



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT BUNGOMA

ELRC CAUSE NO. 63 OF 2017

KELVIN REYNOLD NAMALE.....CLAIMANT

VERSUS

YAKO SUPERMAKET COMPANY LTD.....RESPONDENT

J U D G M E N T

Suit was commenced by a Memorandum of Claim on 19th/12/2014 seeking reinstatement to the position held previously by the Claimant and in the alternative payment of compensation for unlawful and unfair dismissal.

The Claimant further prays for various termination benefits to wit:

- i. In lieu of leave Kshs 17,000.
- ii. Arrears salary for July 2017 Kshs 17,000
- iii. Notice pay Kshs 17,000

The Claimant also seek punitive damages against the Respondent for mistreatment and

iv. Certificate of service.

Parties agreed to conclude the matter based on the pleadings, list of documents filed and written submissions.

A consent order to that effect was recorded on 25.7.2018 by Advocates for the parties.

Facts of the Case.

The Claimant was employed by the Respondent as a casual employee on 18.8.2010.

In 2011, the Claimant was confirmed to permanent position as an Information Technology Technician earning a monthly salary of Kshs 19,380. Payslip for the month of November, 2013 was produced to confirm that fact.

The Claimant worked well and continuously until around May 2014, when the Claimant noticed some strange digital movement of funds and immediately reported the same to his supervisors and in particular to Mr. Sudhir Shambhulal Khetia.

The movement of funds was usually done after close of business as shown in annex KRN 2-6. Money paid by VAT on various items was changed and assigned to the sales of generators and other items which are VAT zero rated but which items were not actually sold.

The movement of funds were meant to deprive the Government Revenue.

Instead of acting on the matter, Mr. Khetia accused the Claimant of theft, assaulted him and called in police to arrest the Claimant (KRN '7 & '8').

One Mr. Saurabh Pandya appeared to have been doing the money transfers.

The Claimant reported the assault to the police and a P 3 report marked KRN '7' shows that Mr. Khetia slapped Claimant across the face and broke his glasses.

The Claimant was not charged with any theft despite the instigated arrest.

The Claimant was not given any show cause letter. Was not subjected to any disciplinary hearing but was simply dismissed from work without being given any letter of dismissal.

He was simply kept away from work without pay and was not paid any terminal benefits.

The Claimant prays for payment of terminal benefits set out in the Memorandum of Claim, Compensation for unlawful dismissal and punitive damages due to the unfair labour practice by Mr. Khetia, who assaulted the Claimant in the course of his employment.

Response:

The Respondent filed a response to the Memorandum of Claim on 7.1.2015 in which particulars of employment of the Claimant are admitted. Content of paragraph 1, 3, 4,5 and 6 of the statement of claim were admitted.

Therefore the position that Claimant held and the monthly salary of Kshs 19,380 is not in dispute.

The Respondent denied all the particulars of claim stating that the Claimant was not a good employee that he had warning letters and was suspected of theft of monies from the shop and reported to the police. The company had lost up to Kshs 9.5 million. The Respondent denied that Mr. Khetia assaulted the Claimant and that the Claimant is not entitled to any punitive damages as claimed or at all.

The Respondent states that the Claimant was not dismissed from work but he simply absconded from work upon being reported to the police for theft.

The Respondent counter claims general damages from the Claimant for breach of fiduciary relationship leading to loss of unspecified amount of money in the counter claim.

Determination:

The issues for determination are:

- i. Whether the Claimant was dismissed from work or he absconded from duty.
- ii. Whether the Claimant is entitled to the reliefs sought.
- iii. Whether the Respondent has proved the counter claim.

Determination:

The provisions of Section 107 and 108 of the Evidence Act Cap 80 Laws of Kenya places the burden and incident of proof on the person who alleges and who would lose the case if no evidence was led at all.

In the present suit there are serious contested issues of fact regarding whether the Claimant was dismissed from employment or as the Respondent alleges, he absconded work upon being reported to the police and was arrested on allegations of theft.

The Claimant has pleaded that he was slapped by Mr. Khetia his employer, wrongly reported to the police and was arrested just because he had discovered theft of VAT by an Indian employee and had reported to his boss Mr. Khetia.

On the contrary, the Respondent states that the Claimant did not return to work upon arrest by the police and that the Claimant should be held responsible for breach of fiduciary duty and trust and pay general damages to the Respondent.

The Claimant had filed a list of witnesses and named Kelvin Reymold Namale and others to be added but he did not record and file any witness statement for himself and for his intended witnesses. Therefore other than the pleadings before court and the admission made by the Respondent, no evidence was tendered whatsoever to prove the allegations by the Claimant that he was unlawfully dismissed from the employment of the Respondent. No evidence was also adduced to prove that the Claimant was assaulted by Mr. Khetia, his supervisor in the course of employment.

To the extent that these allegations were denied by the Respondent in the pleadings, the Claimant had the onus of proving on a balance of probabilities that indeed these events happened. It is only upon sufficient evidence being adduced by the Claimant on these matters that the burden shifts to the Respondent to rebut the claims made by the Claimant.

Accordingly, the Claimant has failed to prove on a balance of probabilities that he was unlawfully dismissed from the employment of the Respondent. The Claimant has also failed to prove that he was assaulted by Mr. Khetia in the course of his employment.

The claim for unlawful dismissal is dismissed accordingly.

Issue No. ii

Having found that the Claimant has failed to prove that he was unlawfully and unfairly dismissed from the employment of the Respondent and having also failed to show that he was unlawfully assaulted by his employer the claims for award of General and Punitive damages are dismissed.

Terminal benefits.

The fact of employment of the Claimant and the salary he earned was admitted by the Respondent. No evidence was adduced by the Respondent to rebut the prima facie evidence placed before court by the Claimant to the effect that upon separation with his employer he was not paid.

- i. Kshs 17,000 in lieu of leave and
- ii. Kshs 17,000 being arrear salary for the month of July, 2014.

The Claimant is therefore entitled to payment of Kshs 34,000 as claimed.

The manner of separation was not determined and so the Claimant is not entitled to payment in lieu of notice and the claim is dismissed.

Counter Claim

No evidence was adduced at all to prove the counter claim and the same is equally dismissed.

In the final analysis judgment is entered in favour of the Claimant as against the Respondent for Kshs 34,000 being payment in lieu of leave and arrear salary.

The sum is payable with interest at court rates from the date of filing suit till payment in full.

The Respondent to pay costs of the suit.

The Respondent to provide the Claimant with Certificate of Service within 30 days.

DATED, SIGNED and DELIVERED at BUNGOMA this 1st day of FEBRUARY, 2019.

HON. M. N. NDUMA, JUDGE

EMPLOYMENT AND LABOUR RELATIONS COURT

BUNGOMA

Appearances:-

Mr. Wekesa for Claimant

Mr. Ombaye for Respondent

Chrispo: Court Assistant.