



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

ELDORET

CAUSE NO. 21 OF 2019

JOHNSON BIRONGA.....CLAIMANT

AND

ELDO-ROSTA CONSTRUCTION CO. LTD.....RESPONDENT

JUDGEMENT

1. The claimant averred that he was at all material times employed by the respondent as a site agent/construction manager and worked as such from January 2013 until December 2018 when the respondent unlawfully terminated his service and refused to pay his dues. According to the claimant, the termination was unlawful and unprocedural and violated section 45(2) of the Employment Act.
2. The respondent did not grant the claimant salary in lieu of notice, the respondent did not grant the claimant hearing nor did the respondent explain to the claimant the reasons for termination. Further the respondent initially suspended the claimant without half pay as required by law and thereafter purported to verbally dismiss the claimant.
3. The respondent on its part pleaded that the claimant was given an opportunity to explain why disciplinary action should not be taken against him but he elected not to attend the meeting. The decision to summarily dismiss the claimant was arrived at after due process as required by law was duly undertaken. According to the respondent the claimant's chronic absenteeism from work adversely affected the contract strategic planning and implementation of projects under his supervision therefore affecting the operation of the respondent.
4. At the oral hearing the claimant stated that he was a building technician and recorded a witness statement on 21st? May 2019 which he sought to adopt as his evidence in chief. According to him, he was the respondent's Quantity Surveyor until 2015 when he was taken to Kababi as site agent and later in June 2016 he was taken to Masinde Muliro University in the same capacity where he worked until 2019. His salary was Kshs 100,000 per month. The claimant further stated that he was verbally stopped from working. He was told his services were no longer needed. He received a letter in September, 2018 claiming he had absconded duty. He responded to the same and continued working. He denied absconding duty. According to him, he was supervising two sites and would alternate depending on activities on each site. He was not required to sign any attendance register. It was further his evidence that he was summoned for a disciplinary hearing and further that he received a suspension letter on 28th? September 2018 informing him he would be called for disciplinary hearing. A disciplinary hearing was held on 12th? January 2019 and that during suspension he was only paid for November 2018. During the period he worked, he never went on leave and was never paid in lieu.
5. In cross-examination he stated the respondent wrote to him on 28th? November 2018 and that the letter did not inform him of his absence from work. He further stated that he received a letter dated 10th? September, 2018 which accused him of chronic absenteeism. He never provided any sick offs. He denied receiving the letter of 21st? January, 2019 but attended the meeting of 12th? January, 2019. He requested to be released by the end of January 2019.
6. Regarding sick offs it was his evidence that he communicated over the same by sms that he was unwell. He went to a private hospital but never provided any documents from the private hospital.
7. The respondents first witness Mr Anthony Murage stated that he worked for the respondent as a Manager and that he recorded a statement which he sought to adopt. According to him, the claimant used to work for the respondent as a site agent at Masinde Muliro University and Kakamega Hospital. The claimant left employment. They received reports from the security that the claimant used to absent himself severally from the site. The site had an attendance register and all staff used to sign in. When the respondent received the reports of absenteeism they issued the claimant with a show cause letter. The claimant responded to the letter denying absconding duty. The respondent asked him to produce off-duty applications and approvals and also sick offs granted by a government medical officer but he never produced any. A disciplinary meeting was set up and the claimant invited to attend, which he did. The claimant requested at the meeting that he be released by the end of January, 2019. He was asked to put his request in writing but never did. A termination letter was therefore issued. Mr Murage denied knowledge of the claimant being admitted in hospital.

8. In cross-examination he stated that he could not remember when the claimant was employed and that the claimant's salary was Kshs 70,000/= per month. The claimant was overseeing two sites and that they were two kilometres apart. He could oversee them simultaneously. The total period the claimant was absent was three months. It was possible the claimant could be marked absent in one site while present in another.
9. It was Mr Murage's evidence that the claimant used to send text messages asking for permission to be absent, however the issue before the court did not concern periods when he asked for permission via text messages.
10. Concerning disciplinary hearing it was his evidence that there was only one hearing on 17th? January, 2019 and the claimant never attended. It was further his evidence that the claimant was dismissed for absenting himself from work without permission and that he was paid his terminal dues upon dismissal. Further the claimant's salary included house allowance.
11. The respondent's second witness Mr Daniel Okwara stated that he was the respondent's director. He adopted as his evidence in chief, the statement he recorded. According to him the claimant used to absent himself from work and Mr Murage informed him about it. He had previously warned the claimant about his chronic absence. The claimant was issued with a show cause letter demanding proof that he was unwell. He never produced any documents. The claimant was invited for a disciplinary hearing and he attended late. He requested to be released in January and was asked to put it in writing but never did. He was subsequently summarily dismissed.
12. In cross-examination he stated that the claimant was employed in 2013 and that there were issues so he decided to try him in the field. The respondent was unaware of any medical condition which required that the claimant be frequently admitted in hospital. He never produced any document from a private doctor showing sickness. It was further his evidence that the claimant was paid electronically through Mpesa he was however not paid his terminal dues upon termination.
13. The respondent's 3rd? witness Mr Wycliff Sifuna stated that he worked for the respondent as a security officer and that he was stationed at Masinde Muliro University and Doctors plaza at Kakamega. He was the one who made the entries in the attendance register.
14. In cross-examination he stated that the register did not bear the name of the employee concerned. It was his evidence that the claimant was supervising two sites and did not have to come to the site where he was every day. He would only record when he came.
15. The respondent's further witness Ms Evelyn Aswani stated that she worked for the respondent as a security officer and that she was in charge of the attendance register at MMUST. She was the one who prepared the attendance register concerning the claimant but forgot to indicate his name.
16. In cross-examination he stated that the site had about forty workers but concerning the claimant, there was a separate register. She used to record when the claimant reported to work and when he did not.
17. The claimant was summarily dismissed for failing to show up for a meeting called on 17th? January, 2019 (see the dismissal letter dated 21st? January, 2019). The accusation against the claimant was that he chronically absented himself from work without authority. By a letter dated 10th? September, 2018 the respondent called upon the claimant to provide copies of off-duty applications forms and approvals from his supervisor. The letter further asked him to provide sick offs granted by a Government Medical Officer. The claimant did not appear to seriously dispute the fact that he absented himself from work. He further conceded that he did not furnish any sick off granted by a government doctor but stated the reason for not providing the sick sheet was because he attended a private doctor. The claimant however did not produce any document to show a private doctor attended to him.
18. By a letter dated 17th? January 2019 the claimant was invited for a meeting to show cause why disciplinary action should not be taken against him for absconding duty from 12th? January 2019. A period of five days. As per the minutes attached as part of the respondent's bundle of documents, this meeting took place and the claimant attended and the issue of his absence from work deliberated on. The claimant is recorded to desired to be released by the respondent since his relationship with the director had severed. The director is recorded to have responded by saying he would get back to him but asked that the claimant put his request in writing.
19. The court was not shown any notice or communication to the claimant concerning a meeting scheduled for 17th? January,2019 which he was accused of not attending leading to his summary dismissal.
20. A dismissal or termination of employment would be considered unfair if the reason for such dismissal or termination is different from the accusations levelled against such employee and over which he or she had been accorded an opportunity to defend self.
21. It is evidently clear from the foregoing that the claimant was dismissed not because he was guilty of chronic absence from work but because he failed to attend a meeting called by the respondent on 17th? January 2019. No evidence of notice of such meeting served on the claimant was produced. Further, if the claimant was to be dismissed for not attending this meeting he ought to have first of all been taken through a disciplinary hearing as required by the Act before he could be summarily dismissed. To this extent the court finds and holds that the claimant's dismissal was unfair within the meaning of section 45 of the Employment Act.
22. The claimants other heads of claim such as house allowance, annual leave and severance pay will be rejected because first of all no evidence was produced to support the same. The claimant was fairly senior and worked for almost 6 years hence ought to have on occasion even once, raised the issue of unpaid house allowance and annual leave with the respondent. The claim for service pay will also be rejected because the claimant was registered with NSSF.

23. Considering that the claimant had served the respondent for about six years and in view of his own admission that he absented himself from work on medical grounds but never presented any medical documents to support the same, the court will for the reason that the dismissal was for reasons he was never accused of in the first place award the claimant as follows:

- a. One month's salary in lieu of notice 100,000

- b. Four months' salary as compensation for
unfair termination 400,000

500,000

- c. Cost of the suit

- d. Items (a) and (b) shall be subject to taxes and statutory deductions.

24. It is so ordered.

Dated at Nairobi this 23rd day of October, 2020

Abuodha Jorum Nelson

Judge

Delivered this 23rd day of October, 2020

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge