



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.3 OF 2017

NOAH AKATU ALOMBA CLAIMANT

VERSUS

GREEN PARK GOLF & COUNTY COMPLEX

T/A THE GREAT RIFT VALLEY LODGE & GOLF RESORT RESPONDENT

JUDGEMENT

The claimant was employed by the respondent as an electrician in the maintenance department on 5th August, 2011 until on 6th December, 2014 when employment was terminated. The claimant got sick and went on sick leave.

The claimant was earning Ksh.18, 000.00 per month and which was increased to Ksh.19, 500.00 per month on 12th September, 2012 and to ksh.23, 055.00 per month from 5th August, 2013.

On 28th November, 2014 the respondent allowed the claimant to represent staff welfare at the burial of the father of a colleague Mr Maurice Amunga in Western Kenya, Kakamega County for 3 days. While at the burial in Kakamega he got sick with malaria and the doctor recommended 4 days sick off which he informed the immediate supervisor Mr Ronald Chirchir through a colleague Mr David Mukundi and Alex Musungu.

On 5th December, 2014 the claimant reported back to work and produced the treatment prescription and was allowed to work from 2 to 6pm. On 6th December, 2014 at 10am the claimant was informed by his immediate boss about the letter terminating employment which related to summary dismissal for absconding duty.

The claimant lodged an appeal on 7th December, 2014 but there was no response but proceeded to evict him from his allocated accommodation on 8th December, 2014.

On 16th August, 2016 the claimant collected his certificate of service. In the tabulation of terminal dues, there was disagreement.

The respondent failed to follow the provisions of the Collective Agreement (CBA) in addressing the summary dismissal.

The claimant is seeking the following;

- a) Two months' notice pay ksh.52,272.00;
- b) 45 months leave ksh.7,685.00;
- c) Pro-rata leave travelling allowance ksh.1,958.00;
- d) Service charge for December, 2014 ksh.8,000.00;
- e) Underpayment 2012 ksh.184,080.00;
- f) Overtime 882 hours ksh.221,646.60;
- g) Compensation ksh.276,660.00; and

h) Costs.

The claimant testified that while working for the respondent there was a delay in the implementation of the CBA and increase of wages from June 2011 and there was an underpayment. The claimant was entitled to reasonable accommodation but was kept in very harsh and inhumane conditions of living in a room of 10x10 and seeks to be paid the due underpayment and house allowance due.

The certificate of service issued is with wrong information as employment ceased on 5th December, 2014 but the certificate issued states 2nd February, 2016.

The claimant also testified that on the duty roster he was scheduled to work from 7pm to 10pm which went on for over 16 to 15 hours and the overtime hours were not compensated. In December, 2014 he was entitled to a service charge, an 8% pay on the sales but this was not paid to him. There was a night shift allowance under the CBA which was not paid.

The claimant attended burial in Kakamega and got sick. He informed his immediate boss through his work colleagues and went for treatment in Kayole at Nairobi. The respondent has a clinic but he opted to attend at his doctor's for treatment. The respondent firm is in Naivasha but he passed by on his way from Kakamega to Kayole to seek treatment.

The claimant called his witness John Ndati Mutuki who was working with him in the same department and who testified that he was in the night shift from 6 to 10pm and there was no compensation. The claims by the claimant for the extra hours should be compensated.

The witness also testified that the CBA at clause 5 made provisions for overtime which as recorded and paid in cash. There was a muster roll which had a record of work hours. Some days he worked for 7hours and some 5 hour and others 16hours or 3 hours.

Defence

The defence is that on 28th November, 2014 the claimant was granted staff pass that gave him limited time of absence from 6am and was required to resume duty but he failed to return or make official communication. The claimant had been assigned to attend burial of a colleague's father on 28th and 29th November, 2014 and was to return to work on 1st December, 2014 but he did not report back.

The respondent initiated disciplinary proceedings against the claimant for being absent from work without lawful cause and subsequently dismissed him from employment on 6th December, 2014. The alleged sick off is an afterthought as he never informed the respondent about the same. The claimant has since been issued with certificate of service.

The claims made are without merit a notice pay is not dues in a case of summary dismissal, there is no unpaid leave days or travelling allowances and alleged. Underpayments for 2012 are not justified.

The claimant was paid leave travelling allowance as noted in the payment statement for final dues at Ksh.1, 692.00. There were 10 days of leave paid at Ksh.7, 685.00 and the claimed service charge for December, 2014 is not payable as the claimant was not at work for the month. There was no overtime work unpaid. The summary dismissal was justified and no compensation is due.

David Mukundi testified that he is a carpenter with the respondent and worked with the claimant, who was dismissed for absconding duty for no lawful cause from 1st December, 2014. He had attended burial but failed to return and his whereabouts were unknown. He had accompanied the claimant with other 3 employees to the burial but the claimant failed to return with them. The claims that the claimant called him with information of being sick are not true.

Julius Waithaka Njorge also testified that he was the supervisor of the claimant and was allowed time to attend burial and was to return on 1st December, 2014 but he did not. As the supervisor, he informed the next in line Mr Chirchir. This was a busy time of the year with Christmas festivities and the services of the claimant were required but he failed to attend work. There was no communication of the absence.

The employees who worked overtime were compensated by getting off days or less work hours in a given day. All overtime hours were accounted for.

Crispin Ochieng testified that at the human resource officer the claim for underpayment in the year 2012 is not justified. In the CBA and payment slip the respondent had an oversight in July, 2012 and the total underpayment of ksh.4, 800.00 was paid. No service charge is due for December, 2014 as there was no work done. Such service charge is a shared gross profit and the claimant did not work so as to earn the same.

The overtime due as provided for in the CBA is not paid in cash. This is compensated by days off or less work hours. By December, 2014 the claimant owed in 7 days for taking more time off.

The certificate of service was issued to the claimant in the year 2016 as he had not cleared.

The claimant was provided with accommodation and meals. It was a benefit given to all employees. When an employee is unwell there is an in-house clinic for treatment and where there is a recommendation for further medical attention, the same is escalated and a referral made. The claimant failed to attend work for no good cause and the dismissal was justified.

At the close of the hearing, the respondent filed written submissions. The claimant acting in person had indicated he would file his written submissions but failed to attend.

Determination

On 6th December, 2014 the claimant was dismissed from his employment with the respondent for being absent from work from 1st December, 2014 after he had been given 3 days to attend burial. It was noted that there was no communication on the work absence which amounted to gross misconduct.

The claimant states that he got sick while attending burial and he informed his work colleagues David Mukundi and Alex Musungu to inform the boss Mr Chirchir.

Mr Mukundi testified for the defence and denied such allegations. He attended burial with the claimant but returned to work without him and his whereabouts remained unknown until he showed up at work on 5th December, 2014.

Work absence for no good cause is a justified ground for summary dismissal. Section 44(4) of the Employment Act, 2007 allow an employer to summarily dismiss an employee is absent from work without good cause. The claimant testified that he got malaria while attending burial in Kakamega and opted to attend hospital in Kayole, Nairobi.

This evidence is far-fetched. The reason being the respondent runs an in-house clinic. Treatment for staff is provided. To travel from Kakamega to Kayole, Nairobi one has to pass through Naivasha where the respondent is situated. Logic demands that a sick employee of the respondent would use the in-house facility for an illness such as malaria instead of going out of his way to Kayole, Nairobi.

In any event, even where the claimant was sick and required to attend at his private doctor, such is allowed under section 30 and 34 of the Employment Act, 2007. The only condition to be met is that the claimant should have informed the employer of the reason for absence and upon return to submit the medical certificate from a recognised government facility.

The claimant has filed a note from *East Care Medical Centre, Kayole Nairobi* done on 4th December, 2014. the note has no sick off days allocated and even where this was the case, and such note is not one envisaged under the provisions of section 43 of the Act. Far from it. The medical Certificate should emanate from a recognised medical facility. The signatory of the note presented by the claimant is left obliterated. This is on purpose and not acceptable as proof of sickness and is contrary to what the law expects as held in the case of **Dorothy Ndung'u versus Machakos University [2015] eKLR**.

Of interests is this medical note. It is issued on 4th December, 2014. The claimant does not given an account of himself from 1st to 4th December, 2014. After being allowed time to attend burial for 3 days with paid transport and in the company of 3 other employees who returned to work, it is not clarified to the employer or to the court as to where the claimant was from 1st to 4th December, 2014 when he went to Nairobi way past Naivasha so as to obtain the medical note. This does not place the claimant in good light.

The claimant was invited to show cause before summary dismissal. The claimant was accorded due process are required under section 44 read together with section 41(2) of the Employment Act, 2007. The summary dismissal is lawful and justified.

No notice pay is due or compensation.

In the payment of terminal dues, the claimant was paid for 10 days of pending leave days. From the work records filed by the respondent pursuant to section 10(6) of the Employment Act, 2007 such record speak to the facts of what leave days were due and has since been admitted at ksh.7,685.00

Equally, the evidence by the respondent that service charge was payable based on sales and profits shared and where the claimant did not work in December, 2014 he cannot justify the claim for such service charge or payment on work not rendered. To claim such payment from profits worked for by other employees would be an unjust enrichment.

Pro-rata leave travelling allowance has been admitted at ksh.1, 692.00.

On the claim for underpayment for the year 2012, the subject CBA reviewed on its terms and the wage paid to the claimant for the period, he was generously paid. The only underpayment of ksh.4, 800.00 for September to December, 2012 is admitted as the only part owing. Assessing these claims, this is correct and is awarded.

On the overtime claim, Mr Mukundi and Ochieng were able to address how overtime arose and compensated. From the work records, the hours at work when overtime work arose were well accounted for and compensated with a day off of work for fewer hours.

The claimant testified that he was living in inhumane and deplorable conditions. That he was allocated quarters of 10x10 for bachelors who were contrary to his expectations and this should be compensated.

The provisions of section 31 of the Employment Act, 2007 only requires the employer to provide the employee with reasonable accommodation. The quality is not defined. However, where an employee is provided with living quarters for a bachelor and also provided with meals while at work, the employer has met the legal threshold. The purpose is to ensure the employee is allowed housing so as to be at the place of work within reasonable reach.

Though not pleaded as to how the alleged living quarters said to be inadequate should be addressed, the claimant stood out as a person keen to exaggerate on his circumstances as his fellow work mates were happy with the allocated accommodations and meals. They also did not fault the medical facility provided and when granted time off to attend burial for a colleague's father, they complied and returned as directed.

On the Certificate of Service, section 51 of the Employment Act, 2007 requires the same be issued at the end of employment. It is not the date of issue which is important, the date when employment commenced and ended is crucial. The respondent shall re-issue the Certificate of Service in accordance with section 51 of the Act.

Accordingly, what is due is the admitted claims of leave day's ksh.7, 685.00, travelling allowance ksh.1, 692.00 an underpayments of Ksh.4, 800.00. The claimant shall be re-issued with a Certificate of Service in accordance with section 51 of the Employment Act, 2007 covering the period when employment commenced and ended. Other claims are dismissed. Each party shall bear own costs.

Delivered at Nakuru this 25th day of April, 2019.

M. MBARU

JUDGE

In the presence of: