



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1589 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

VINCENT ABUYA OBUNGA.....CLAIMANT

VERSUS

MAST RENTAL SERVICES LIMITED.....RESPONDENT

JUDGMENT

The Claimant filed suit vide statement of claim dated 20th September, 2013, seeking damages for unlawful termination arising out of an employment relationship with the Respondent.

He avers that from 15th June 2010, the Respondent employed the services of the claimant as a broadcast Technician at a salary of Kshs.25,000 per month which salary was reviewed to Kshs.35,000 per month after he was confirmed as a permanent employee.

That he served the Respondent with diligence and utmost loyalty until 18th July, 2013, when he alleges that he was unfairly terminated. He claims for salary in lieu of notice, house allowance, unpaid salary for 18 days worked in July 2013, deducted pension and damages for unlawful termination.

The Respondent filed its Statement of Defence on 30th October 2013, wherein it admits the employment relationship but denies that the same was unfair. The respondent avers that the Claimant misappropriated funds in the sum of Kshs.14,000/= and failed to pay security guards at the site in Nakuru where he was based.

The Respondent contends that the Claimant was deceitful and absconded duty on 8th to 12th July 2013, and left the site in the hands of a technician who was not versed in managerial duties. Further that through the Claimant's acts of embezzlement and theft the Respondent lost a power cable worth Ksh.25,000 which the Claimant admitted selling off and converting the proceeds to his personal use.

That the Respondent convened an urgent disciplinary meeting where it was resolved to summarily dismiss the Claimant. The respondent offered to pay the claimant salary for the month of July, 2013, which the Claimant rejected. According to the respondent the termination was fair and as such the Claim should be dismissed with costs.

Evidence

The Claimant led evidence to the effect that he was stationed in Nakuru from 15th June 2013, and his duties were to ensure that there was no interference with broadcasting as the Respondent's business was outsourced broadcast services. At the Nakuru site he was the person in charge of the other employees while a Mr. Wanyama was in charge when he was away.

That between 8th and 10th July 2013, his wife who was pregnant was admitted at Star Hospital which compelled him to take 3 days' leave. He received an approval of the leave by email. He attended to his wife and paid for her medical bill using a card known as "**Kadi ya Uzazi**". That he returned to the site the day his wife was discharged on 12th July 2013.

It was his evidence that while he was on leave a generator cable was lost and the incident was reported to the police.

That on 2nd July, he was sent money for 2 night watchmen and he paid them the same day. That they did not complain to him about withholding of their salaries. That on 18th July 2013 he was called to Nairobi by one Ibrahim Muchoki who was in charge of Finance and

Administration. When he arrived in Nairobi he found Mr Ibrahim with Mr Simiyu, the in charge of the respondent's 7 sites in Kenya, who told him that the Respondent was not doing well. He was requested to resign but he declined. He was then told that since he had refused to resign he was being charged with stealing 1,000 litres of petrol and for absconding duty. Thereafter he was told to never step in the Nakuru site or else they would cause him to be arrested.

That he had no clue that he would be charged on that day. That he was never allowed to collect his belongings and neither was he allowed to have a friend accompany him. He avers that he was unfairly terminated and prays for compensation as contained in the memorandum of claim to wit:

- i. A Declaration that the said termination was unfair
- ii. An Order directing the Respondent to pay the sum of Kshs.312,000.00 as salary in lieu of notice, house allowance, unpaid salary for 18 days worked in July, 2013 and deducted pension.
- iii. An order for payment of Kshs.420,000.00 to the Claimant being compensation for unfair termination of employment.
- iv. An order directing the Respondent to issue a certificate of service to the Claimant
- v. The costs of this suit with interest thereon at Court rates.
- vi. Any other relief as the Court would deem just and expedient.

Ibrahim Muchoki testified on behalf of the Respondent. He stated that the Claimant worked for the Respondent and his last posting was in Nakuru, Menengai site. That his duties included overseeing the Respondent's operations at Menengai site.

That when the Claimant was transferred to Nakuru he was initially reluctant to report to the new station but he reported and assumed his duties. That after the claimant reported RW1 got unconfirmed information that the Claimant was always absent from duty and would leave site on Sundays and report back on Fridays.

