



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 106 OF 2017

STEPHEN OKUMU ONGORO.....CLAIMANT

VS

CASAURINA NOMAD LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Stephen Okumu Ongoro was an employee of Casaurina Nomad Limited in the position of Security Bouncer. He worked as such earning a monthly salary of Kshs. 17,584 from 1st February 2010 until 9th January 2017, when his employment was terminated.
2. Following the termination, the Claimant brought a claim for compensation for unlawful termination and payment of terminal benefits. The claim is documented by a Statement of Claim dated 3rd February 2017 and filed in court on 9th February 2017. The Respondent filed a Statement of Response on 4th April 2017.
3. At the trial the Claimant testified on his own behalf and the Respondent called its Director, Ananias Nyamu Kiragu and another Security Bouncer, Killian Kahindi Kambi. Both parties further filed written submissions.

The Claimant's Case

4. The Claimant states that on 9th January 2017, his immediate boss, A. Nyamu Kiragu issued him with a dismissal letter on allegations of failing to carry out lawful instructions. He claims that he was not paid his final dues.
5. The Claimant seeks the following:

- a) One month's salary in lieu of notice.....Kshs. 17,584
- b) Leave pay for 7 years.....82,289
- c) Years of service.....61,655
- d) 12 months' salary in compensation.....211,008
- e) Costs plus interest

The Respondent's Case

6. In its Statement of Response dated 27th March 2017 and filed in court on 4th April 2017, the Respondent states that the Claimant's employment was lawfully and fairly terminated on 9th January 2017, for failure to obey lawful and proper orders issued by his employer.
7. The Respondent further states that before being served with a dismissal letter, the Claimant was notified in writing of the wilful disobedience of a lawful and proper command and was invited to make written and oral representations, which were considered by the Respondent's Grievance and Disciplinary Committee (GDC).

8. The Respondent denies the Claimant's entire claim and states that upon dismissal, the Claimant was paid all his lawful dues which he acknowledged.

Findings and Determination

9. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

10. The Claimant was summarily dismissed by letter dated 9th January 2017 which accused him of:

- a) Failure to prevent motor vehicle registration number KCF 515J, which had rammmed into the Respondent's building, from leaving the accident scene as per instructions;
- b) Failure to take photographs of the accident motor vehicle and its insurance sticker despite having an opportunity to do so;
- c) Failure to seek reinforcement to implement the Company's instructions.

11. Prior to the dismissal, the Claimant was issued with a show cause letter dated 30th December 2016 which also served as an invitation to appear before the Company's Grievance and Disciplinary Committee.

12. The Claimant responded to the show cause letter on 3rd January 2017, admitting that he had received instructions from the Director to take photographs of the accident motor vehicle and the damage caused and to make a report to the Police. In his response, the Claimant further stated that as he was receiving orders from the Director, the driver of the subject motor vehicle moved it from the accident scene. The Claimant added that he was prevented from accessing the insurance sticker by the Police Officer handling the matter.

13. The question before the Court is whether the Respondent had a justifiable reason to summarily dismiss the Claimant and whether in effecting the dismissal, due process was observed. I must state from the outset that in determining whether a dismissal or other form of termination of employment is justifiable, the Court is not expected to exchange the employer's decision with its own.

14. What the Court is required to do is to ask whether in the circumstances of the case, the employer acted reasonably and if the answer to that question is in the affirmative, then the Court should not interfere (see *Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya [2017] eKLR*).

15. It is not in contest that arising from an accident on 24th December 2016, the Respondent's property was damaged by a third party motor vehicle. From the evidence on record, the accident was reported to the Claimant by his colleague, Killian Kambi. The Claimant went to the scene and saw for himself the damage caused to the Respondent's property. He thereafter received specific instructions from the Director towards securing the accident scene and protecting his employer's interests.

16. The Claimant told the Court that he first sought out the owner of the motor vehicle who was within the Respondent's premises and as he did so the motor vehicle was moved from the scene of the accident. He further stated that he was prevented from accessing the insurance sticker by the Police Officer who was assigned to handle the case.

17. The Respondent's Director, Ananias Nyamu Kiragu testified that the Claimant had back up options from other Security Bouncers, KK Security and the Police. The Claimant did not dispute this piece of evidence and he clearly did not utilise any of the options to prevent the subject motor vehicle from leaving the scene of the accident. Further, the Claimant did not offer any explanation as to why he chose to engage the owner of the motor vehicle before securing his employer's interests.

18. Taking the circumstances of this case in their totality, it seems to me that the claimant acted irresponsibly and the Respondent had a valid reason to dismiss him as required under Section 43 of the Employment Act.

19. On the issue of the employer going against the recommendation of the GDC, the only thing to say is that the role of the GDC was to avail the Claimant an opportunity to defend himself against the allegations made against him. The employer was not bound by the recommendations of the GDC and as long as the employer's decision was lawful, the Court will not interfere.

20. On the disciplinary process adopted by the Respondent, I have this to say; the Claimant was issued with a show cause letter to which he duly responded. He thereafter appeared before the GDC accompanied by Anthony Kahindi. The procedural fairness requirements of Section 41 of the Employment Act were thus satisfied.

21. The Court therefore finds and holds that the Claimant's dismissal was lawful and fair. The claims for compensation and notice pay therefore fail and are dismissed.

Other Remedies

22. The Claimant claims leave pay for 7 years. He however admitted in cross examination that he was paid leave pay for 2015/2016. This means that the claim for leave pay is for antecedent years which would be statute barred by dint of Section 90 of the Employment Act.

23. From the Claimant's payslips which he himself produced, he was a contributing member of the National Social Security Fund (NSSF). He is therefore not entitled to service pay.

24. In the end, the Claimant's entire claim fails and is dismissed. In its final submissions, the Respondent foregoes its right to costs. I therefore direct that each party will bear their own costs.

25. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF APRIL 2019

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JUDGE

Appearance:

Mr. Tindi for the Claimant

Mr. S.M Kimani for the Respondent