



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 1525 OF 2015**

**NICHOLAS MWENDWA NZAU.....CLAIMANT**

**-VERSUS-**

**P.G. BISON LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant brought this suit on 31/08/2015, contending that he was employed by the respondent in 2005 as a casual worker, but in 2008 he became a permanent employee earning Ksh.9, 000 per month. He averred that on 24/10.2013 he was accused of theft of 52 furniture handles valued at Ksh. 5,000 and on 25/10/2013 he was taken to the police by the respondent's Director Mr. Hitesh Mediratta and thereafter charged in court with stealing by servant.

2. On 30/10/2013, the respondent served the claimant with a summary dismissal letter citing the reasons as attempted theft of 55 handles but on 8/10/2014 he was acquitted of the said offence of stealing by servant. He therefore brought this suit claiming the following reliefs: -

- (a) A declaration that the dismissal by the Respondent was wrongful, unlawful and unfair;
- (b) Payment of terminal dues and compensatory damages totalling to ksh. 242,550.
- (c) NSSF remittances for
  - (i) The months of January, February, March, April, May, June, July, August and October of 2015,
  - (ii) The year 2007;
  - (iii) The months of January, February, March, April, May, June and July 2008.
- (d) An order directing and /or compelling the Respondent to issue a certificate of service to the Claimant;
- (e) This Honourable court to issue orders and give such directions as it may deem fit to meet the ends of justice
- (f) Exemplary damages;
- (g) Costs of this claim, and Interest at court rates.

3. The respondent file defence on 14/1/2016 admitting that she employed the claimant but denied that she dismissed him unfairly and refused to pay his lawful dues. She averred that the dismissal was lawful because the claimant was found in possession of 52 pieces of furniture handles while leaving her work premises and when he was asked to explain he ran away until the following day when he was arrested and charged in court.

4. She further averred that the claimant is not entitled to the reliefs sought because the dismissal was lawful and he was paid all his dues. She therefore prayed for the suit to be dismissed with costs.

5. The matter proceeded before Judge Marete J on 5/4/2019 when he directed the same to be disposed of by written Submissions. However due to subsequent unforeseen matters the Judge could not determine the matter and it was placed before me to finalize. The proceedings were typed and the parties agreed that I continue from where Marete J reached.

**Claimant's submissions**

6. The claimant reiterated that he was employed by the respondent in 2005 and was dismissed on 30/10/2013 when his salary had risen from Ksh. 9000 to Ksh.16, 500 per month. He submitted that he was not accorded fair hearing before the dismissal as required by section 41 of Employment Act. He relied on **Mary Chemweno Kipkrui v Kenya pipeline co. ltd [2014] e KLR** where the court held that failure to follow the mandatory procedure under section 41 of the Act rendered the termination of employee's contract of service as unfair.

7. As regards the reliefs sought the claimant argued that under section 49 of the Employment Act he is entitled to one month's salary in lieu of notice plus 12 months' salary compensation for unfair dismissal. He contended that the said compensation is warranted because he worked for 8 years and he was made to undergo criminal trials for trumped up charges.

8. He further contended that he never took any leave in 2013 and contended that he was entitled to 21 days equalling to Ksh. 11,550. He further prayed for salary for October 2013 before he was dismissed on 30/10/2013. He also prayed for refund of the NSSF deductions from his salary which was not remitted to the fund by the respondent to the Agency. He relied on the NSSF statement to support that claim.

9. He further prayed for exemplary damages as a punishment to the respondent for her wrong doing, that is, using criminal process as a means of terminating the employment contract. Finally, he prayed for certificate of service under section 51 of the Employment Act.

#### **Respondent's submissions**

10. The respondent submitted that the dismissal of the claimant was grounded on a valid and fair reasons because the claimant was intercepted by security guards while leaving the work premises with 52 handles worth Ksh. 5,200 and ran away. She further contended that after the claimant ran away from the security guards, it was not possible to accord him a hearing before the dismissal. She further contended that when the claimant resurfaced the following day he was arrested and charged in court.

11. As regards the reliefs sought, she maintained that the dismissal was lawful and as such the claim for salary in lieu of notice and compensation for unfair dismissal are not warranted. She further contended that the claim for exemplary damages is not awardable and relied on **Daniel Githinji Waiganjo V Kenpipe Co-operative Savings & Credit [2014] e KLR** where the court held that exemplary damages are not payable in contracts including employment contracts.

12. She further denied the claim for salary for October 2013 contending that the salary was paid as per the computation of final dues filed herein. Finally, she admitted the claim for leave but calculated it at 11.2 days per month equating to Ksh. 6,677.

#### **Issues of determination**

13. There is no dispute from the pleadings, evidence and submissions that the claimant was employed by the respondent from 2005 to 30/10/2013 when he was summarily dismissed. The issues for determination are: -

- (a) Whether the reasons for the dismissal was valid and fair,
- (b) Whether a fair procedure was followed
- (c) Whether the claimant is entitled to the reliefs sought

#### **Valid and fair reason**

14. Under section 43 and 45 of the Employment Act, the employer has the burden of proving that the termination of the employee's contract of service was grounded on a valid and fair reason. In this case the respondent contended that the claimant attempted to steal 52 or 55 pieces of furniture handles. She further alleged that the claimant was caught by security guards and he ran away. The claimant denied the alleged offence and contended that after the dismissal he was acquitted from the criminal charges.

15. After careful consideration of the material and the submissions presented to the court by the parties, I found no evidence connecting the claimant to the alleged theft. The guard who allegedly caught the claimant with the stolen handles did not tender any evidence herein. The I therefore return that the respondent has failed to prove on a balance of probability that the reason cited for the dismissal of the claimant.

#### **Procedure followed**

16. The claimant's case that he was accorded fair hearing has not been rebutted. All that the respondent alleged is that the claimant ran away after being caught taking away the handles and thereby barred her from giving the him an opportunity to explain himself. However, that is not a plausible defence because, the claimant reported to work the following day and instead of granted a hearing the respondent's Director Mr. Hitesh took him to the police where he was arrested and charged in court.

17. It is therefore my view that the claimant did not prevent the employer from conducting a disciplinary hearing by running away as alleged. As already observed herein above the guard who caught the claimant stealing never gave any evidence herein to confirm that the claimant ran awa.. Consequently, I return that the respondent has also failed to prove on a balance of probability that she followed a fair procedure before dismissing the claimant from service.

#### **Reliefs**

18. In view of the findings herein that the respondent has failed to prove that the dismissal of the claimant was grounded on valid and fair

reason and that a fair procedure was followed, I make a declaration that the dismissal was unfair within the meaning of section 45 of the Act. Accordingly, I further find that under section 49 of the Act, the claimant is entitled to one month salary in lieu of notice plus 6 months' salary as compensation for the unfair dismissal. In awarding the said compensation I have considered that the claimant worked for the respondent for over 8 years, and also the employer's conduct at the time of termination.

19. The claim for leave lack particulars and as such I award the 11.2 days admitted by the employer. I also award him salary for October 2013 being Ksh. 16,500. The claim for NSSF remittances is not supported by evidence to prove that during the months in question the claimant was working for the respondent. I therefore decline to grant the same.

20. The claim for exemplary damages is not well founded and is declined. However, the claim for certificate of service is granted because it is a right under section 51 of the Employment Act.

#### **Conclusion and disposition**

21. I have found that the dismissal of the claimant was unfair and that he is entitled to some of the reliefs sought. Consequently, I enter judgement for him in the following terms: -

<b>Six months compensation</b>	<b>Kshs. 99,000</b>
<b>11.2 leave days</b>	<b>Kshs. 7,107</b>
<b>Salary for October 2013</b>	<b><u>Kshs. 16,500</u></b>
<b>Total</b>	<b><u>Kshs. 139,107</u></b>

The said sum is subject to statutory deductions but addition to costs and interest at court rates from the date hereof.

**Dated, signed and delivered in open court at Nairobi this 29th day of April, 2020.**

**ONESMUS N MAKAU**

**JUDGE**