



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 363 OF 2017

(Before Hon. Justice Mathews N. Nduma)

PETER BACH AMIMO.....CLAIMANT

VERSUS

KOTECHA WHOLESALERS LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed on 21st August 2017 seeking compensation for unlawful and unfair summary dismissal and payment of terminal benefits to wit:

- (a) One month salary in lieu of notice.
- (b) Unpaid leave days for 6 years worked.

2. The testimony by the claimant is that he was employed by the respondent on 20th August 2011 earning a monthly salary of Kshs. 15,000.

3. That he worked diligently until 13th March 2017, when he reported to work as usual and was informed by the defendant that his employment had been terminated without any lawful cause and without following a fair procedure.

4. That the respondent did not give the claimant any notice, notice to show cause or any reason for the termination. That the claimant had no warning for any misconduct.

5. That the respondent did not pay the claimant any terminal dues. That the termination was unlawful and unfair and the claimant be awarded as prayed.

6. The respondent filed a reply to the memorandum of claim in which it denies all the particulars of claim and counterclaimed one month salary in lieu of notice in the sum of Kshs. 15,000 alleging that the claimant absconded work without notice and Kshs 1,202 being the outstanding balance from a loan duly given to the claimant by the respondent in the sum of Kshs. 20,000.

7. RW1 testified that he was a General Manager of the Respondent in Rwanda. RW1 testified further that the claimant was confronted with allegations of theft. That the claimant was employed as a driver by a letter dated 1st September 2011. That upon confrontation, the claimant responded by a handwritten letter dated 3rd March 2017, in which he explained that whilst he was reversing the company motor vehicle, someone whom he did not recognize dropped two jericans in the cabin. That the claimant was then confronted for having two jericans of fuel in his car. The claimant therefore denied involvement in the theft of fuel.

8. RW1 testified that the claimant absconded duty on 9th March 2017 and was absent from work up to the end of the month. RW1 testified that he saw the claimant stealing vide the CCTV footage. The footage was produced and marked exhibit '8'. It is a video clip from CCTV camera.

9. RW1 added that the Respondent did not terminate the employment of the claimant because he was a sickly old man. RW1 stated that they were summoned by the labour office and they had explained that they did not terminate the employment of the claimant.

10. RW1 testified that the claimant was paid in lieu of leave days not taken every September. RW1 produced pay slips for September 2012, September 2013, September 2014, September 2015 and September 2016 which show that the claimant was paid in lieu of annual leave not taken each year. The pay slips show that the monthly gross salary of the claimant was Kshs. 17,525.

11. Under cross examination, RW1 reiterated that the claimant was found with two jericans of oil in his vehicle and he had blamed someone else for placing them in the vehicle. RW1 further stated that the claimant had been loaned Kshs. 20,000 and he still owed some balance to the respondent. RW1 stated that the respondent did not report the theft to the police since the claimant had sought forgiveness. RW1 added that the claimant had opted to be paid in lieu of leave days and not to take the leave itself. RW1 prayed the suit be dismissed with costs.

Determination

12. The issues for determination are:

- (a) Whether the claimant was summarily dismissed unlawfully and unfairly or he absconded work.
- (b) Whether the claimant is entitled to the reliefs sought.
- (c) Whether the respondent is entitled to the counter claim.

13. On the issue whether the claimant absconded work or he was summarily dismissed, the claimant bears the onus of proving on a balance of probabilities that he was summarily dismissed and that he did not abscond work.

14. The claimant did not produce any letter dismissing him summarily from work. The respondent on the other hand produced a letter dated 17th March 2017 written to the County Labour Officer Kakamega, bringing to the attention of the Labour Officer that the claimant had absconded duty from 1st March 2017 until the date of the letter.

15. The testimony by RW1 however was that the claimant had been caught on CCTV camera on 3rd March 2017 stealing fuel and had absconded duty from the 9th March 2017 up to the end of March 2017. The testimony by RW1 contradicts the contents of the letter written by the respondent to the labour office.

16. The claimant produced a report to the labour office by the claimant dated 15th March 2017 in which the claimant reported that the respondent unlawfully terminated his employment on 3rd March 2017.

17. Upon a careful consideration of the evidence before court, the court is satisfied that the claimant did not abscond work as alleged by RW1 but his employment was terminated on 3rd March 2017 by the respondent on allegations of theft of fuel. The Respondent did not subject the claimant to any disciplinary hearing nor was the claimant given any notice of termination. The claimant was indeed summarily dismissed and was not given any letter of summary dismissal.

18. However, it is evident that the claimant was found with two jericans of fuel in his vehicle and he had explained to the respondent in writing that he did not know who had placed the jericans in the company vehicle the claimant was assigned to drive. The respondent ought to have followed a fair procedure to investigate and establish the truth of the matter rather than verbally, and summarily chasing the claimant away as they apparently did.

19. The respondent violated *Sections 36, 41 and 45 of the Employment Act* in that they did not follow a fair procedure in terminating the employment of the claimant. The summary dismissal was therefore procedurally unfair and the claimant is entitled to compensation in terms of *section 49(1) (c) and (4) of the Employment Act 2007*.

20. In this regard, the claimant was not given any notice of termination. He was not paid any terminal benefits upon termination nor was he compensated for the termination. The claimant had no previous warning and had served for about five (5) years with a clean record. The claimant did not contribute to the termination because the facts of the matter were not well investigated. The claimant lost his source of income abruptly and he suffered loss and damage. The court finds it appropriate to award the claimant the equivalent of five (5) months salary in compensation in the sum of Kshs. 87,630.

21. The claimant is also awarded one month salary in lieu of notice in the sum of Kshs. 17,526. The claim for payment in lieu of leave days not taken was sufficiently rebutted by RW1 and is dismissed.

22. Judgment is entered in favour of the claimant against the respondent as follows:

- (a) Kshs. 87,630 in compensation.
- (b) Kshs. 17,526 in lieu of one month notice.
- (c) Interest at court rates from date of judgment till payment in full.
- (d) Costs of the suit.
- (e) Provision of certificate of service within 30 days of judgment.

Judgment Dated, Signed and delivered this 20th day of February, 2020

Mathews N. Nduma

Judge

Appearances

Mr. Ouma for Claimant.

Mr. Kashidi for Respondent

Chrispo – Court Clerk