



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1827 OF 2015

KEVIN BWIRE WANDERA.....CLAIMANT

VS

L.G. HARRIS & CO (E.A.) LTD.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment dispute between Kevin Bwire Wandera and L.G. Harris & Co. (E.A.) Ltd. The Claimant’s claim is documented by a Memorandum of Claim dated 12th October 2015 and filed in court on 14th October 2015. The Respondent’s defence is contained in a Memorandum in Reply dated 18th January 2016.

2. The matter came up for hearing before me on 2nd April 2019 during the Nairobi Station Service Week. The Claimant testified on his own behalf and the Respondent called its Store Manager, Nilesh Shah.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a general worker/attendant on 1st January 2013. He claims that his employment was unlawfully terminated on 31st July 2015 on unproved allegations of theft. At the time of termination, he earned a monthly salary of Kshs. 15,377.35.

4. The Claimant’s claim against the Respondent is as follows:

- a) Salary for the month of July 2015.....Kshs. 15,377.35
- b) Salary in lieu of notice.....15,377.35
- c) Compensation for loss of earnings.....184,528.20
- d) Certificate of service
- e) Costs plus interest

The Respondent’s Case

5. In its Memorandum in Reply dated 18th January 2016, the Respondent admits having employed the Claimant between 1st January 2013 and 31st July 2015.

6. The Respondent however denies terminating the Claimant’s employment and states that after receiving his salary for July 2015, the Claimant did not report to work in the month of August 2015. The Respondent accuses the Claimant of absconding duty.

Findings and Determination

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

a) Whether the Claimant has established a case of unlawful termination of employment;

b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

8. In his testimony before the Court, the Claimant stated that following accusations of theft against him and two of his colleagues, the Respondent recovered the sum of Kshs. 7,140 from his salary. Thereafter, the Claimant and his colleagues were told by the Respondent's Director, Shah to go home.

9. The Claimant further testified that he agreed to pay the sum of Kshs. 7,140 to save his job. He did not admit having stolen any goods from the Respondent and he was not given any opportunity to defend himself. He adds that after making the payment, the Respondent terminated his employment.

10. On its part, the Respondent states that the Claimant himself absconded duty soon after receiving his salary for July 2015. Its Store Manager, Nilesh Shah told the Court that on 23rd January 2015, he instructed the Claimant together with two of his colleagues, Daniel Mututa and Joseph Nguo to collect goods returned by the Respondent's customer, Nakumatt Ridgeways. The returned goods were however not delivered back to the Respondent.

11. Shah further testified that the Claimant and his colleagues conceded having lost the said goods and agreed that their value be recovered from their respective salaries. He adds that the Claimant did not report to work from 6th July 2015 and 21st July 2015 and on 27th July 2015, he left never to return.

12. The Respondent's witness was categorical that the Claimant's exit from employment was not on account of the lost goods. Rather, he left by way of desertion. This position is reinforced by the fact that the Claimant had already been surcharged for the lost goods and the Respondent could not rely on this ground without breaching the rule against double jeopardy. I say so because surcharge is itself a final disciplinary action (see *Kenya National Library Services Board v Beatrice N. Ayoti [2014] eKLR*).

13. Taking the ground of desertion as declared by the Respondent, the only question to ask is whether, in reaching the conclusion that the Claimant had indeed deserted duty, the Respondent observed due procedure. It is well settled now that desertion is a serious administrative offence which may, in an appropriate case, attract dismissal of an employee.

14. It is however also well settled that it is not enough for an employer to state that an employee has deserted duty. An employer who relies on this ground must show steps taken towards reaching out to the deserting employee, so as to put them on notice that termination of their employment is being considered. Again, as held in the South African case of *Seablo v Belgravaria Hotel (1997) 6 BLLR 829 (CCMA)* what distinguishes desertion from absence is a demonstrable intention on the part of the employee not to return to work.

15. According to Nilesh Shah who testified for the Respondent, the Claimant stayed away from work between 6th July 2015 and 21st July 2015 and then from 27th July 2015 he disappeared never to return. The Court found this testimony unbelievable for two reasons; first, no reason was given why the Respondent would pay full salary for July 2015 to an employee who worked for approximately half the month; second, having already been punished by way of surcharge, the Claimant had no reason to run away from work. At any rate, the period of absence was too short to amount to desertion.

16. In the result, the Court rejects the Respondent's line of defence that the Claimant deserted duty and thereby adopts the Claimant's plea that his employment was terminated verbally, without justifiable cause and in violation of due procedure. The Claimant is therefore entitled to compensation.

Remedies

17. Pursuant to the foregoing findings, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service as documented in his written contracts of employment as well as the Respondent's conduct in handling his case.

I further award the Claimant one (1) month's salary in lieu of notice.

18. The Claimant admitted having received his salary for the month of July 2015. This claim is therefore without basis and is dismissed.

19. Finally, I enter judgment in favour of the Claimant in the following terms:

a) 6 months' salary in compensation..... Kshs. 85,674

b) 1 month's salary in lieu of notice..... 14,279

Total..... 99,953

20. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

21. The Claimant is also entitled to a certificate of service plus costs of the case.

22. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF MAY 2019

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Omari for the Claimant

Miss Makori for the Respondent