That on 5th July 2013, RW1 received information that 2 watchmen at the site had not been paid their salaries amounting to Kshs.14,000 for June, 2013. The salaries had been sent to the Claimant by the Respondent's Office Administrator to pay them by Mpesa. That the Claimant confessed to using the salary for the 2 guards because he had financial problems.

RW1 stated that on 8th July 2013, he called the Claimant to find out about the UPS for Media Max Networks Limited. The claimant requested to be allowed to get back to him in 10 minutes. This raised his suspicions about the Claimant's whereabouts and as such he called the Caretaker one Mr. Wanyama who confirmed that the claimant was not on duty from 8th July 2013 to 12th July 2013. That the leave forms produced by the claimant are a forgery as the same do not resemble the Respondent's official leave forms.

He testified that the claimant was summoned for a meeting on 18th July 2013, and upon his arrival they agreed to have the meeting on 19th July 2013 to discuss the Claimant's conduct. He was asked to attend with a witness and he indicated that he would appear with the Site Manager of Limuru a Mr. Benhard Onyari as his witness. On 19th July 2013 he preferred Mr. Crispus Simiyu the Operations Manager to be his witness.

After the meeting it was resolved to summarily dismiss the Claimant as the respondent had lost trust in him. That the Claimant refused to sign the minutes on the grounds that his brother who is a lawyer advised him not to commit himself in writing or accept a termination letter. He also refused to accept the certificate of service and payment of Kshs.29,904.00 for days worked in July, 2013.

Mr. Muchoki stated that on 24th July 2013, the Claimant confirmed in writing that he had paid the watchmen albeit belatedly. The respondent later found out that the Claimant had actually paid Kshs.4,000/= and was still to settle Kshs.10,000 which is still outstanding to date. He urged the Court to dismiss the suit.

RW2, **Chrispus Situma** testified that he was invited by the claimant and attended the disciplinary hearing with the claimant on 19th July 2013.

Claimant's Submissions

It is submitted that the Respondent did not have a valid reason to terminate the employment of the claimant as the Claimant did not abscond work as alleged by the Respondent. That the Claimant's presence on site was vital and it was not possible for him to be away save for short periods when he would delegate his duties.

Further, it is submitted that the Claimant did not misappropriate the Respondent's funds as alleged. That the purported admission on record bears a different Identity Card Number than that of the Claimant and thus it does not belong to him.

As to the stolen cable it is submitted that this was not proved as it is alleged that the cable was stolen on 12th July 2013, the same date it is alleged that the Claimant had absconded duty.

For the aforesaid reason it is submitted that there was no justification for dismissal.

On the procedure followed it is submitted that the same was flawed contrary to section 41 of the Employment Act as no notice of a disciplinary meeting was given and the claimant was not allowed to have a representative of his choice at the meeting.

The claimant relied on the case of *Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited (2014) eKLR* where it was stated:

“...the duty rests upon an employer to prove the reason or reasons for the termination and failure to do so such termination shall be deemed to have been unfair...”

On the remedies sought he prays for salary for the month of July, 2013, house allowance set at 15% of the basic pay as was held in the case of *Milkah Khakayi Kulati Vs Sandstorm (Africa) Limited (2014) eKLR*. He also prays for notice pay and damages for unfair termination set at 12 months' salary.

Respondent's submissions

It is submitted that the Respondent was justified to summarily dismiss the claimant for failing to pay employees their salaries, losing a cable while managing the site and absconding duty. That this meets the threshold set out in section 44 of the Employment Act, 2007.

As to the remedies sought it is submitted that the claimants salary was a gross remuneration which falls within the exemption of section 31(2) (a).

The Respondent admits the unpaid salary for days worked in July but they compute it at Kshs.17,490/= being salary for 15 days. That notice pay is not payable as section 44(1) and (3) contemplate a dismissal without notice.

The respondent admits the prayer for pension but state that the same should be claimed from the Respondent's insurance Company after collecting the relevant forms from the Respondent. That the Certificate of Service is ready for collection by the Claimant.

As to damages for unfair termination the Respondent denies that the termination was unfair and therefore damages do not lie.

Determination

According to the pleadings, evidence on record as well as the submissions made by and on behalf of the parties the issues for determination are whether the summary dismissal of the Claimant was fair and whether he is entitled to the prayers sought.

Section 41 of the Employment Act provides for fair procedure while section 43 provides for proof of reason for termination as follows:-

41. Notification and hearing before termination on grounds of misconduct

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.

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.

43. Proof of reason for termination

1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45(1) and (2) prohibits unfair termination. The section provides as follows:-

45. Unfair termination

1) No employer shall terminate the employment of an employee unfairly.

2) A termination of employment by an employer is unfair if the employer fails to prove—

a) that the reason for the termination is valid;

b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

c) that the employment was terminated in accordance with fair procedure.

Reason for termination

The grounds for summary dismissal according to the Respondent as extracted from the Memorandum of Response and the termination letter are, absconding of duty without permission, misappropriation of funds and loss of company property.

The Claimant however states that the incident of loss of company property occurred while he was away from the station and it is therefore not true that he was involved in its loss. The Respondent on the other hand states that they learnt of the loss on 12th July, 2013, when the Claimant was reporting back to work from his unauthorised leave and the incident was reported to the Nakuru Central Police Station. At the hearing the Claimant confessed that the cable was locked in his bedroom but on seeking to verify the same, it was found that he was lying.

On absenteeism, the Respondent aver that the Claimant was away from 8th to 12th July without authorisation. That the leave forms produced by the Claimant were fake and do not conform to the forms by the Respondent. A cursory glance at the same show a slight difference in format and content. The Claimant's form does not seem to bear an authorisation signature but he claims that the authorisation was sent by email which email is not attached to the bundle of documents in court. It is therefore right to conclude that the Claimant was away from duty without authorisation.

On misappropriation of the Respondent's funds, the Respondent in the minutes of the disciplinary meeting indicate that the Claimant confessed to converting the guard's salary to his own use. The Claimant in evidence stated that the money for the guards was sent while he was away on leave and he ensured to pay the guards immediately he reported back. The Respondent contends that an amount of Kshs.10,000/= remains outstanding from the money meant to be payment for the guards. The Claimant did not rebut this assertion. In any event he did not need to be physically present to pay the guards by Mpesa.

The three grounds for dismissal were valid as at the time of dismissal and therefore the Respondent was justified in dismissing the Claimant.

Procedure

Section 41 of the Employment Act requires that before terminating an employee on grounds of misconduct, poor performance and physical incapacity, the employer shall first explain to the employee, in a language he understands and in the presence of another employee or shop floor union representative of his choice, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their representations for consideration before the termination is decided. In this case, there was a meeting and RW2 filed a witness statement and led evidence in Court that he attended the disciplinary hearing on the claimant's invitation to be his witness where the charges were read to the claimant and the Claimant was given an opportunity to defend himself.

In the case of *Caliph O Ogega v National Social Security Fund Cause 280 of 2013 (unreported)* the court held:

"Before any employee is terminated or dismissed, such an employee must be taken through a fair procedure. This is per section 43 and 47 of the Employment Act where such an employee must receive notice with an outline of the reasons for such termination. A hearing of the employee is paramount in fair employment and labour relations based on section 35 and 41 of the Employment Act. ... due process must be followed."

In the instant the Claimant was given a hearing as envisaged in the law. For these reasons the summary dismissal of the claimant was valid.

Whether the Claimant is entitled to the remedies sought

One month's salary in lieu of notice

This being a summary dismissal, the Claimant is not entitled to payment in lieu of notice.

House allowance

Section 31 of the Employment Act provides for house allowance as follows:-

31. Housing

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service—

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

The claimant's letter of appointment states that he would be paid a gross taxable remuneration. His salary was thus inclusive of house allowance. The claim thus fails and is dismissed.

Unpaid salary

Both parties admit that the salary for days worked in July 2013, was not paid. The claimant did not deny that it was offered and he refused to accept it as alleged by the respondent. The same is thus due.

Pension

The Respondent states that the Claimant can collect the same from the Respondent's insurance company upon filling the requisite forms. The Claimant can thus pursue his contributions through the proposed channel.

Damages

Having found that the dismissal was both substantively and procedurally justified no damages are due.

Orders

The result of the foregoing is that judgment is entered for the claimant in the sum of Kshs.24,230.80 being 18 days' salary for days worked in July 2013.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE