



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CASE NO. 168 OF 2013

(Before Hon. Justice Mathews N. Nduma)

BENSON E. MISIKO.....CLAIMANT

VERSUS

MANA PHARMACY.....RESPONDENT

JUDGMENT

1. The suit is premised on amended memorandum of claim dated 13th October 2015 and filed on 15th November 2016.
2. The claimant seeks compensation for alleged unlawful and unfair termination of employment and payment of terminal benefits comprising:
 - (i) Wages for June 2012.
 - (ii) One month salary in lieu of notice
 - (iii) Underpayment of wages and
 - (iv) Unpaid overtime for 3 years.

Facts of the claim

3. The claimant was employed by the respondent in the pharmacy in June 2003 as a store keeper at a monthly salary of Kshs 3,000. The claimant worked continuously until 5th July 2012 when his employment was terminated. At the time the claimant earned Kshs. 11,000 per month.
4. The claimant reported the dispute to the Ministry of Labour for conciliation but same was not resolved.
5. The claimant testified in support of his claim under oath. He relies on the statement of claim and lists of documents filed as exhibits in this matter. The claimant told the court that his job was terminated because he asked for salary arrears for the months of June and July 2012. The claimant was verbally told to go home. He was not given notice, notice to show cause nor any valid reason for the termination. He had no written warning nor was he subjected to a disciplinary hearing.
6. That claimant went home immediately and reported matter to the union of Commercial Food and Allied Workers. The union wrote a letter of demand to the respondent dated 3rd August 2017. The claimant was charged with a criminal case in which respondent alleged he had stolen medicines from the store. The claimant was acquitted of charges. The claimant denies that he absconded duty stating that he was sacked by the respondent. The claimant testified that he was not paid in lieu of notice, was not paid for leave days not taken. That he worked from 6.00 am in the morning to 6.00 p.m in the evening and was not paid overtime. That he opened the store, cleaned it, served customers and prepared for the following day between 5 p.m to 6 p.m in the evening. That he also did stock taking and that he worked with 13 staff members. The claimant states that he was not given certificate of service. That he was not given a hearing and did not see the audit report. The claimant denied any theft. The claimant says he suffered loss and damage. The claimant had no letter of appointment either.

Response

7. Application to introduce an alleged audit report after the closure of claimant's case was dismissed by the court. RW1 Dr. Samuel Wangube testified in support of the defence case.

8. RW1 told the court that he employed the claimant from January 2012 to July 2012, a period of six (6) months only. He was a store keeper. That the claimant ran away after stock was taken at the end of June. That the audit disclosed many discrepancies in stocks. That RW1 called the claimant to his office to explain stock loss. RW1 presented to the claimant a list of documents with discrepancies. The claimant said he would like to go to the 1st floor and pick documents and come back to explain. The claimant went and never came back.

9. RW1 reported matter to the police. The claimant was arrested after ten days and charged in CM Criminal case No. 3682/2012 at Eldoret. The case was withdrawn under *Section 87 (A) of the CPC*. RW1 produced the court proceedings.

10. RW1 said the claimant worked for 5^{1/2} days a week. RW1 said he did not issue claimant with show cause letter but he called him to explain. That the claimant was the only suspect. That the case was withdrawn because police file was not available and there were no witnesses. RW1 said claimant absconded so he did not give him notice. That claimant worked only six months and was not due for any benefits.

11. RW2 was Stephen Opondo a police officer No. 69274. He was currently based at Central Police Station at Mombasa. He was the investigation officer of the case when RW1 reported theft by claimant. RW2 visited the pharmacy and arrested the claimant thereafter.

12. RW2 prepared a report and recorded O.B NO. 38727/8/17. RW2 said drugs worth Kshs two (2) Million shillings were reported stolen. RW2 stated that the claimant was in charge of the store. RW2 testified he was transferred before the criminal case was concluded. The case was withdrawn under *Section 87 (A) of CPC*. RW2 said several employees worked under the claimant. That there was no security personnel at the pharmacy. RW2 stated that the claimant had absconded duty. They went to his house and did not recover any drugs from the house. An accomplice was arrested later who was found with drugs. He was the 2nd accused. RW2 transferred the file to Corporal Munyao who was also transferred before matter was prosecuted.

Determination

13. The issues in determination are:

- (a) The period the claimant was employed.
- (b) Whether the claimant was dismissed from work or absconded duty.
- (c) Whether the claimant is entitled to the reliefs sought.

Issue (i)

14. With regard to the date of employment of the claimant the claimant pleaded in the memorandum of claim and testified that he was employed by the respondent in June 2003. That he was not given a letter of employment. That he worked continuously until when his employment was terminated on 5th July 2012. The respondent on the other hand pleaded in the Memorandum of Response and RW1 testified that the claimant was employed by the respondent in January 2012. The respondent did not produce a letter of employment.

15. *Section 9 of the Employment Act, 2007* provides:

“(1) A contract of service

Which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months shall be in writing.

(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3)”

Section 10 on the other hand provides “(7) *If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer*”

16. In the present case, there is a real dispute as to the date the claimant was employed by the respondent. The claimant alleges he was employed in June 2003 whereas the respondent states that the claimant was employed on 5th July 2012.

17. This is a major material discrepancy as to a term of contract that in terms of the law must be contained in a written contract. The respondent is obliged to reduce that term into writing but has failed to produce the written contract.

18. In terms of *Section 10(7)*, the burden of proving or disproving the date the claimant was employed has shifted to the respondent in this case. The respondent has failed to disprove the evidence by the claimant that he was employed by the respondent in June 2003. The court therefore finds that the claimant was employed by the respondent in June 2003 and not on 5th July 2012.

Issue (ii)

19. The second issue for determination is whether the claimant absconded work or his employment was terminated by the respondent. The claimant told the court that his employment was terminated by the respondent on 5th July 2012 when he demanded to be paid his salary for June 2012 which had not been paid as at that date. The claimant told the court that he was instantly chased from the employment without notice or chance to explain himself.

20. The respondent on the other hand told the court that the claimant was questioned about missing stock and asked to be allowed to go to the 1st floor of the building to get documents to explain the loss. That the claimant absconded work and disappeared completely until he was arrested by the police upon report by RW1 of the missing stock in the estimated value of Kshs 2 Million.

21. RW2 testified that he was the investigating officer in the matter and he arrested the claimant upon receiving the report from RW1. Clearly, the claimant was not at work when he was arrested. The issue is whether he had absconded from work or he had been dismissed by RW1.

22. The onus of proving on a balance of probabilities that the claimant was dismissed from employment rests with the claimant in terms of Sections 107 and 108 of the Evidence Act Cap 80 laws of Kenya. The claimant testified he left employment on 5th July 2012. That the following day he reported the termination. That he also reported the termination to the union immediately.

23. The claimant produced a demand letter from the union dated 3rd August 2012 and a record from the Ministry of Labour of the dispute he had reported. That a joint meeting was called by the ministry of labour to take place on 3rd August 2012 but it did not take place since the respondent did not attend. According to the claimant, he reported the dispute to the ministry of labour on 16th July 2012 and to the union on 25th July 2012. The claimant has not explained what he did between the 5th July 2012, when he was dismissed and the 16th July when he reported the matter to the ministry of labour and subsequently to the union on 25th July 2012.

24. The claimant contradicted himself by saying that he had left employment on 5th July 2012 and that he went home on 3rd July 2012 and reported the matter to the union the following day. This testimony is at variance with the claimant's pleadings in the statement of claim.

25. The court is also at a loss why, the claimant was demanding his salary for June and July on 5th July 2012, which demand he blames for the dismissal by RW1. At this time, the salary for July 2012 had not accrued and the delay for the June salary can hardly be said to have been inordinate.

26. These discrepancies in the claimant's testimony and the pleadings has discredited the evidence by the claimant to such an extent that the court is inclined to believe the testimony by RW1 that the claimant absconded work upon discovery of the stock loss. The version by RW1 is corroborated by the testimony by RW2 to the effect that they had to look for the claimant to arrest him for the loss of stock. The report to the police of the stock in the pharmacy renders further credibility to the version by the respondent.

27. Accordingly, the court finds that the claimant has failed to prove on a balance of probabilities that he was dismissed from work unlawfully by RW1. RW1 has sufficiently rebutted the discredited version of events narrated by the claimant.

28. The court therefore finds that the claim by the claimant that he was unlawfully dismissed from work without notice lacks merit and the suit is dismissed in this respect.

Issue (iii)

Compensation and notice pay

29. The third issue for determination is whether the claimant is entitled to the reliefs sought in the memorandum of claim. Upon the finding by the court that the claimant absconded work to avoid arrest following discovery of loss of stock, the claims for compensation and payment in lieu of notice are rendered untenable and the same are dismissed.

Salary for June 2012.

30. The claimant has proved that he worked for the respondent up to the 5th July 2012. The claim for arrear salary for the month of June up to 5th July 2012 has not been rebutted by the respondent. The court finds the claim has been sufficiently proved and awards the claimant Kshs 16,209.10 in respect thereof.

Underpayments

31. The claimant worked as a stores keeper from June 2003 to 5th July 2012. The claimant has relied on Legal Notice No. 64 of 1st May 2011 and legal notice No. 7 of 1st May 2012 to demonstrate that he was underpaid in the position of store keeper for the period 1st May 2011 to 5th May 2012. The court awards the claimant Kshs 39,305.10 in respect of the pleaded and proved underpayments.

Accrued Leave.

32. The claimant testified that he was not given leave for 9 years. The claim for unpaid leave days not taken was not defended by the

respondent who maintained that the claimant worked for the respondent only for six months. This version by the respondent has been rejected by the court. However, the claim for leave days not given is limited to three (3) years. The rest is declared to be time barred. This court awards the claimant accrued leave for three (3) years in the sum of Kshs. 46,234.80.

Service pay

33. The claimant worked for 9 years and was not placed on NSSF or any other pension schemes for the entire period by the respondent. In terms of Section 35(5) of the Employment Act, the claimant is entitled to service pay for the period worked in the sum of Kshs 54,366 as calculated in the memorandum of claim. The court awards the claimant accordingly.

34. In the final analysis the court awards the claimant terminal benefits set out herein before against the respondent as follows:

- (a) Kshs. 156,115 in respect of terminal benefits set out above.
- (b) Interest at court rates from date of filing suit till payment in full.
- (c) Costs of the suit.

35. For the avoidance of doubt, the claim for compensation and notice pay are dismissed since the claimant absconded work and was not unlawfully dismissed by the Respondent.

Judgment Dated, Signed and delivered this 20th day of May, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Kirwa for claimant.

Mr. Jaoko for Respondent

Chrispo – Court Clerk