



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 378 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

GEORGE NJENGA GAKARI.....CLAIMANT

VERSUS

DOSHI ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

The Claimant is a former employee of the Respondent who filed suit through the firm of Mudeshi Muhanda & Company Advocates seeking damages for wrongful and unfair termination. He avers that he was employed by the Respondent on 30th January, 2009 as a sales representative earning a salary of Kshs.35,000.

He avers that he carried out his work with great commitment which the Respondent acknowledged by reviewing his salary to Kshs.94,769.

That on 21st May, 2012, he proceeded on annual leave and paternity leave and on the day he was to report back, he fell sick and through an email he informed the General Manager Mr. Vimal Vaghela and Human Resource Manager Scholastica Koome that he could not report to work.

That he was given 2 weeks sick off but he reported back to work after 2 days as he was feeling much better. On reporting back to work he was informed by the Human Resource Manager that she had been instructed to terminate his services and was thereafter handed a termination letter.

He avers that the termination was brutal and undermined all the efforts he had put in the process of working for the Respondent. That at the time of termination he had a loan with equity bank and was unable to service it due to loss of employment and his name was referred to the Credit Reference Bureau which tainted his name.

That by summarily dismissing him, the Respondent had breached the mandatory provisions of section 35 and 36 of the Employment Act as no hearing ever took place and due process was thrown out of the window.

He was paid half his pension of Kshs.71,702/= and was informed that he would become eligible for the other half on attaining 50 years. He thus prays for one month's salary in lieu of notice, House Allowance and damages for wrongful and unfair termination.

The Respondent in the Statement of Response admits the employment but deny that the termination was wrongful and unfair. The respondent avers that the Claimant was a perpetual derelict and on 26th June, 2012, when he was to report back to work from leave the Respondent's efforts to reach him were fruitless.

That on 27th June, 2012, the respondent received a call from the Claimant indicating that he was unwell where upon he was requested to avail medical evidence to process sick leave on his behalf. That the Claimant failed to furnish this evidence until 14 days later when he sent an email attaching the doctor's diagnosis and after insistence that the Claimant availed a scanned copy of the alleged medical evidence.

The Respondent alleges that the Claimant was reckless and arrogant and refer to an incident on 16th July, 2012, when the Claimant went to the office and demanded that he be sacked if the Respondent so wished.

That the Respondent sought to know the reasons why the Claimant absconded work but the Claimant refused to respond to the same. His case was referred to the General Manger of the Respondent but the Claimant still failed to respond. Based on this the respondent terminated

the claimant's employment.

Evidence

The Claimant led evidence as set out in the claim and upon cross examination he conceded that his gross salary was Kshs.56,000 and not 94,709 as pleaded. He also stated that he proceeded to both his annual leave and paternity leave and was supposed to report back on 9th July, 2012 but fell sick and was given two weeks leave to end on 23rd July, 2012. That he communicated to the HR Manager of the Respondent via email about this but on 20th July, 2012 he was called by the HR Manager who informed him that he had been dismissed. He stated he was dismissed for an invalid reason and that he was denied due process.

He stated that he did not abscond work but that he reported to work in the field after he felt better which was two days after the doctor recommended 2 weeks sick off on 12th July, 2012.

The Respondent did not call any witnesses.

Claimant's Submissions

It is submitted that section 41 of the Employment Act was not adhered as the Respondent failed to avail evidence to show that they gave the Claimant a fair hearing prior to termination which amounted to unfair and unlawful termination. The claimant relies the case of **Industrial Cause 1050 Of 2011 Loice Otieno Vs Kenya Commercial Bank** where it was held:

“The doctrine of natural justice or procedural fairness is now an essential part of the employment relationship. An employer must comply with procedures set out in section 41 even in circumstances where summary dismissal or what the Respondent referred to as instant dismissal is contemplated.”

That the termination was unfair contrary to Article 47 of the Constitution of Kenya 2010. That the Respondent admitted to summarily dismissing the Claimant on 20th July, 2012 and as such the Claimant is entitled to damages as prayed.

As to house allowance it is submitted that the same is due as provided under section 31(1) of the Employment Act, 2007. That the Respondent failed to avail evidence to show that house allowance was paid to the Claimant. The counsel for the Claimant urged the Court to allow the Claim as drawn.

Respondent's Submissions

It is submitted on behalf of the Respondent that the claimant absconded duty without permission of the Respondent. That the letter of summary dismissal informed the Claimant of the reasons for his dismissal which were that he did not report back to work upon the completion of his sick leave days. That he could also not account for 6 days which was not controverted in evidence. That the Claimant was dismissed from service according to the provisions of section 44(4) of the Employment Act. That the Claimant was given opportunity severally to mount his defence but he failed to do so and thus the termination was lawful and fair.

As to the reliefs sought the Respondent submits that the Claimant is only entitled to payment for the days he worked in the month of July, 2012 subject to completion and clearance procedures of the Respondent.

On house allowance it is submitted that according to the contract of employment the Claimant was to be paid a consolidated wage and as such the claim for house allowance should fail. They submit that the Claim should be dismissed with costs.

Determination

The issues arising for determination are whether the summary dismissal of the claimant was unfair and if he is entitled to the remedies sought.

For there to be fair termination there must be both valid reason as provided in Section 43 and fair procedure as provided in Section 41 of the Employment Act.

The claimant was dismissed on grounds of absconding duty. According to the letter of dismissal the claimant went on annual leave and paternity leave and was expected back on duty on 26th June 2012. He however communicated to the Human Resource Manager on 27th June 2012 alleging that he was unwell after undergoing a minor surgery and the Doctor had recommended sick leave. The Human Resource Manager responded immediately to the claimant's email communication asking for a doctor's letter to facilitate approval of sick leave. This was on 28th June 2012. The claimant did not avail the same until 16th July 2012.

According to the letter of dismissal, the claimant did not account for 6 days.

At the hearing, the claimant first stated he was originally supposed to report back on 26th June 2012. He then stated this was a mistake as he was supposed to report back on 7th July 2012. He testified that the doctor's sick off was dated 26th June and gave him two weeks sick off. He again stated the sick off was from 9th to 23rd July.

The claimant testified that he reported to work on 12th July 2012.

From the foregoing, it would mean that up to the day he reported to work the claimant had not submitted his medical treatment documents so that he could be given sick off. The doctor's letter was submitted by email dated 16th July 2012.

The claimant did not produce a copy of the doctor's letter granting him sick off for the court to see whether it was from 9th to 23rd July 2012 or from 26th June 2012.

From the contradictory evidence of the claimant it is not clear whether or not he absconded duty for 6 days that he failed to explain as stated in the letter of dismissal. The respondent having failed to call a witness, it was incumbent upon the claimant who was alleging that the termination was unfair to prove so.

On the issue of disciplinary hearing, the respondent was evasive as to whether there was compliance with the law. The claimant stated he was not given a hearing. The letter of dismissal does not refer to any hearing having taken place or even to a notice of show cause having been issued to the claimant to respond to the averments in the statement of response to the effect that the claimant reported to the office on 16th July 2012 and demanded to be paid his terminal dues which is not supported by evidence.

From the foregoing I reach the conclusion that the claimant was not subjected to a disciplinary hearing. The result is that the dismissal of the claimant did not comply with Section 45(2) and was thus unfair.

The claimant prays for payment of one month's salary in lieu of notice. Having found his summary dismissal unfair, he is entitled to the same and I award him Kshs.56,000 which was his correct salary according to the payslip annexed to his memorandum of claim.

The claimant further prayed for house allowance for 4 years. The claimant's letter of appointment is explicit that he was paid a gross consolidated salary. He is thus not entitled to house allowance.

The claimant prayed for damages for wrongful/unfair termination on redundancy. This is not payable as he was not declared redundant. I also find that the claimant is not entitled to compensation as he was the author of his misfortune.

Conclusion

In conclusion I award the claimant the sum of Kshs.56,000. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE