



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAKURU

CAUSE NO.148 OF 2016

BENARD WANYAMA MAKOKHA CLAIMANT

VERSUS

ROBINSON INVESTMENT LTD.....RESPONDENT

JUDGEMENT

On 1st October, 2013 the claimant was employed by the respondent as the Operations Manager at a salary of Ksh.30, 000.00 per month. His duties included assigning the various guards to their respective sites, ensure security surveillance and report for new orders.

In June, 2014 the claimant was transferred to Nairobi office as branch manager and to oversee the growth of the business and recruit new security guards. The claimant was also overseeing work in Mombasa and Central Province. The respondent was guarding postal installations in Central Province where there were 18 guards together with Dedan Kimathi University.

In February, 2015 the claimant was transferred to Kisumu branch as Administrator. The duties widened with the claimant covering Kisumu, Nyanza and the western region.

For his duties, the claimant was not given a written contract.

On 24th January, 2016 the claimant was suspended over allegations that there were ghost workers between 38 and 43, 17 missing files, absenteeism and that he made the respondent to lose confidence on his daily duties and there was termination of assignments by the clients. Such suspension was for a month and without pay.

At the end of the suspension, there was no communication to the claimant over any investigations or his employment status.

On 18th January, 2016 the claimant was issued with a notice to show cause and in his response dated 19th January, 2016 he denied the allegations made.

On 24th to 207th February, 2016 the claimant reported back to work but the human resource manager told him he had no directions with regard to his case.

The claimant reported the matter to the labour officer on 1st March, 2016. He then asked for his December, 2015 and January, 2016 salaries which remained unpaid. There was no response.

There has been no communication since.

The claimant is seeking for orders that his suspension was wrongful and unlawful and that the due wages should be paid, he had not taken leave of 15 days, pay for rest days not compensated; overtime pay, public holidays, house allowance and certificate of service.

Claims;

- a) Notice pay Ksh.30,000.00;
- b) December 2015 and January, 2016 pay ksh.60,000.00;

- c) Annual leave 41 days ksh.47,307.70;
- d) Off duties/rest days 108 Ksh.725,760.00;
- e) 23 public holidays 154,560.00;
- f) Overtime 3,456 hours Ksh.1,244,160.00;
- g) House allowance Ksh.121,500.00;
- h) Compensation Ksh.360,000.00; and
- i) Costs.

The claimant testified that he worked diligently for the respondent until 24th January, 2016 when he was suspended over various allegations. The respondent alleged there were 36 ghost workers which was not true. The check list was done to facilitate the pay roll. At the time the claimant was in charge at Kisumu as the Administrator with 5 outstations. He had to attend to all complaints and made monthly reports. The claimant was also in charge of Nyanza and western region.

The claimant also testified that he did not sign the patrol chats as he was not able to travel to all the 5 outstations. The alleged 36 ghost workers included guards at the residence of the member of parliament which was 50 kilometres away from Kisumu and he was only required to call and confirm work attendance.

Upon suspension, the claimant replied to the allegations and when his salary was not paid, he reported the matter to the labour officer. The allegations that he stole through the ghost workers is not true.

In response to the show cause notice the claimant noted that he had shortcomings and needed a second chance to improve. The secretary at the office would compile the attendance sheet and submit to the director. There was no notice with regard to any missing files. There was no letter of summary dismissal issued to the claimant. The one filed in court was never issued to him. Defence

The defence is that the claimant being an administrator was entrusted with various duties while at Kisumu branch. He was required to coordinate with supervisors and advise the respondent. he was the official custodian of all office files and was required to ensure that all guards signed a check list to confirm work attendance.

In January, 2016 after auditing a few check lists, the respondent discovered that he was not properly coordinating with his supervisors leading to unsigned checklists leading to absent guards or 'ghost' workers being included in the payroll and getting unjustified pay. The claimant also failed to advise the respondent over misused company property in repairs, maintenance and in salaries and was carrying out illegitimate trade with the company fuel hence stealing from the respondent.

The claimant was issued with a notice to show cause on 8th January, 2016. The claimant replied on 9th January, 2016 and admitted that there were unsigned checklists and needed a second chance to improve on his work. This was negligence, careless and in disregard of duty. The respondent had no confidence in the claimant's work.

On 11th January, 2016 the respondent audited the Kisumu office files and discovered a total of 53 files of its current employees missing. These files would be used for identification. This exposed the respondent to absentee of ghost workers and a loss of funds. These files had been entrusted upon the claimant. He was issued with notice to avail these files.

The defence is also that the claimant is guilty of gross misconduct for defrauding his employer by fixing fake/gross workers into the employer's muster roll and pay rolls without the respondent's knowledge. Such was dishonest conduct.

The claimant was suspended on 24th January, 2016 pending investigations on the grounds that the respondent conducted two head counts and found ghost workers ranging between 38 and 43. There were 17 files missing even after the respondent requiring the claimant to address the matter. The respondent lost business due to the negligence of the claimant. Upon such evidence there was no other option save to dismiss the claimant for fraud, gross misconduct and the matter was reported to the police over stealing by servant.

The summary dismissal was in compliance with section 44 and 41 of the Employment Act. the dismissal was lawful and fair and in accordance with fair procedure. There is no notice pay or compensation due to the claimant and the suit should be dismissed with costs.

Agnes Rutinu testified that she is a director of the respondent and had employed the claimant as administrator, Kisumu branch to run the same by supervising the staff under him. The respondent carried an audit of the claimant's checklists in January, 2016 and discovered he had failed to coordinate with the supervisors leading to unsigned checklists and there were ghost workers included in the payroll and getting unjustified wages.

From December, 2015 the respondent noticed increased staff in Kisumu. An audit was done and it was noted the high wages paid but the files were missing the checklists submitted some were not signed. The claimant and the supervisors were facilitated to travel and check on the guards. Vehicle was fuelled and motor bike given for this purpose. The defence that the guards were far away from Kisumu is not justified as traveling to such places was facilitated by the respondent.

The claimant was issued with a show cause notice on 8th January, 2016 and replied on 9th January, 2016 and admitted to the misconduct.

Ms Runitu also testified that on 11th January, 2016 the respondent carried out another audit and discovered total 53 employees' files under the claimant missing and without any justifiable explanation. A notice was issued to the claimant to avail the missing files and he was also suspended.

During investigations the respondent discovered 43 ghost workers under the claimant's docket and 17 files missing. The respondent was forced to issue letter of summary dismissal.

The respondent lost ksh.160, 000.00 for 21 months all being over Ksh.1 million. The claimant was informed of the decision regarding dismissal and the labour officer was copied to the same notice.

The claimant had taken his due leave days in October, 2013 and in March, 2014 and no days were overdue as a result. As an administrator, the claimant's role required him to be in the office between 8am to 5pm. He as only supervisory and not a guard required at work overtime. The guards were to report to their supervisors while the claimant would get reports therefrom. The due salary was agreed at ksh.30, 000.00 which was inclusive of a house allowance. The claimant owes the respondent Ksh.1, 731,000.00 funds lost due to ghost workers.

Both parties filed written submissions.

On 25th February, 2016 the claimant was issued with letter of summary dismissal on the grounds that following several head counts of staff at his branch it was established that there were ghost workers being paid by the respondent and as a result lost huge funds. The presence of ghost workers led to stealing therefore the reasons for the dismissal from employment.

Section 44(3) and (4) of the Employment Act, 2007 allow an employer to dismiss an employee where the employee has fundamentally breached the employment contract or has grossly misconducted himself, has performed work carelessly by being negligent and has put into loss the property of the employer. Also where an employee has committed acts of a criminal nature or is convicted is liable to summary dismissal.

The only condition the employer has to meet is ensuring procedural justice pursuant to the provisions of section 41(2) of the Employment Act, 2007;

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

The employee must be given a hearing however short the notice.

In this case on 8th January, 2016 the claimant was suspended on the grounds that;

It has been discovered that either you have absented yourself from duty most often you have misused the company property, due to absence of blank and unsigned check list, one being bicycle assigned to you by carrying out illegitimate trade with the same, as well forging the said signatories for various guards.

From time to time guards have called and complained of not being visited at their assignments neither you not knowing their problems, which signal a clear sign of your carelessness and negligence of your duties. ...

On equal date, 8th January, 2016 the claimant was issued with notice to show cause on the grounds that;

The management has regrettably noted that you have failed to properly co-ordinate with your juniors, being supervisors under your obligated watch.

The company has taken and already audited few of your check lists which are already discouraging, and signals theft from the company due to unsigned check list, hence the company cant determine the number of ghost workers it has been paying for quite long. Therefore the company is counting loss due to your carelessness.

The claimant replied the next day, 9th January, 2016 and admitting that;

... (4) Most of the days I was away to outstations due to incidents and new deployments month of December 2015 and was a result the supervisors took advantage of my absence and played sinister games knowing that the check lists were not checked and issued. I am really disturbed about this occurrence.

...

Though some shortcomings have been noted by the management on my work performance I promise that given a second chance I will correct and improve on what I have failed and mistakes done by the supervisors not to happen again and I am very remorseful of what happened behind my back by supervisors. ...

Following these responses, on 11th January, 2016 the claimant was issued with notice and directed to avail missing files following an audit and discovery that over 53 files under his administration were missing. The claimant testified and confirmed that he was issued with the show cause notice and also suspended from duty. The respondent also testified that they brought to the attention of the claimant the issue of the missing files and upon which some were recovered whereas 177 were not traced.

For the reasons given, notice issued and responses made by the claimant as at 9th January, 2016 summary dismissal was justified. The respondent however opted to suspend the claimant and issued letter of summary dismissal on 25th February, 2016 and that following the audit and tabulation of lost files and ghost workers, the claimant owed Ksh.1, 771,000.00. The matters of theft had also been reported to the police. There is an OB record.

Following a suspension, the employee is entitled to a hearing in accordance with section 41 of the Employment Act, 2007. Such hearing is to allow the employee to give his defence and in the presence of another employee of his choice.

From the proceedings, after the claimant was issued with show cause notice, more malpractices were noted and particular the one relating to missing files. Some files were recovered and other has not been recovered. During such investigations and findings the claimant was on suspension.

Save for the responses given on 9th January, 2016 the claimant was not given a hearing following his suspension. As much as the respondent made findings which in their nature justified summary dismissal for gross misconduct, the claimant was entitled to a hearing.

Without a hearing, the resulting dismissal became procedurally unfair. Even where there are justifiable grounds, due process is mandatory in accordance with section 41 of the Employment Act, 2007. Employment terminated on 25th February, 2016 and the wages due up and until such date are due.

On the admission by the claimant that there were work lapses following his failures to supervise employees under his watch, the respondent incurred losses as a result, for such losses, section 19(1)(b) of the Employment Act, 2007 allow for a deduction of such loss from the due wages of the employee;

(b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee;

In this case the respondent has made a demand of Ksh.1, 771,000.00 for the 23 months of the claimant keeping ghost workers and a monthly payment of ksh.161, 000.00. There is no specific defence the claimant made in this regard.

Such monies are reasonably due from the claimant putting his responses of 9th January 2016 into account. He allowed his supervisors to file check list returns which were not signed. Such led to losses by the respondent. the claimant admitted to his lapses in this regard.

For the failure to abide the mandatory provisions of the law, compensation is awarded to the claimant at one (1) months' pay all at Ksh.30,000.00 and the wages due for January and February, 2016 are assessed at Ksh.030,000.00 all being Ksh.60,000.00. from such dues, the respondent shall recover its losses and in accordance with section 20 of the Employment Act, 2007.

As there is no counter-claim for the lost monies, the available terminal dues are the only available monies to the respondent to recover from on the losses incurred.

The claimant is seeking the payment of his annual leave days all at 41 days. The respondent witness testified that the claimant took his due annual leave for the year 2014 and had just taken more leave days in the year 2015. However no record is submitted. As the custodian of the work records, where the claimant took his annual leave as required under section 28 of the Act, such record should have resolved the matter.

Without the record of the claimant taking his annual leave days all being 41 days, such is due and awarded at ksh.47, 307.70.

On the claim for off days and overtime pay, the claimant was an administrator and required to be at work for specified hours. His evidence was that he was made to be at work over hours and did not take a rest. However, where an employee opts to be at the place of work before reporting time and remains at work after work hours to be able to complete tasks which ordinarily ought to have been completed within the allocated time, such over hours cannot be expended at the expense of the employer without approval, consent or authorisation. The fact of reporting to work early or leaving work late must have a rationale. It cannot be a daily occurrence unless with the concurrence of the employer. Such claims are declined.

Work during public holidays should be compensated. Without the work records in this regard, the claimant is entitled to pay for the 23 noted public holidays all at Ksh.154, 560.00.

On the claim for house allowance, there being no record of an employment contract giving a consolidated wage of ksh.30,000.00 as required under section 10(1) and (3) of the Employment Act, 2007 read together with section 31 of the Act, house allowance is due as claimed.

The failure by an employer to issue an employee with a written contract of employment only serves damage to the employer. Where there are no written terms and conditions of engagement, upon filing suit with the court, the word of the employee must be believed where it has a foundation in the applicable law.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

(a) Compensation Ksh.30,000.00;

(b) Unpaid wages for January and February, 2016 Kshs.60,000.00;

(c) Pay for work during public holidays Ksh.154,560.00;

(d) House allowance ksh.121,500.00;

(e) Annual leave pay Ksh.47,307.70;

(f) From the above dues the respondent shall recover losses incurred at the instance of the claimant at ksh.1,771,000.00;

(g) Each party shall bear own costs.

Delivered at Nakuru this 21st day of February, 2019.

M. MBARU JUDGE

In the presence of: