



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 164 OF 2017

(Before Hon. Justice Mathews N. Nduma)

LEONARD OWINO OBURE.....CLAIMANT

VERSUS

KAIMOSI TEA ESTATES LTD....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 24th April 2017 praying for compensation for wrongful dismissal and payment of terminal benefits including 3 months' salary in lieu of notice, overtime worked as per the CBA of 2014 – 2016 and costs of the suit.
2. CW1, the claimant testified that he was employed by the respondent in 1997 as a general worker. That he worked continuously until 30th October 2016 when he was seriously injured in the course of duty. The injury led to amputation of the left little finger. The claimant made a claim for compensation but was not paid to date.
3. The claimant testified that he continued to work for the respondent including doing painting work until he was summarily dismissed for taking 16 litres of peat silk emulsion paint instead of the authorized 8 litres allocated to him by factory manager. The claimant had been assigned to paint chep/cube block. The claimant denied that he was stopped at the gate by the security officer to go and adjust the gate pass to reflect 16 litres instead of 8 litres.
4. Claimant denied that he had adjusted the gate pass himself and did not go back to the factory manager as required. The claimant stated that he passed the gate with the 8 litres.
5. The claimant testified that he was not given opportunity to explain himself in that he was not given a show cause letter nor called to a disciplinary hearing. Claimant testified that he had a good record at work and had no previous warning.
6. CW1 stated that he believes he was summarily dismissed for persisting in his claim for compensation. The claimant did not file any suit for compensation in respect of the claim. He testified that he was paid Kshs. 13,624 salary per month.
7. CW1 insisted under cross examination that he only had 8 litres of paint and not 16 litres as alleged. CW1 denied having altered the gate pass.
8. CW1 stated that he painted from 7.00 am in the morning until 10.00 pm in the evening and was not paid overtime, including back dated over time as per 2014 – 2016 CBA. That he was dismissed before the CBA increment of salary was paid although it was concluded while he was in service.
9. The claimant stated that if he had stolen paint as alleged, he would have been reported to the police and charged for theft which did not happen. The claimant prays for the reliefs sought.

Defence

10. RW1 Mark Kipchoge testified that he was the security officer on duty on the material day.
11. RW1 testified that on the day the claimant brought to the gate a gate pass for 8 litres of paint. That the claimant later went to the gate as a passenger in a vehicle. RW1 checked the vehicle and it had 16 litres of paint. RW1 stopped the claimant from passing and referred the

claimant to the factory manager since the claimant told him he had made a mistake.

12. RW1 testified that the claimant came back with an adjusted gate pass which he said was adjusted by the factory manager. The gate pass was however not signed afresh. The document had been cancelled and new entry added. That 8 litres was replaced with 16 litres.

13. However under cross examination, RW1 observed that the gate pass showed 16 litres and it had no cancellation. RW1 stated that this was not a police case and it was not reported.

14. RW1 added that the manager changed the gate pass after he referred the claimant to him. CW1 stated that he discovered the mistake on the spot and the manager asked him about the matter the following day.

15. RW1 stated that he attended a disciplinary hearing where all persons were asked to testify. RW1 added that the original gate pass had 8 litres on it. RW1 stated that the claimant was given opportunity to defend himself. RW1 added that the meeting was chaired by the manager. RW1 stated that he was not aware of any previous incidents by the claimant. RW1 confirmed that the claimant was injured years before at work.

16. Under re – examination RW1 clarified that the original gate pass was no. 82 and that the one cancelled was done in his absence and that he had remained at the gate and that CW1 told him that the manager had altered the gate pass.

17. RW2 Emmanuel Kiprono testified that he was the driver of the respondent. That he knew the claimant well even though the respondent had 800 workers. That on the material day the claimant approached RW2 to transport paint for him to a site. RW2 testified that he was also scheduled to take a driver to a manager's house in the same area.

18. That CW1 brought 4 Jeri cans of paint to the vehicle from the store.

19. That CW1 had a gate pass with him. That he left the CW1 sorting out a dispute at the gate and proceeded to take the driver to the manager's house. That he later took CW1 to site with a different motor vehicle. RW2 stated that he delivered 16 litres of paint to the site. That CW1 and other were painting company houses. RW2 said that he was not involved in the gate pass issue.

20. RW2 said he was later called to a meeting but was not asked to speak. RW2 said that union members were present at the meeting. RW2 added that CW1 spoke at the meeting but RW2 did not know if the claimant had called anyone else to the meeting.

Determination

21. The issues for determination are:-

- a. Whether the summary dismissal of the claimant was for a valid reason and if it followed a fair procedure.
- b. Whether the claimant is entitled to the reliefs sought.

22. In answer to issue (a) above, it is not in dispute that the claimant worked for the respondent as a general worker from 1997 and worked continuously until the year 2016 when he was summarily dismissed by the respondent.

23. There is conflicting evidence from CW1 on one hand and RW1 and RW on the other regarding whether or not the claimant had 8 litres of paint or 16 litres and whether a disciplinary hearing took place before the dismissal.

24. Upon a careful analysis of the oral and documentary evidence before court, the Court has arrived at the conclusion that on the material day the claimant was allowed to take 8 litres of emulsion paint to a site where he and others were painting company houses.

25. That the claimant had obtained and presented to RW1 a gate pass for 8 litres of paint but when RW1 inspected the vehicle at the gate, it had 16 litres of paint. RW1 sent back the claimant to have the gate pass rectified since the claimant had explained to him that he had made a mistake in the requisition. The Court is satisfied that the claimant went for a while and came back with an amended gate pass authorizing him to take 16 litres of paint out of the gate.

26. RW2 is the driver who was taking the claimant to the site. RW2 testified, which testimony the court deems to be true that he left CW1 and RW1 sorting out the issue of the gate pass and he first went to drop a driver. The court is also satisfied that RW2 picked CW1 later at the gate together with 16 litres of paint.

27. The court finds the testimony of CW1 that he had taken 8 litres of paint and not 16 litres and that he had not altered the gate pass himself to reflect 16 litres to lack credibility and untrue on the face of the overwhelming testimony by RW1 and RW2.

28. The Court also finds that testimony by CW1, that he was not given a show cause letter and was not called to a disciplinary hearing to be false on the basis that RW1 and RW2 rebutted that testimony by CW1 in a clear, candid and consistent manner.

29. RW1 and RW2 produced written statements made before the disciplinary hearing held their statements were consistent with their testimony before court.

30. The Court finds that the claimant has failed to discharge the onus placed on him under sections 107 and 108 of the evidence Act, Cap 80 Laws of Kenya read with section 47 (5) of the Employment Act, 2007 to determine that the summary dismissal was wrongful.

31. On the contrary the respondent successfully justified the dismissal by preponderance of evidence that it had a valid reason to end the employment of the claimant.

32. The respondent has therefore satisfied section, 41,43,45,46 and 47 of the Employment Act. The Court finds that the termination of the employment of the claimant was lawful.

33. However there is overwhelming evidence from CW1 and RW1 that the claimant had served the respondent from 1997 up to the year 2016, a period of about 19 years. CW1 and RW1 testified that the claimant had a good work record and RW1 was not aware of any previous warnings or offences committed by the claimant at work.

34. On the basis of the above testimony by CW1 and RW1 the court deems this an appropriate case to commute the summary dismissal of the claimant to a normal termination in recognition of the many years of good service to the respondent.

35. Accordingly, the separation of the claimant and the respondent is deemed a normal termination and the claimant is entitled to payment of all terminal benefits provided in the CBA for the period 2014 – 2016 as follows:-

a. Notice pay.

27. In accordance with clause 24 (c) of the CBA, the claimant is awarded two (2) months' salary in lieu of notice in the sum of Kshs. (13,311.75 X 2) Kshs. 26,623.50

b. Gratuity calculated at 22 days salary for each completed year of service in terms of clause 32 (a) of the CBA in the sum of Kshs. (443.70 X 22days X 19 years) Kshs. 185, 466.60

c. Overtime

The claim for overtime is not proved and is dismissed.

In the final analysis Judgment is entered in favour of the claimant as against the respondent as follows:-

a. Kshs. 26,623.50 in lieu of two months' notice.

b. Terminal gratuity in the sum of Kshs. 185,466.60

Total award Kshs. 212,090.10

c. Interest at Courts rate from date of Judgment till payment in full.

d. Costs of the suit.

Judgment Dated, Signed and delivered at Nairobi this 11th day of June, 2020

Mathews N. Nduma

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, this ruling has been delivered to the parties online with their consent. 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 18 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.

Mathews N. Nduma

Judge

Appearances

M/s Odinga for Claimant

Mr. Wachira for Respondent

Chrispo – Court Clerk