



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2202 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

PETER NJANE KAGERA.....CLAIMANT

VERSUS

MOTOR BOUTIQUE LIMITED.....RESPONDENT

JUDGMENT

The Claimant, Peter Njane Kagera filed this claim vide a Memorandum of Claim dated 11th December 2014 alleging unlawful and unfair dismissal from employment and non-payment of terminal dues against the Respondent, Motor Boutique Limited. He avers he was employed as a Sales Assistant by the Respondent from 8th March 2006 and that his last salary was computed at Kshs.31,754 per month.

He avers that towards the end of February 2012, a customer bought a motor vehicle battery at the company’s shop while being attended to by his colleague, one Mr. John Momanyi who mistakenly recorded and charged the customer an excessive price. That when the Claimant discovered the said mistake, he immediately called back the said customer and refunded him the excess amount and further made a rectification entry into the system. That he was later summoned by the company’s director, Mr. Jiterdra Charda who demanded for an explanation and after he explained, he was ordered to close the shop and go home. That the Director had promised to call him back but to the date of filing suit, he had never been recalled. That his efforts to get the Director were futile as the security guards did not allow him into the company’s premises.

The Claimant further avers that his abrupt send off by the Respondent amounted to unfair and unlawful summary dismissal considering he had done nothing wrong and had diligently served the Respondent for 6 years. That the Respondent breached the law, principles of natural justice and his constitutional right to fair labour practice. That he is thus entitled to terminal dues and damages which he tabulates as follows:

a. One month’s salary in lieu of notice..... Kshs.31,754

b. Damages for abrupt loss of income and trauma and inability to meet continuing obligations as a result of which he seeks compensation at 12 months’ salary

(31,754 x 12)..... Kshs.412,802

That despite making a demand to the Respondent to make good the claim, it had refused and/or ignored to compensate him. He prays for judgment against the Respondent for:-

1. A declaration that the Claimant’s dismissal from employment was unlawful and unfair.
2. A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
3. An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totalling Kshs.412,802/=
4. Interest on (c) above from date of filing suit till payment in full.
5. Costs of this suit plus interest thereon.

The Respondent filed its Statement of Defence on 16th March 2015 admitting that it employed the Claimant. It avers that on that fateful day in February 2012, the Claimant had been deployed to work in its premises on Ngong Road when he colluded with Mr. Momanyi, a worker in the said shop, to overcharge a customer, Mr. Steve Muturi of the Consumer Federation of Kenya. That the customer was issued with a handwritten receipt as opposed to the computer generated ETR receipt and only returned to the shop upon realizing that the price on the receipt did not tally with the price tag on the battery. That the Claimant thereafter vanished from the said premises without any justification confirming he had deliberately swindled the customer and engaged in financial impropriety to the detriment of the Respondent's business. That Mr. Momanyi's verbal explanation was that the Claimant instructed him to issue a handwritten receipt with inflated figures. The respondent avers that it apologised to the customer and the issue was resolved after the customer was refunded the entire amount he had paid as well as keeping the battery.

The Respondent avers that the Claimant was given an opportunity to defend himself when he was asked to submit a written explanation to the management within 2 days but he could not exonerate himself and offered no explanation. It denies that it instructed him to close the shop or sent him away stating that the Claimant opted to abscond duty on his own volition without notice and never made any attempt to resolve the matter with the management. It contends that the Claimant was probably apprehensive that criminal charges may be preferred against him over the incident. That any loss suffered by the claimant if any, cannot be attributed to the Respondent.

In a Counterclaim, the Respondent avers that the Claimant owes it a sum of Kshs.31,754 as compensation in lieu of notice (special damages) for deserting duties unceremoniously and without notice. It prays for judgment against the Claimant for an order that the Claimant's claim is improper and unfounded; any other award the court deems fit to grant the Respondent; this suit to be struck out for being frivolous, vexatious and an abuse of the court process; and for costs of this suit.

The Claimant filed an Answer to Defence and Defence to Counterclaim on 3rd August 2015 dated 9th July 2015. He avers that he only noticed the discrepancy in the handwritten bill while feeding the receipt into the system a day after the computer system had been rectified. That the error had arisen because the Respondent had declined to label prices on the items being sold, which prices were only to be extracted from the computer system. That if the system failed, the cashier had to rely on price memory. He explained that this at times led to incidences of marginal overcharging and/or undercharging and in such cases, the customer's telephone would have been written on the receipt or in a book to be notified upon the system being re-activated. The Claimant averred that his dismissal was without due process and/or notice and that the counterclaim for notice pay is mischievous and should be dismissed with costs.

Evidence

The Claimant adopted his filed witness statement as his evidence in chief and with leave of Court, he orally amended *paragraph 3 of the Statement of Claim* to the effect that he was employed on 8th March 2005. He testified that he refunded the customer who came back to the shop the following day around Kshs.700 – 800. That he was told to close the shop and give the key to the cashier, Joshua Oditu so that stock taking could be done and go home until he was called. He stated he does not know what the stock taking revealed. He testified that he had never had any disciplinary issues before because he was a diligent worker. Under cross-examination he stated that he left the Respondent's employment when he was a supervisor and not sales assistant and that he was not issued with a letter of termination by Jitu or the Respondent.

RW1, KAMLESH CHITRODA who is the general manager of the Respondent testified that the respondent technically forbid issuance of handwritten receipts but when the customer needs to claim VAT, they issue the receipts on demand by the customer. He stated that they have a power backup generator which turns on in 5 to 6 seconds and that there was therefore no question of power blackout and system hanging. That they instructed both the Claimant and Momanyi to go to the office to respond to the complaint by the customer but since they did not go to the office, they were deemed to have absconded duty.

Under cross-examination, RW1 confirmed the Claimant was a Supervisor/Cashier and that RW1 himself refunded the money to the client and not the Claimant. That on the day of the incident, they were called by a staff at the said shop who told them that the two employees had left and had not returned. He further confirmed that it is Momanyi who sold the battery to Mr. Muturi's driver and wrote the receipt. He stated that the incident was reported to the police by their Human Resource but the file was misplaced. He stated there was no proof of the report as per documents in court. He also testified that the respondent did not write to labour officer to report that the two employees had absconded duty.

In re-examination, RW1 stated there was no system failure on the date the Claimant and Momanyi issued handwritten receipts.

Claimant's Submissions

The Claimant submits that under **Section 45 of the Employment Act**, the employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure. That no police report was ever made as regards the incident because if he had indeed conspired to defraud the customer, then the Respondent would have taken action against him. Further, that no letter was written to the local labour officer by the Respondent notifying him/her of an employee who had absconded duty/deserted work as required by law and that if it were true he had absconded/deserted duty, the labour office ought to have been notified. That he was not served with any show cause letter, no hearing took place before the decision to summarily dismiss him was reached and the decision to summarily dismiss him was extremely harsh and unwarranted. That fair process as required by **Section 41 of the Employment Act** was thrown out of the window and hence his dismissal was unfair and unlawful.

He urged this Court to rely on the case of **Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers v Mombasa Sports Club, Cause No. 440 of 2013** where Radido J. observed that termination of employment is unfair if the employer fails to prove that the reason for the termination is valid and for a fair reason. He further cited the case of **Donald Odeke v Fidelity Security Ltd, Cause No. 1998 of 2011** where the court observed that an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them and that it does not matter what offence the employee is charged of, if the employee is not heard, the termination is ipso facto unfair.

The Claimant submits that he has proved his case to the required standards and that notice having not been given or paid, the same is payable under **Section 36 of the Employment Act**. He further submits that the Respondent did not issue him with a letter of service to enable him get alternative employment and that he is entitled to a certificate of service under **Section 51 of the Employment Act**. He urges this court to award him the full 12 months' gross salary in compensation for the unfair and unlawful dismissal from employment as stipulated under **Section 49 of the Act**.

In his Further Submissions, the claimant submits that the Respondent never called Mr. Momanyi as a witness to corroborate its allegations. That **Section 43 of the Employment Act** provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reason for termination and failure to do so, such termination is deemed to have been unfair within the meaning of Section 45 of the Act. That the reasons for termination of a contract are the matters the employer genuinely believed to exist at the time of terminating the contract and which caused the employer to terminate the services of the employee. He relies on the case of *Walter Ogal Anuro v Teachers Service Commission [2013] eKLR* where the court held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. The Claimant submits that the fairness test in this case was never achieved as there was no substantive justification for the Respondent to terminate his employment and equally, he was never taken through a fair process before being sent home.

Respondents' Submissions

The Respondent in the instant case denies it terminated the Claimant's contract of employment and further denies having a Mr. Jiterdra in their establishment stating that it is unconceivable that one could order closure of the business premises in the circumstances of the matter.

The Respondent cites the case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited, Cause No. 74 of 2013* where the court held that whatever reasons an employer may have to terminate the employment of an employee, that employee must be taken through the mandatory process as outlined under Section 41 of the Employment Act.

It submits that the Claimant deserted work on his own and that it tried to have him to return to work through emissaries, specifically the Human Resource Officer but its efforts were futile. That desertion amounts to absconding duty with the consequence of a serious labour sanction because it is similar to negating a contract of employment without notice to the employer. It cites the South Africa Labour Court in *SACWU v Dyasi [2001] 7 BLLR 731 (LAC)* cited in the case of *Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] eKLR* where it held that –

“desertion amounts to repudiation of contract of employment which the employer is entitled to accept to reject. The acceptance of repudiation amounts to dismissal if employee fails to render service. Failing to contact the respondent constitutes unexplained absence for the period the grievant was away.”

The Respondent submits that it is entitled to notice pay as prayed in the counterclaim because the Claimant deserted duty to evade disciplinary action and defeat in-depth investigation of the matter. That in *John Onteri Momanyi v Motor Boutique Limited [2018] eKLR*, Ongaya J. observed and held as follows:

“The Court returns that the respondent's evidence was coherent and clear. The claimant voluntarily absconded duty and refused to avail himself for disciplinary process after the customer made the complaint. The Court reckons that the claimant admitted that the respondent's human resource manager was the claimant's brother, he admits that he discussed the case with the brother, and the Court returns that other than the formal processes of the disciplinary process, the claimant must have enjoyed that fraternal relationship and cannot turn around as claimed in the present suit. As submitted for the respondent, “The only logical conclusion that one could reach from the conduct of the claimant is that the claimant indeed intended to swindle the customer and by extension defrauded the company with intent to enrich himself unlawfully.” The Court returns that the claimant deserted duty without notice and the counterclaim will succeed as per Section 35 of the Act.”

Analysis and Determination

The issues for determination are whether the Claimant was unlawfully and unfairly dismissed from employment by the Respondent or it is the Claimant who absconded/deserted duty and whether the Claimant is entitled to the reliefs sought.

In the case of *Samsung Electronics East Africa Ltd v K M [2017] eKLR* the Court observed that:

“29. In a claim such as this, the burden of proving there was an unfair termination of employment or wrongful dismissal rests on the employee, while the burden of justifying the grounds for the termination of employment rests on the employer.

See Section 47(5) of the Employment Act. Whether or not a termination is considered fair will depend on whether the reason(s) for termination and the procedure for dismissal was fair. See *CFC Stanbic Bank Limited vs. Danson Mwashako Mwakuwona [2015] eKLR...*”

In the case of *Daniel Mueke v Bhogals Auto World [2014] eKLR* the court in dismissing the claim stated:

“17. The Claimant has not discharged the very low threshold placed upon an employee in a complaint of unfair termination by section 47(5) of the Employment Act, 2007.

18. It is not necessary therefore to embark on an inquiry as to whether the Respondent complied with sections 41, 43, 45 and 47(5) of

the Employment Act, 2007. The question as to whether there was unfair termination of services is therefore not necessary.

19. But the Court observes that questions of desertion or abscondment raise difficult questions of law. The difficulty is based on a legal question of the extent, nature and scope of the protection granted to employees against procedurally unfair termination by section 41 of the Employment Act, 2007 when an employer alleges desertion or employee absconded.”

The Claimant has argued that he was told to go home to be called later on but since the Respondent never called him back, he took it that he was dismissed from employment without being served with a show cause letter or being accorded a disciplinary hearing. The Respondent’s case is that the Claimant absconded work after it had told him to go to the head office and explain himself and counterclaims for notice pay as compensation for the Claimant’s desertion of duty. **Section 107 of the Evidence Act** provides that whoever asserts the existence of facts must prove those facts exist and so the burden of proof lies on that person. There are no documents to prove that the Claimant was summoned to give an explanation of the incident or that the Human Resource did indeed look for him and neither is there any evidence in record that the Claimant tried to access the Respondent’s premises but was not allowed in. There is further no termination letter with RW1 denying in his testimony that the Claimant was dismissed. As it stands, it is the Claimant’s word against the Respondent’s.

Section 108 of the Evidence Act further provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. On proof of a particular fact, **Section 109 of the Evidence Act** states that such proof lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Since it is the claimant who approached the court for redress, it is he who carries the burden of proof that he was dismissed. It is only after this is proved by the claimant that the respondent would be called upon to justify the grounds of termination. This is the essence of Section 47(5) of the Employment Act as read together with Sections 107, 108 and 109 of the Evidence Act.

This court has previously passed its judgment in a case with similar facts and against the Respondent herein: **John Onteri Momanyi v Motor Boutique Limited (supra)** as cited by the Respondent, where Ongaya J. held that the claimant (Mr. Momanyi) deserted duty without notice and that the counterclaim succeeded as per section 35 of the Act. The claimant in the above case is the same colleague referred to in this case whom the Respondent alleges together with the Claimant herein, absconded duty.

Conclusion

I find that the claimant has not proved that he was dismissed from employment by the respondent on a balance of probabilities. He has thus failed to discharge his burden under Section 47(5) of the Employment Act with the result that this claim fails and is dismissed.

On the counter, it is my view that the respondent did not intend to raise the same and only made a counterclaim because the claimant filed suit. Whereas there is nothing wrong with this, I find that it has not proved that it did anything when the claimant allegedly absconded duty. As pointed out by the claimant, the respondent did not dismiss the claimant or even send him a show cause notice. It did not report the collusion to defraud a customer to the police. It did not report to the Labour Officer that an employee had absconded duty. It simply did nothing, perhaps considering that it was good riddance of the claimant. I thus find no justification to enter judgment for the respondent in terms of the counterclaim with the result that the counterclaim also fails and is dismissed with costs.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE