



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1004 OF 2015

VINCENT KEYA1ST CLAIMANT

EVANS NJERU.....2ND CLAIMANT

VERSUS

D.M. ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

1. The suit herein is contained in the Amended Memorandum of Claim filed on 17.9.2018 and it seeks compensation for unfair termination plus terminal dues as set out in body of the claim.

2. The Respondent denied liability for the alleged wrongful and unlawful termination of the claimant services and averred that it is the claimants who voluntarily deserted their employment. She further averred that before the desertion, the Claimants were caught by CCTV in the company's premises stealing spare parts and thereafter they were arrested and charged in court. It is further defence case that even before the case was over, the claimant demanded to be paid their terminal dues and she paid them.

Claimant's Evidence

3. The second claimant testified as Cw1 and adopted his written statements dated 9.6.2015. He also produced 5 documents as exhibits to support his case. In brief, he stated he was employed by the respondent as a driver in February 2013 for a monthly salary of Kshs. 25575.

4. On 15.3.2015, the lorry he was assigned developed problems in the gear box and during lunch time brought back to have it checked by a mechanic. The mechanic requested for a test drive in order for him to understand the problem and they were given a gate pass. However, while test driving they were called back and informed that there was robbery and the director accused him of stealing company property.

5. On 16.3.2015, he was arrested with others and detained at the Industrial Police Station from 9.00 a.m. to 8.00 p.m. then released without any changes. Thereafter they went to find out how they could be paid their money. On 18.3.2015 and 19.3.2015 they reported to the Human Rights Commission and demand letters were served on the respondent. However, on 20.3.2015 they called back to the police station where they were locked up and thereafter charged but the case was dismissed because no witnesses were called.

6. He further testified that the employer was summoned by the labour officer into a meeting where he accepted to pay their salary but declined to pay terminal dues. He therefore prayed for the reliefs sought in the amended claim.

7. On cross-examination, he contended that the suspects arrested were 15 in total but only a few were charged. He further reiterated that the charges were later dropped for lack of evidence. He denied that he was caught by CCTV carrying stolen metals. He further denied that he deserted employment and maintained that he was dismissed. He contended that the first claimant was given a termination letter but he was not given one. Finally, he admitted that after meeting the employer at the labour office he was paid Kshs. 11,138 for days worked and leave days as per the voucher dated 11.5.2015.

8. The first claimant testified as CW1. He also adopted his written statement dated 9.6.2015 as his evidence. In brief he stated that he joined the respondent on 11.2.2011 as a mechanic and worked upto 15.3.2015. His salary was Kshs. 23500 per month.

9. On 15.3.2015 he was on duty and at around noon a colleague brought in a lorry for repair. He however asked that they do a test drive to establish the problem at around 1.30 p.m. While still on the road they received phone telling them that there was a robbery at the company and turned back but on arrival they were accused of stealing goods from the company. Thereafter they were arrested and detained but released without charges.

10. On 20.3.2015 he was called back to the police and charged and released on cash bail after 24 hours. Thereafter he was paid Kshs. 15000

without particulars after pursuing dues through the labour office. He denied the allegation that he deserted employment, but admitted that he never reported back after being released on bail. He prayed for judgment as prayed in the amended claim contending that he used to work seven (7) days in a week from 6 a.m. to 6 p.m. without any rest day or public holidays. There was also no leave or payment for over time worked.

11. On cross-examination, he contended that he was dismissed from work by being arrested and taken to court. He further contended that after acquittal, he reported to the office to demand for his dues but it was denied. He however admitted that he was paid Kshs. 15000 and signed the payment voucher dated 11.5.2015 stating the particulars of the payment as 15 days worked @Kshs. 784 equally to Kshs. 11760 and leave totalling to Kshs. 3528.

12. He contended that the said dues were too little considering the days he worked for the respondent.

Defence Evidence

13. The Respondent's Accountant, Mr. Francis Kabuigi Musamula testified as RW1. He also relied on his written statement dated 10.4.2019 and produced four (4) documents as exhibits. In brief, he stated that a theft occurred at the place where the claimants were working and the matter was investigated by the police. According to him about 15 suspects were arrested, of which nine (9) were released, but the claimants who were the main suspects, were charged.

14. Thereafter the claimants reported the matter to the labour office and they were paid salary for the days worked plus accrued leave and the matter was settled. He denied that the claimants were dismissed by the respondent and contended that they deserted voluntarily and demanded their terminal dues. He therefore prayed for the suit to be dismissed with costs.

15. On cross-examination, he contended that he joined the respondent first in 1989 as a General Clerk and later became an Accountant. He contended that the claimants were caught by CCTV stealing in cahoots with others and as such they did not deserve notice before termination. He further stated that some of the suspects ran for good when they learned of the intended police action. He however admitted that he never recorded any statement with the police and the criminal case was withdrawn under section 87A of the Criminal Procedure Code. Finally, he confirmed that the first claimant was paid Kshs. 15288 and the 2nd claimant Kshs. 11138 after they reported to the labour office.

Claimant's Submission

16. The Claimants submitted that their services were unfairly terminated because they were not issued with any prior notice as required by section 35 of the Employment Act. They further contended that they were never accorded fair hearing as required by Article 50 of the Constitution. In their view the termination was unfair within the meaning of section 45 of the said Act which required that termination of employment by the employer must be for a valid and fair reason and that a fair procedure must be followed.

17. For Emphasis, they relied on **Mary Chemweno Kiptui vs Pipeline Company Limited [2014]eKLR** and **Mary Kitsao Ngowe and 37 Others vs Krystallien Salt Limited** where the courts underscored that for termination to be fair, the employer must prove that both substantive and procedural fairness was observed. She contended that the respondent has not discharged the said burden and prayed for the reliefs sought.

18. The Respondent never filed any submission despite being given the leave to do so.

Issues for determination

19. There is no dispute that the claimants were employed by the respondent until March 2015. The issues for determination are:

- (a) Whether the claimants deserted the employment or they were dismissed by the respondent.
- (b) If the answer to (a) above is dismissal, whether it was unfair and unlawful.
- (c) Whether the claimant is entitled to the reliefs sought.

Desertion or Dismissal.

20. It is common ground that on 15.3.2015, the respondent accused the claimants of theft which led to their arrest and arraignment before court for theft charges. There is also no dispute that the claimants were granted bail but failed to report back to work and instead reported the dispute at the labour office demanding payment of their terminal dues.

21. There is no dispute that they were paid salary for the days worked plus accrued leave days. However, they did not produce any documentary evidence or even oral evidence from an eye witness who saw them report back to work after being released on bail. I, therefore, find and hold that the respondent has proved on a balance of probability that the claimants deserted their work voluntarily after being released from lawful custody on bail.

22. On the other hand, I find that the claimant has not proved on a balance of probability that they were dismissed by the respondent. They

admitted that they were not served with any termination letter and contended that the respondent dismissed them by causing them to be arrested and charged in court. Such contention in my view is mere assumption without any reasonable basis.

Unfair termination

23. In view of the foregoing finding, the claim for unfair termination falls on its face.

Reliefs

24. The claim for compensation for unfair termination must fail entirely because the claimants deserted their job voluntarily. As regards the rest of the claim for terminal dues, I return that no damages are payable to the claimant in view of the payment vouchers dated 11.5.2015 by which they acknowledged payment of their terminal dues as full and final settlement. the claimants never challenged the validity of the said settlement agreement and as such the said agreement constitutes a binding contract between the parties thereto. consequently, I decline to consider the claim for terminal dues and proceed to dismiss the suit with costs.

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

ONESMUS N.MAKAU

JUDGE