



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 592 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

VINCENT NYANGU.....CLAIMANT

VERSUS

PAUL MBOGO.....1ST RESPONDENT

GAMBO TECH (K) LIMITED.....2ND RESPONDENT

JUDGMENT

The Claimant filed a Statement of Claim on 8th April 2014 which was amended on 24th October 2017. He avers that he was employed by the Respondents as an Electrical Technician him until 29th December 2013 when his employment was terminated without any notice or payment in lieu of notice. He alleges that the Respondents terminated his employment contrary to the principles of natural justice and Section 41 of the Employment Act 2007. He seeks the following prayers:

1. A declaration that the Claimant’s termination from his employment was unlawful and unfair.

2. The Claimant to be paid his terminal benefits set out in the claim

totalling to Kshs.1,315,744.04.

3. The Respondent be ordered to compensate the Claimant for wrongful termination at the equivalent of twelve (12) months’ gross salary

4. The Court do issue such orders and give such direction as it may deem fit to meet the ends of justice

5. The Respondent to pay the costs of the claim

6. Interest.

The 1st Respondent filed a Statement of Response on 13th November 2017. He avers that he was an employee of the 2nd Respondent and that he was misjoined in the suit. He avers that the Claimant has not specified which Respondent employed him. He contends that the Claimant was terminated as a result of misconduct due to stolen goods and absconding.

Evidence

The Claimant testified as CW1. He testified that when he reported to work on 29th December 2013, the 1st Respondent asked him to go back home. That he was never called back to work and that he was not paid his December salary. He denied stealing any property and stated that he was never arrested for stealing. He further denied absconding duty.

In cross-examination, he testified that he had sued the 2nd Respondent but he was engaged by the 1st Respondent. He testified that the 1st Respondent paid his salary and he did not know if the 1st Respondent had a supervisor.

PAUL MBOGO, the 1st Respondent's Operations Manager testified as RW1 and relied on his Witness Statement. He testified that he worked as an Operations Manager for the 2nd Respondent. That the Claimant stole one of its customer's conductors and absconded an identification parade on 6th January 2014 where the customer's watchman was to identify the person who collected the customer's conductors. He stated that the customer's watchman identified the Claimant as he opened the gate for him.

In cross-examination, he testified that he paid the Claimant on behalf of the 2nd Respondent. He testified that the Claimant left work on 6th January 2014 and did not report to work thereafter.

He testified that the Claimant did not work daily and when he worked he reported from 8 am to 3 pm and at times up to 4 pm. He denied that the Claimant worked for 5 hours overtime. He testified that the Claimant was paid his December 2013 salary. He testified that the Claimant was not paid house allowance as he was paid a daily wage as a casual worker. He testified that he reported the incident but he never called the Claimant to question him.

Parties Submissions

It was submitted on behalf of the claimant that the Respondent coined the theft narrative in order to shift the Court's attention from delving into the substance of the claim for unfair termination. He relied on section 43 of the Employment Act and submitted that no criminal records were produced in Court to support the allegation that he had stolen company property or requiring him to attend a disciplinary hearing.

He submitted that the Respondent disregarded the mandatory procedures under section 41 as read with section 43 of the Employment Act which requires an employee to be given a notice to show cause and a disciplinary hearing before termination is effected. He submitted that the right to be heard is a minimum basic requirement. He relied on the decision in **Caliph O Ogega v National Social Security Fund Cause 280 of 2013 (unreported)**.

He submitted that having demonstrated that his termination was unfair and unlawful, he was entitled to the prayers sought in the claim.

The 1st Respondent submitted that as a result of his Preliminary Objection on grounds that he never employed the Claimant, the Claimant was allowed to amend his claim.

He submitted that the 2nd Respondent being an incorporated company has the capacity to sue and be sued thus the claim against him should be struck out. He argued that the Claimant did not adduce any evidence in support of his claim as provided under section 107 of the Evidence Act. He urged the Court to dismiss the claim with costs to him.

Determination

The issues for determination are:

1. Whether there was an employment relationship between the Claimant and the 1st Respondent.
2. Whether the Claimant was unfairly terminated.
3. Whether the Claimant is entitled to the reliefs sought.

From the evidence on record, the 1st respondent, was an employee of the 2nd respondent which is a limited liability company. I thus find that there was no employment relationship between the Claimant and the 1st Respondent.

Consequently, the claim against the 1st Respondent fails and is dismissed.

During the hearing, the Claimant was stood down and the Court granted counsel for the Claimant an opportunity to regularize the Court records with respect to proof of service of the claim on the 2nd Respondent. It was the claimant's position that though he had served the 2nd Respondent with the Claim, he did not file an affidavit of service. From the record, the Affidavits of Service sworn by Diffina Moithaga were in respect of the hearing notices. Although the claimant was given time to prove service upon the 2nd respondent, no affidavit of service was filed. The 2nd respondent was joined in the suit through the Amended Statement of claim.

In the absence of proof of service of the claim and summons upon the 2nd Respondent, it had no opportunity to defend itself against the allegations in the Claim. The court can therefore not make any orders against the 2nd respondent.

With respect to the 1st respondent, I find that there is no claim against him because he was an employee of the 1st respondent like the claimant and was only performing his duties in his interactions with the claimant.

For the foregoing reasons I find that the claimant has not proved his case against the 1st respondent, while the claim against the 2nd respondent cannot be maintained as it was not served with summons and amended claim.

The result is that the entire claim collapses and is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF JUNE 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE