



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.199 OF 2016

WINNISTONE AYIEKHA MUSIONI.....CLAIMANT

VERSUS

ERETO BOOKSHOP LIMITED.....RESPONDENT

JUDGEMENT

On 2nd December, 2013 the claimant was employed by the respondent as a general worker at a gross wage of Ksh.11, 623.00 per month. On 5th October, 2015 the claimant was suspended and since there has been no communication. Such resulted in unfair termination of employment. The claimant made demand for payment of his dues but the respondent failed to oblige.

The matter was reported to the labour officer but the respondent failed to make good the claims.

The claimant is seeking the payment of the following dues;

- a) Notice pay Ksh.11,623.00;
- b) Untaken leave Ksh.11,623.00;
- c) Pro-rata leave Ksh.8,717.25;
- d) Service pay Ksh.5,811.50;
- e) Service pay Ksh.4,358.63;
- f) Unpaid house allowance Ksh.36,612.45;
- g) Damages for unfair termination of employment Ksh.218,22.83;
- h) Certificate of service; and
- i) Costs.

The claimant testified that in the year 2013 he was employed by the respondent as a shop attendant and while on duty the respondent would give them lunch and he would buy his own and add to his portion. The respondent accused him of taking more food than required and on which basis he was suspended. The respondent gave him a paper to write down what had happened and on this basis the claimant wrote an apology to safeguard his employment but such resulted in termination of employment. The claimant had hoped for a pardon but the respondent used the apology to dismiss him.

The claimant also testified that upon his employment being terminated he was not paid his terminal dues as set out in the Memorandum of Claim.

In defence the respondent admit the claimant was an employee but got involved in theft of its property to which the admitted and wrote an apology. The respondent had then lost confidence and faith in the claimant and thus issued him with a letter terminating employment. Terminal dues were calculated and cheques issued to the claimant but he declined to accept. The claims made are without merit and should be dismissed.

Mr Simon Masikonde the managing director for the respondent testified that he employed the claimant as a shop attendant but terminated his employment on 15th October, 2015 following acts of theft to which the admitted. The claimant became a habitual thief and when he was caught he called him to his office where he wrote an apology. There was rampant theft by several employees which run the business down forcing him to close the enterprise.

Mr Masikonde also testified that he called the claimant to collect his terminal dues which he has failed to attend to.

By letter dated 15th October, 2015 the respondent terminated the claimant in his employment on the grounds that on 5th October, 2015 he was implicated in a syndicate where foodstuffs were stolen from the kitchen. such acts had continued to happen despite several verbal warnings and following the written confession by the claimant, the respondent found it necessary to terminate employment.

In the same letter the respondent offered to pay to the claimant salary for 5 days worked all at Ksh.1, 125.00. Mr Masikonde for the respondent testified that the claimant refused to accept the payment in terminal dues.

The claimant admitted that he was suspended from work on 5th October, 2015 following what he alleged claimed to be for unknown reasons. However, there is letter of apology done in his hand on equal date as follows;

Re: Apology and Confession for Eating Chips and Other Foods

.....I do apologise and confess that time and again I have been eating café's foods without buying. I have [been] eating food like chips, beef, meat, tea, milk, soup. I confess before the manager that I have done so instead of helping to control. ...

Section 44 of the Employment Act, 2007 allow an employer to summarily dismiss an employee for a fundamental breach of the employment contract following acts of criminal nature or acts which constitute loss of confidence and trust. In this regard the claimant admitted to theft and putting to waste the employer's property and which resulted in the business closing down.

The allegations by the claimant in his pleadings that he was sent away on suspension for no good cause are therefore not true. Such is in perpetuation of the lack of trust, confidence and a reflection in his person and character. The notice issued to the claimant terminating employment on the basis of theft, for being implicated in a syndicate where foodstuffs were stolen from the respondent business was true and justified summary dismissal.

On the claims made notice pay is not due to an employee where summary dismissal is justified.

Leave days due are a right under section 28 of the Employment Act, 2007 where not taken or paid. The respondent as the employer has not submitted nay work records to demonstrate the claimant had taken or been paid for the leave days due. The claimant had tabulated leave twice and on the last year in service he is entitled to Ksh.8, 717.25.

On the claim for service pay, such is not due as the respondent was paying the statutory dues as set out in the payment statement attached to the memorandum of claim.

House allowance was paid together with the monthly wage. Such is not due.

No damages or compensation is due to an employee whose employment is lawfully terminated.

Save for the payment of leave pay at Ksh.8, 717.25 and provision of a Certificate of Service, the claims are hereby dismissed. Each party shall bear own costs.

Delivered at Nakuru this 31st day of January, 2019.

M. MBARU JUDGE

In the presence of: