



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.354 OF 2017

ELLY AYIEKO GWARA.....CLAIMANT

VERSUS

EVANS SUNRISE MDICAL CENTER.....RESPONDENT

JUDGEMENT

The claimant is an adult male and the respondent is a medical institution.

On 5th June, 2000 the claimant was employed by the respondent as a security officer at a wage of Ksh.3,500 per month and without any other work benefit(s) through oral contract. Work hours were 7pm to 6am every day per week.

In October, 2000 the claimant was transferred to the maintenance section.

In the year 2002 the claimant's wage was increased to Ksh.4,200 per month. In the year 2004 the wage was increased to ksh.6,200 per month and a house allowance of Ksh.800, responsibility allowance to Ksh.500, uniform allowance Ksh.300 gross being ksh.7,800 per month.

In the year 2005 the wage was increased to ksh.7,200 basic; in the year 2006 basic wage was increased and gross at Ksh.9,300 and until the year 2010 when basic wage was ksh.7,200; house allowance at ksh.1,200; responsibility allowance to ksh.1,000; risk allowance to ksh.500; and uniform allowance to ksh.300 gross at Ksh.10,200.

In the year 2012 the wage was increased with gross at ksh.12,000 per month.

The claimant worked diligently and was only issued with one warning letter in the year 2004 and was suspended for two week.

The claim is that on 5th May, 2014 the claimant reported to work and worked until 5.30pm when Mr Olweny the managing director gave him Ksh.5,000 to give to a welder to buy angle lines. The claimant gave the welder ksh.4,000 and retained Ksh.1,000 for buying welding rods and 3 cuttings discs. The welder bought the lines but they were of inferior quality. These items were required for the maintenance of the sewage drainage and around 2pm Mr Olweny came to check on the repairs and found the welder had left for lunch and then at 4pm called the claimant to hand over the receipts for the purchased goods and there was a dispute as to the items purchased and that the claimant had been given cash to facilitate the purchases but had not undertaken the same as directed. Mr Olweny then claimed the submitted receipts had been altered and the welder also confirmed that he had purchased 18 gauge rods instead of 16 gauge rods upon consulting with the supervisor only to realise this was in error.

Following these events the claimant was suspended from duty for 2 week ending on 19th May, 2014 and such suspension was without pay. On 19th May, 2014 the claimant reported back to work and to his supervisor Mr Oloo and who directed him to wait for Mr Olweny and who informed the claimant that his matter was being handled by Dr Olweny.

On 22nd May, 2014 the claimant reported back to the respondent but the directors were busy and he returned home and reported back the next day and Mr Oloo advised him to return on 24th May, 2014 but there was nobody to meet him as the directors were said to be away.

On 2nd June, 2014 the claimant reported to work and was told to return on 4th June, 2014 but was advised to return on 7th June which he did and Mr Olweny told him that Mr Oloo had instructions to redeploy him to any other department in the hospital but Oloo denied having been given such instructions upon which Olweny advised the claimant to go home and wait for written instructions.

There has been no communication to date.

The claim is that he has a family and self to feed and by being sent back and forth by the respondent was unfair as his wages were not paid and there was no communication with regard to his employment contrary to section 45 of the Employment Act. that the respondents terminated his employment for no good cause and without payment of his dues and claims as follows;

- a) Notice pay Ksh.9,024.15;
- b) Pay for 5 days worked in May, 2014 Ksh.1,735.50;
- c) Underpayments from the year 2012/2013 Ksh.30,480;
- d) Overtime claims for 6 years Ksh.184,587;
- e) Compensation.

The claimant testified in support of his claims on 14th May, 2014 he was dismissed from his employment by the respondent for no good cause and without notice or payment of his terminal dues. upon allocation of work for sewage repairs the respondent asked to the receipts and upon submission the claimant was suspended for two weeks and when he reported back as directed his supervisor Mr Oloo sent him to the director and on four occasions he continued to report without any work allocation.

The claimant also testified that he his employment was unfairly terminated. He was not given a hearing after his suspension and no terminal dues were paid.

The allegations that he had stolen while undertaking maintenance duties is not true.

He did not abscond duty as alleged in defence.

The claimant also testified that he took his normal annual leave and was paid. In week he worked for 6 days from 6pm to 7am and was not paid overtime worked.

The defence is that the claimant was employed in the year 2000. He was posted to the maintenance section. The claims made are without justification as there was no termination of employment as alleged, the claimant absconded duty and by filing suit is in abuse of court process.

The claimant was suspended for 2 weeks on reasonable suspension of theft of Ksh.5,000 pending investigations and was required to resume work after the suspension period. Upon investigations the claimant was found culpable for the loss of the money and the respondent opted not to terminate his employment but redeploy him to any other department within the premises.

The defence is also that upon the claimant returning on duty after suspension he was informed that he had been redeployed but he insisted on resuming work in the maintenance department and stood his ground. He then absconded duty in breach of his employment contract.

Prior to the theft incident the claimant had been issued with warning letters, there was a suspension from duty and had been reinstated despite noted misconduct which included illegal sale of hospital tap water, failing to properly handle, care or respond to patients in distress in contravention of the internal disciplinary mechanisms of the respondent.

Despite the claimant committing gross misconduct and being recalled back on duty for redeployment he has refused to attend work on the misconception that his employment was terminated. Had this been the case a written communication should have been issued as is the practice. the claims made for compensation, notice pay are without justification.

The claimant took his annual leave with pay, there was no overtime work and there is no proof to the claims made and should be dismissed with costs.

To support the defence Linnet Izima Omwonya the human resource manager testified that the claimant has worked for the respondent since June 2000 and was not issued with letter or notice terminating his employment with the respondent. in May, 2014 the claimant stopped attending work. He had been suspended following gross misconduct and following missing funds which he failed to give an account and after the suspension ended he reported back he was redeployed from the maintenance section but he disappeared and has never returned.

Ms Omwonya also testified that this was not the first time the claimant was of gross misconduct. In the year 2004 he was suspended and reinstated.

On the claims made, where there was overtime work, this was factored in the claimant's wages. In the payment statements, the claimant had an overtime pay allowance.

On the claim for underpayment, the claimant had a gross wage of Ksh.14,000 over and minimum wage and his wages were increased annually based on the Wage Orders. The claimant took his annual leave with pay and his claim should be dismissed with costs.

At the close of the hearing both parties filed written submissions. These submissions are analysed together with the pleadings and evidence.

It is common cause that the claimant was employed by the respondent from the year 2000 as a security guard and was later transferred to the maintenance section and where he worked until his suspension on 4th May, 2014 following alleged misconduct and for a period of two weeks.

The claim is that upon reporting back from suspension, the claimant was taken back and former without any communication and despite Mr Oloo his supervisor being directed to redeploy him this was not done and this resulted in unfair termination f his employment.

The defence is that the claimant was of gross misconduct and was suspended and despite such action he reported back and was redeployed from the maintenance section to any other section but he declined and insisted on being retained in the same department. He then absconded duty and the claims made should be dismissed.

Written communication between an employer and employee is the fodder of fair labour relations. Such assist the court where there is a dispute such as herein. It is also a legal requirement that all instructions to the employee by the employer which touch on the terms and conditions of employment be made through written notice pursuant to the provisions of section 10(1) and (7) of the Employment Act, 2007.

Though not documented, both parties agree that on 4th May, 2014 the claimant was sent on suspension following various allegations with regard to his work performance.

suspension of an employee from duty is the prerogative of the employer used as an administrative measure to address misconduct or to allow for investigations. Such administrative measure should therefore be addressed within fair labour practices to ensure that where the suspended employee is found to have misconducted himself is called to show cause why his employment should not be terminated and where not culpable be recalled back to work. This is the import of section 41 of the Employment Act, 2007 that;

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

The defence that the claimant reported back to work after his suspension and was redeployed is without any written evidence. the claimant challenged this defence on the grounds that he was taken back and forth between management and his supervisor and despite communication that Mr Oloo should redeploy him to another section, he was sent back to management. After four consecutive attendance without direction(s) he took it that his employment had been terminated.

The evidence by the claimant is taken as truth on the face of the defence that there was no termination of employment despite his redeployment. This in essence is because, if the claimant failed to attend his duties as directed by the employer, if he refused to report to work as redeployed and this followed his suspension following alleged gross misconduct, the respondent as the employer was legally bound to apply the provisions of section 44(3) and (4) of the Employment Act, 2007.

An employee who refuses, fails and neglects to attend to his employment as directed by the employer is in breach of his employment contract and warrant summary dismissal. Equally, an employee who fails to attend work for no good cause and despite being given directions to attend by the employer fails to abide such lawful instructions and directions, this amounts to gross misconduct and warrant summary dismissal.

The employer who fails to exercise this legal rights under section 44 of the Employment Act, 2007 and leaves the employee at large only visits claims as this one. One of unfair termination of employment. Where the claimant reported back to work and was not allocated work as alleged, a reasonable employee would take it

that his employment had been frustrated by the employer. The court finds there was unprocedural termination of employment. Despite the alleged misconduct the claimant is said to have committed, procedural fairness outlined under section 41, 43 and 44 of the Employment Act, 2007 required the respondent as the employer to address and communicate with as correctly submitted by the claimant in the case of

Simon Mbithi Mbane versus Inter Security Service Limited [2018] eKLR.

Employment terminated without due process and contrary to section 45 of the Employment Act, 2007 and thus unfair. The claimant is entitled to notice pay and compensation.

Notice pay is claimed at Ksh.9,024. This is due.

Compensation due pursuant to the provisions of section 40 of the Employment Act, 2007 is also subject to the provisions of section 45(5) of the Act where the court is required to take into account the employee work record. The claimant has admitted to previous misconduct and which resulted in his suspension in the year 2004. save for the procedural lapses in addressing his employment termination, the claimant was suspended in May, 2014 following allegations of misconduct. these cases taken into account, compensation is awarded at two (2) months gross wage earned as of 4th May, 2014 at ksh.12,000 all at ksh.24, and 000.

On the claim made for 5 days worked in May, 2014 there is no challenge and this is due at ksh.1,735.50.

On the claimant for overtime pay for 6 years, Ms Omwenya testified that all overtime hours are factored in the payment statement in an allowance. The claimant filed his List of Documents on 11th March, 2016 and which includes several payment statement for the years 2013

and 2014 and part of his work benefits included a monthly pay of Ksh.2,000 for *responsibility allowance/ overtime allowance*. In a given year the claimant would be paid ksh.24,000 for overtime and for the duration of employment in comparison to his claims for underpayment, this was a generous compensation.

For the entire duration of his employment the claimant was not under any written contract of employment. The General Wage Orders applied to him.

On the claims for underpayments from 1st May, 2002 to 30th April, 2006 and the applicable law then being Employment Act Cap 226 (since repealed) and putting into account the provisions of section 93 of the Employment Act, 2007 with regard to transitional provisions, the claims made ceasing 30th April, 2006 section 90(2) of the Employment Act, 2007 with regard to continuing injury apply.

For the period of 2012/2013 the minimum basic wage was ksh.6,999. From the payment statements filed by the claimant, in this period his basic wage was Ksh.7,200; house allowance Ksh.2,000; overtime pay ksh.2,000; risk allowance ksh.500; and uniform maintenance ksh.300 per month gross being Ksh.12,000. This was good compensation for his employment and there is no underpayment.

For the period of 2013/2014 the minimum wage was ksh.9,024 as correctly noted by the claimant in his pleadings. In this period he continued to be paid a basic wage of ksh.7,200 per month inclusive of house allowance and other benefits all gross at ksh.12,000 per month. The basic wage inclusive of house allowance due at 15% should have been $Ksh.1,353.90 + 9,024 = 10,377.60$ per month. The payment of ksh.12,000 per month was a generous remuneration for the claimant. To make further payments as claimed would be unjust enrichment and contrary to fair labour practices.

Accordingly, judgement is hereby entered for the claimant against the respondent that there was procedural unfairness in termination of employment and compensation awarded at ksh.24,000; notice pay Ksh.9,024; and each party shall bear own costs.

Dated and delivered electronically this 4th June, 2020 at 0900 hours

M. MBARU 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 the Order herein shall be delivered to the parties via emails. this 4th June, 2020 at 0900 hours

M. MBARU JUDGE