



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.24 OF 2016**

**SAMUEL NYASIMI.....CLAIMANT**

**VERSUS**

**MERICA HOTEL.....RESPONDENT**

**JUDGEMENT**

On 19<sup>th</sup> September, 2018 both parties attended court for hearing directions and a hearing date was allocated by consent for the 25<sup>th</sup> February, 2019. On the due date the respondent and the legal representative remained absent. The claimant was heard on his evidence.

Claim

The facts to the claim are that the claimant was employed by the respondent on 31<sup>st</sup> March, 2010 as an Assistant Security and issued with appointment letter on a wage of ksh.15,000.00 per month. Such wage was not inclusive of a house allowance.

The letter of appointment indicated that the claimant would be entitled to 26 days of annual leave instead of 21 days, which violated section 28 of the Employment Act, 2007.

The claimant enjoyed some off days until 2<sup>nd</sup> January, 2013 when he left employment while earning Ksh.53,000.00 per month.

The claimant went on his off day on 1<sup>st</sup> January, 2013 and stayed home until 28<sup>th</sup> January, 2013. On 27<sup>th</sup> January, 2013 the local chief of his home in Nyamira went to the claimant's home and informed him that he had received a call where the claimant was required back at work following a problem and loss of money. The respondent then sent its officer's to the claimant's home being the Chief Security Officer Daniel Chirchir and Investigating officer Gitau and who questioned him on allegedly lost cash at work. The claimant and the officer travelled to Nakuru.

The claimant was arrested and taken to CID office where he found two other employees of the respondent, Dorcas Kiprop and Purity who were cashiers and handled the cash box and password.

On 31<sup>st</sup> January, 2013 the two cashiers were released from custody leaving the claimant. On 1<sup>st</sup> February, 2013 the claimant was charged in court for alleged theft by servant and released on bond after three months in May, 2013. The criminal case was heard until 14<sup>th</sup> October, 2015 when the claimant was set free for lack of evidence.

The claimant went to the respondent for his terminal dues but the respondent refused to pay. The respondent also refused to reinstate the claimant back to his employment.

The claimant was entitled to notice pay and for overtime hours worked as he would be at work for 16 hours a day for 6 day each week. The overtime is claimed on the grounds that the basic pay did not change from Ksh.15, 000.00 per month.

The claimant is claiming for 70 annual leave days being the balance of days not taken.

The claimant is seeking the following;

- (a) Notice pay Ksh.35,000.00;
- (b) House allowance at 15% ksh.81,000.00;

(c) Overtime ksh.1,520,620.00;

(d) Annual leave Ksh.35,000.00; and

(e) Compensation.

The claimant testified that in January, 2013 he took his annual leave but while home he was called back to work on 28<sup>th</sup> January, 2013 and arrested by the CID officer and then charged with alleged theft by servant. He was only released in May, 2013 after paying bond and was then set free in October, 2015 and when he went back to work he was not reinstated or paid his terminal dues.

The claimant also testified that the defence by the respondent that he was called back to work and he failed to report back is not correct as the respondent knew he was in custody and by calling him back to work they knew he would not be able to report back. The show cause notice was sent to his home address while he was in custody. The respondent had caused the arrest. This was not absconding duty.

#### Defence

The defence is that the claimant was employed by the respondent from 31<sup>st</sup> March, 2010 as a security assistant and promoted to supervisor until 3<sup>rd</sup> January, 2013 when he left employment on his own volition. At the time the claimant had the duty to accompany cashiers to the strong room to drop collections to a safe, keeping keys to the strong room, assigning security officers' duty and opening the strong room.

On 1<sup>st</sup> January, 2013 the claimant reported on duty at 6pm and CCTV show that he left at 3.43am which was unusual since he was supposed to leave at 6am after handing over to the day supervisor. On the same night the claimant had accompanied the cashiers to deposit cash in the strong room and in the morning when the day security went for a check they found the key to the strong room at the desk and immediately reported the matter to the night auditor and confirmed the procedure of passing through his office by the cashier and the claimant the previous night. Upon checking the strong room it was discovered the door was open and the safe and there was no money inside and efforts to reach the claimant were futile as his phone was off.

The cash in the safe was Ksh.954, 850.00 the amount the claimant stole. This was reported to Nakuru police station on 15<sup>th</sup> February, 2015 and the police travelled to Kisii where the claimant was apprehended.

On 4<sup>th</sup> February, 2013 the respondent wrote to the claimant requiring him to report to work but he never did. On 21<sup>st</sup> February, 2013 a show cause notice was issued but the claimant failed to oblige. There was no good cause shown as to why the claimant was absent from work.

On 4<sup>th</sup> March, 2013 invited the claimant to a hearing but he failed to attend. On 18<sup>th</sup> March, 2013 the disciplinary committee recommended the summary dismissal of the claimant having failed to attend at the disciplinary hearing. The letter of summary dismissal was sent to the claimant through his last known address.

The respondent also filed the various work records including the show cause notices, invitation to a hearing on his absence from work and letter of summary dismissal.

As noted above, the respondent did not attend at the hearing.

#### Determination

Despite the fact of the respondent failing to attend during the hearing the issues which emerge for determination shall be addressed on the merits and based on the pleadings, evidence and the applicable law. Such issue can be summarised as follows;

Whether there is a cause of unfair termination of employment; and

Whether the remedies sought are due.

The claimant testified that on 1<sup>st</sup> January, 2013 he went on his routine off duty and stayed home until 28<sup>th</sup> January, 2013 when his chief informed him that the respondent through its officers had called asking for him. Such long attendance for off days is not explained.

However this is clarified by the claimant in his evidence that on 31<sup>st</sup> January, 2013 he was arrested by CID at Nakuru and later charged in court for theft by servant and remained in custody until May, 2013 when he was released on bond.

Criminal proceedings against an employee have motions of their own distinct and separate from internal disciplinary proceedings following workplace misconduct. The employee who is charged in a criminal case can lawfully be taken through internal workplace disciplinary proceedings as the requirements for each is different as held by the Court of Appeal in the case of **Regent Management Limited versus Wilberforce Ojiambo Oundo [2018] eKLR**;

*It is also settled that the institution of criminal proceedings is not a bar to civil proceedings on similar facts. See this Court's decision in **Geoffrey Kiragu Njogu vs. Public Service Commission & 2 others [2015] eKLR**. With the foregoing in mind we concur with the majority decision of this Court in **Attorney General & another vs. Andrew Maina Githinji &***

**another [2016] eKLR** that a dismissed employee need not await the outcome of any criminal proceedings that may be mounted concurrently with internal disciplinary processes that may culminate in the impugned dismissal before challenging such a dismissal. Consequently, we find that the learned Judge did not err in entertaining and determining the respondent's suit during the pendency of the criminal proceedings.

As noted by this Court in **Iyego Farmers' Co-operative Sacco vs. Kenya Union of Commercial Food and Allied Workers [2015] eKLR**, whenever an issue of wrongful or unfair dismissal arises the court looks at the validity and justifiability of the reasons for termination and also interrogates procedural fairness.

In this case, the respondent was justified to require the claimant to show cause as to why he was not at work as required vide notice dated 4<sup>th</sup> February, 2013 noting the claimant's whereabouts remained unknown from 2<sup>nd</sup> January, 2013.

Absence from work without a justifiable cause is a justified ground for summary dismissal under the provisions of section 44(4) (a).

*(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;*

And an employee who is arrested and is not released within 14 days and or commits an offence against or to the substantial detriment of the employer is subject to summary dismissal under the provisions of section 44(4) (f) and (g).

*(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or*

*(g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.*

Upon the arrest of the claimant, he remained in custody for over 3 months and therefore not able to report to work. It was the duty of the claimant as the employee to report to work as required. The defence that the respondent knew when he was in custody as they had caused to be reported the loss of money is not sufficient to address workplace misconduct and requirement to report his whereabouts from 2<sup>nd</sup> January, 2013.

The show case issued was not responded to. The summary dismissal that followed is hereby found justified and in accordance with the law.

On the claims made, compensation and notice pay is not due in a case of justified summary dismissal.

The claim for house allowance is on the grounds that the claimant was paid a basic wage of ksh.15, 000.00 per month without a house allowance at 15% of such wage. For a security assistant, the wage of ksh.15, 000.00 per month is above the minimum wage for such position. The contract of employment was also specific at clause 3 that the paid wage was;

*Gross consolidated salary of ksh.15, 000.00 per month plus a share of service charge.*

On these provisions, the respondent met the requisite threshold.

On the claim for overtime pay, the claimant states that in the year 2010, 2011 and 2012 he worked for 16 hours per day for the 6 day per week such being a total of 96 hours instead of 52 hours allowed. The over hours of 44 hours were not compensated.

The claimant has attached work sheets for July, 2010. From this records;

On 20<sup>th</sup> July, 2010 it is noted time in is 1802 hours and closing time is 21<sup>st</sup> July, 2010 at 00hours but with a note that the claimant had worked for 12 hours;

On 21<sup>st</sup> July, 2010 taking over time 0001hours and closing time on 21<sup>st</sup> July, 2010 at 1020hours with a note that there was a handing over to the day guard.

From this records, where the claimant was at work on 20<sup>th</sup> July, 2010 from 1802hour to 00hours on the same day he cannot have worked for 12 hours. This is not practically possible. As he as closing the day so as to clock a new day on 21<sup>st</sup> July, 2010 the account given is not reasonable to explain work for 12 or 16 hours as claimed as the basis for overtime pay.

It is also not clear how the claimant obtained the work record which ordinarily the respondent ought to have produced. The work record submitted does not aid the claims for overtime pay at all. In any event had the claimant not made this submission, his evidence alone would have been sufficient basis to confirm the same, however with the work records filed, these claims are lost.

On the claim for annual leave for 70 days, the claimant produced the annual leave application forms approved on 1<sup>st</sup> January, 2013 for 30 days and a balance of 14 days. Leave approved on 5<sup>th</sup> March, 2012 for 25 days and balance of 25 days. Leave approved on 14<sup>th</sup> November, 2011 for 13 days and a balance of 31 days. Cumulatively, the claimant had approved 68 days off annual leave from a total of 78 leave days due under the period of employment. The balance of days not taken is 10 days pursuant to clause 6 of the employment contract which provided for 26 days of leave.

For the 10 days of annual leave days not taken this amounts to Ksh.11, 666.70.

There is no pleading for the payment of costs.

**Accordingly, the claims made are found without merit save for the annual leave pay due and assessed at ksh.11, 666.70. The claimant should also be issued with his Certificate of Service in accordance with section 51 of the Employment Act, 2007.**

**Delivered at Nakuru this 21<sup>st</sup> day of March, 2019.**

**M. MBARU**

**JUDGE**

In the presence of:

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