



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 1646 OF 2013

BENJAMIN MUOKI KATUNGE.....CLAIMANT

VERSUS

DODO WORLD KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The claimants pleaded that 28th August, 2012 he was employed by the respondent as a financial controller at a monthly salary of Kshs 240,000/=. According to the claimant he executed his duties with acumen zeal, devotion and total commitment in best interest of the respondent.
2. On or about the 5th day September, 2009, the respondent without any justifiable reason at all capriciously, unilaterally and unlawfully terminated the claimant from service. The claimant therefore sought an order for compensation from the court.
3. The respondent on its part pleaded that the claimant during the tenure of his employment engaged in embezzlement of funds and failed to adhere to orders given by his superiors. In particular the claimant severally requisitioned for monies on the pretext of attending to respondents business but failed to do so. Further that the claimant blatantly disobeyed instructions to contact the respondent's bankers to discuss the respondents operations despite being expressly instructed by the director.
4. According to the respondent the claimants conduct was highly prejudicial to the operations of the respondent given the duties bestowed upon him. Further the claimant was severally questioned by the director of the respondent on his conduct but did not provide a satisfactory answer. In his oral evidence the claimant further stated that he was terminated on 5th September, 2013 when he was due to proceed on two days off to attend to personal issues. He denied knowledge of any embezzlement of funds. It was his evidence that prior to termination he never underwent any disciplinary hearing. He further stated that prior to termination he had no disciplinary issues and that he was neither issued with any warning letter of show cause letter. Further upon termination the respondent never paid him his salary for September.
5. In cross-examination he stated that on termination he was entitled to three months' notice or one month's salary in lieu. He further stated that he was aware Mr Endo had denied writing the letter increasing his salary from 175,000/= to 240,000/= (BMK 2). The claimant further stated that the auditors came on 5th September, 2015 and denied failing to supply them with documents.
6. The respondents first witness Mr Yoshitaka Endo stated that he was the director of the respondent. It was his evidence that there were problems concerning money. The claimant decided his own salary and wrote a letter giving himself salary increment. He denied signing BMK 2 and denied ever discussing salary increment with the claimant. It was further his evidence that he called the auditors because he thought there was a problem with money. He was not conversant with accounts which is why he called the auditors. On the day they were to sit with the auditors the claimant did not report to work yet he had no official permission. He called the claimant on phone but he never answered.
7. In cross-examination he stated that the respondent did not keep attendance records. It was further his evidence that the claimant disobeyed most of his instructions.
8. The respondent's second witness Mr Stanley Mwangi stated that he was an accountant working for the respondent and before that he was working for an audit firm and the respondent was one of their clients. It was his evidence that the end of August, 2013 they went to collect information to enable them prepare an audit. They met the claimant and asked for schedules but the claimant said he did not have the schedules. The claimant became angry and pushed them away and left the office.
9. In cross-examination he said the claimant told them he had no schedule to give them. According to him the schedules were in the claimant's computer and he was the only one with access.
10. The claimant's service was terminated on allegations of embezzlement, falsehood and irresponsibility. These are grounds which if

proved can justify termination of service. The burden of proof for termination is cast upon the employer. The evidence of proof of discharge of this burden can only be demonstrated by the evidence from the employer showing that the employee was confronted with the accusations against him and called upon to offer an explanation and such explanation found unsatisfactory.

11. The respondent in this case admits that the claimant was not taken through this process. The respondent claimed the claimant did not come to work when the auditors were called yet there was no evidence in form of any letter or memorandum sent to the claimant asking him to return to work or risk his contract being terminated. Further, the respondent alleged the claimant embezzled funds and auditors were called to verify and possibly ascertain the extent of the embezzlement yet no report was produced in court over the same. The claimant would seem to have learnt about the accusations against him in the termination letter which was too late in the day.

12. To this extent, the court reaches the inevitable conclusion that the respondent failed to discharge the burden of proof of reasons for the termination of the claimant's contract and further that the termination was unprocedural hence unfair within the meaning of section 45 of the Employment Act.

13. Concerning heads of compensation, the claimant alleged that the respondent increased his salary from Kshs 175,000/= per month to Kshs 240,000/=. The respondent denied this and stated that the letter marked BMK2 in the claimant's bundle of documents which purports to be evidence of such increment was a forgery. The claimant confronted with this denial, did not produce any other evidence such as payslip, bank statement or cheque drawn on account of salary to show that indeed his salary was Kshs 240,000/= per month as claimed. Concerning severance pay, the claimant in his letter of confirmation of employment dated 29th November, 2012 was stated to be a member of the respondent's pension scheme.

14. In such a case, he was not entitled to severance pay which ought to have been in service since the former is only payable in cases of redundancy. Regarding overtime this claim was not quantified and in any event the claimant's position in the respondent was fairly senior and compensation reasonable hence could not have been entitled to overtime.

15. In conclusion the court awards the claimant as follows:

a) One months salary in lieu of notice	175,000
b) Salary for 5 days in September	29,170
c) 15 days pro rata leave for 2013	87,500
d) Six months' salary for unfair termination of service <u>1,050,000</u>	
	<u>1,341,670</u>
e) Costs of the suit	
f) Items (a), (b), (d) shall be subject to taxes and statutory deductions.	

16. It is so ordered.

Dated at Nairobi this 1st day of March, 2019

Abuodha Jorum Nelson

Judge

Delivered this 1st day of March, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge