The defence is that, The claimant was not dismissed from his employment, he absconded duty upon being served with a warning letter on 19th September, 2013 for gross misconduct. the reliefs sought should be dismissed with costs.

The defence is also that the claimant as a herder in the livestock department persistently breached his terms of employment by habitually reporting to work while intoxicated, using abusive and insulting language to his superiors, refusing to obey lawful orders and performing his duties poorly and negligently. On 29th December, 2012 the claimant refused to take lawful orders when asked to relieve his sick co-worker and became rude to his supervisor Mr Kamunge and when found intoxicated was suspended for 4 days.

On 19th February, 2013 the claimant was found intoxicated while on duty. The claimant was intoxicated when one cow was rescued from drowning by passer-by. He then absconded duty when he was issued with a warning letter.

The defence is that the claims mad should be dismissed with costs.

Samuel Simechera Mdoko testified that he works for the respondent as a house allocator. He allocated the claimant with a house and the records are kept by the respondent.

Francis Kimunge the foreman testified that he has worked for the respondent for the last 20 years and worked closely with the claimant who was a herder. The claimant had the habit of reporting to work while drunk and was issued with a warning. As his supervisor, several complaints came to him and he verbally warned the claimant.

On 29th December, 2012 the claimant was directed to attend work to relieve a sic colleague but he declined. When approached he could not attend work as he was drunk.

On 19th September, 2013 the claimant could not account for one cow. It was recovered downstream and when questioned he could not give a proper account as he was drunk. A warning was issued to him but he declined to take it and since, he has not reported back to work.

Joshua Loshorua testified he is the livestock manager with the respondent and on 19th September, 2013 the claimant could not account for one cow which got lost while he was grazing. He could not tell how the cow got into the river. He was not diligent in his duties. The cow was recorded and brought to the estate.

Mr Loshorua also testified that due to the conduct of the claimant and his failure while on duty he was issued with a warning but he declined to accept it and has since absconded duty.

At the close of the hearing both parties filed written submissions.

The claimant though not literate appreciates the proceedings and with advice from his legal representative, the records filed for and on his behalf are clear.

The claimant admitted that on various dates while he was at work he had a big herd he was required to graze. The allegations that he allowed a cow to drown is not true.

However, the claimant relied on his witness statement attached to his memorandum of claim. He has singed the statement and take in its contents, and with the benefit of legal advice, the statement is to the effect that when he was issued with a letter of warning over the lost cow, he refused to accept such warning because the allegation made were not true.

Section 44(4) of the Employment Act, 20077 allow an employer to summarily dismiss an employee who refuses to take lawful instructions. Such an employee notified of his alleged gross misconduct and sanctioned with a warning, the option is to accept the warning and where not true to challenge the same with an appeal.

On the evidence of the claimant that he was issued with a warning but he refused to take it and walked away because it was not true, he basically frustrated his own employment. This cannot be visited upon the respondent as the employer.

The claim for reinstatement is not available in the circumstances of this case. Even where the remedy of reinstatement was due, the time lapse from September, 2013 to date is over and above the time contemplated under section 12 of the Employment and Labour Relations Court Act, 2011 read together with section 49(4) of the Employment Act, 2007.

The claimant is seeking payment of notice. this is not due in a cause where summary dismissal was due and the face that the claimant refused to accept a warning issued by the employer and opted to walk away.

On the claim for payment of annual leave for 15 years, the claimant testified that. The claimant was not clear on the number of years of employment save that his statutory dues were remitted to NASF from the year 2007 and employment terminated in June, 2013. Where this is to be taken as correct, employment subsisted for only under 6 years.

In the last payment statement filed by the respondent, the claimant had a payment for pro-rated leave. There is *prima facie* evidence of the claimant taking his annual leave or being paid in lieu thereof. This payment Is not challenged. Where there were more leave days due or going, this should have formed a good basis to address.

In any case, if there was work continuously without taking leave or payment in lieu thereof, that would amount to *continuing injury* and in terms of section 90 of the Employment Act, 2007, the Claimant should have moved Court within 12 months. The Claimant moved Court more than 12 months after separation.

Accordingly, the claims made are found without merit and are hereby dismissed. Each party shall bear own costs.

Delivered at Nakuru this 20th day of February, 2020.

M. MBARU

JUDGE

In the presence of: