



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 362 OF 2015

(Formerly ELRC Nairobi Cause 1289 of 2011)

SHEM BASWETI NYAMANCHE.....CLAIMANT

VERSUS

FISH PROCESSORS (2000) LIMITED.....RESPONDENT

(Before Hon. Lady Justice Maureen Onyango)

JUDGMENT

The Claim

Vide his statement of claim filed in Nairobi as Cause No. 1289 of 2011 and transferred to Kisumu by order of the court made on 21st September 2015, the claimant avers that he was employed by the respondent, a limited liability company with registered offices in Nairobi in 2000 as a driver of motor vehicle registration No. KAM 082L Isuzu Canter. That on 14th October 2008 while driving along Kisumu Bondo Road he was hijacked and robbed to Kshs.200,000 belonging to the respondent. He reported the robbery to Kombewa Police Station where he recorded a statement. The police notified Mr. Rajesh Kumar, a Director of the respondent, about the robbery. Mr. Rajesh reported to Maseno Police Station on 4th and 5th October 2008 and recorded as statement to the effect that the claimant had stolen Kshs.200,000 from the respondent.

As a consequence the claimant was arrested and charged in Maseno PMCR Case No. 1030 of 2008 with the offence of stealing by servant contrary to Section 281 of the Penal Code. After full trial the claimant was acquitted under Section 215 of the Criminal Procedure Code.

It is the claimant's averment that he reported to work daily from 4th October 2008 to 9th July 2010 when he was acquitted but he was never assigned any duties or paid salary nor was he informed that he had been dismissed from employment. Upon acquittal he requested the respondent to pay his salary arrears and reinstate him but in vain. Further the respondent did not communicate to him that he had been terminated from employment.

It is the claimant's position that he was unfairly terminated from employment. He prays for the unpaid salary from 4th October 2008 together with underpayments. He further prays for terminal benefits, unpaid leave, medical and house allowance, and overtime worked. He also prays for costs and interest.

At the hearing of the case the claimant reiterated the averments in the memorandum of claim. In addition the claimant testified that following the termination of his employment, Mr. Rajesh ensured he did not get employment anywhere, that he was employed by Sojpa but Mr. Rajesh ensured he was sacked. That he again got employed by Mombasa Maize Millers but Mr Rajesh told them that the claimant had a case with the respondent as a result of which he was relieved of his duties.

The Response

The respondent filed a statement of defence in which it avers that the claimant was in its employment up to 4th October 2008 but denies that Mr. Rajesh reported to the police that the claimant had stolen its Kshs.200,000. The respondent avers that the police investigated the alleged robbery of the claimant and in their own discretion arrested and charged the claimant.

The respondent further aver that the claimant absconded duty from the date of his arrest whereof his employment was summarily terminated.

The respondent denies that it owes the claimant as claimed in the statement of claim and prays that the same be dismissed with costs.

At the hearing of the case the respondent called one witness MR. RAJESH KUMAR PATEL who testified that following the robbery incident the claimant was arrested and charged in Maseno Principal Magistrate's Court. That the claimant did not report to work from the date he was charged on 4th October 2008. Mr. Rajesh testified that the respondent keeps records of attendances. He denied tearing the letter of demand allegedly served upon him by the claimant. He further denied that he instigated the sacking of the claimant by Shah Sojpar and Mombasa Maize Millers as alleged by the claimant and testified that after the claimant's testimony in court he made inquiries with both companies who denied that the claimant ever worked or sought employment with them.

He testified that the claimant never complained about house allowance, leave or medical allowance and stated the claims are not genuine.

Mr. Rajesh admitted during cross-examination that the claimant was not notified of the termination of his employment or that his actions amounted to absconding of duty. That the claimant was further not informed that he was required to report back to work or required to explain his absence. He testified that after the claimant absconded duty his name was retained in the register for 30 days before it was removed and that the claimant was paid for all day worked up to 4th October 2008.

Mr. Rajesh testified that the respondent had never had any problems with the claimant or his work up to the time he left. He denied receiving a demand letter from the claimant.

Determination

I have considered the pleadings and evidence and further the submissions filed by both parties. The issues for determination are whether the termination of the claimant's employment was unfair and if he is entitled to the prayers sought.

At paragraph 6 of the defence the respondent pleads that it summarily terminated the claimant's employment for absconding duty. Further at paragraph 7 of the defence it is pleaded that the claimant was dismissed as a consequence of being charged with the criminal offence of stealing by servant.

The respondent's witness admitted during cross examination that the claimant was never informed of his dismissal nor was he given an opportunity to explain why he failed to report to work.

The claimant on the other hand testified that he was reporting for work during the period he was undergoing trial but was never assigned any duties or paid salary.

Section 41 requires that an employee is informed of the reasons for which his employment is to be terminated and given an opportunity to defend himself which in this case the respondent did not do. Section 43 further requires proof of reasons for termination.

The failure of the respondent to comply with both Sections 41 and 43 implied termination of the claimant's employment was unfair in terms of Section 45 of the Employment Act. I therefore declare the termination unfair.

Remedies

The claimant prayed for salary for the period he was undergoing trial. The respondent did not controvert the claimant's averments that the claimant reported to work during the period he was undergoing trial. The respondent submitted bulky records of attendances during hearing and was advised to extract the relevant entries and file with its submissions which it failed to do.

By virtue of Section 10(7) of the Employment Act, I find that the respondent failed to controvert the claimant's evidence to the effect that he reported to work and it is the respondent who failed to assign him work. I therefore award the claimant unpaid salary arrears from 5th October 2008. I will however limit the same to 12 months' salary, as it would be unconscionable to award him salary for the entire period when he has admitted he was never assigned any work.

The claimant's salary of Shs.8,000 per month was below statutory minimum wage. I therefore award him the underpayments in the sum of Kshs.2,140.70 per month based on the minimum consolidated wage of Kshs.10,140.70 per month that he was entitled to.

In view of the fact that the underpayments are reckoned on the basis of consolidated wage, it is inclusive of house allowance which the claimant has claimed separately. The claim for house allowance is thus included as the underpayments.

On the prayer for leave, the respondent did not prove that the claimant took leave for 2008. The leave forms produced were for 2004, 2005, 2006 and 2007. I award the claimant leave for 2008. I have further noted that the leave forms reflect that the claimant did not take the minimum 21 working days. He only took two days less each year. I therefore award him 8 days leave. In total, I award the claimant 29 days' leave.

Conclusion

In conclusion, I enter judgment for the claimant against the respondent as follows –

1. Salary for 12 months based on minimum rate of pay for driver, medium sized vehicle (Kshs.10,140.70 based on minimum wage of Kshs.8,818 plus 15% house allowance) Kshs.121,688.40.
2. Underpayments for 12 months only (Kshs.10,140.70 less Kshs.8,000 paid) Kshs.2,140.70 x 12 = Kshs.25,688.40

3. Leave 29 days based on basic wage of Kshs.8,818 per month Kshs.9,835.50.

Total Kshs. 157,212.30

4. The respondent shall pay claimant's costs and interest shall accrue at court rates.

DATED AND SIGNED AT NAIROBI ON THIS 3RD DAY OF APRIL 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 29TH DAY OF APRIL 2019

MATHEWS NDERI NDUMA

JUDGE