



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE 1915 OF 2015

PETER OLOUCH DEYA.....CLAIMANT

-VERSUS-

RILEY SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 28.10.2015 alleging that his employment was unfairly terminated by the respondent on 7.3.2015. He therefore prayed for the following reliefs:

(a) A declaration that the purported dismissal by the Respondent was evil, invalid, null and void, illegal, unjust, inequitable and unfair. A declaration that the Claimant's fundamental and basic rights of employment under the provisions of the employment Act no. 11 OF 2007 and the Constitution have been infringed and trampled upon by the Respondent with impunity.

(b) A declaration that the Respondent must obey and respect the law in its dealings with the Claimant

(c) An order that the Respondent to reinstate the Claimant to employment and to pay all the wages and other entitlements due to the Claimant from date of unfair termination (7th March 2015) to the time of reinstatement to employment.

(d) General damages for:

(i) Unfair, illegal and unprocedural termination

(ii) Mental anguish and psychological torture

(e) The Respondent to pay any other loss consequent upon the illegal dismissal exemplary damages.

(f) Interest on (c), (d) and (e) above at court rates from date of unfair termination (7th March 2015) until settlement in full.

(g) Costs of this suit.

(h) Any further relief this Honourable Court may deem fit to grant.

2. The respondent denied the alleged unfair termination and contended that the claimant was fairly and lawfully terminated for absconding duty after his shift was changed from night to day. She further averred that the claimant was accorded right to appeal but he failed to exercise it. She further averred that after the termination the claimant was paid all his terminal dues and voluntarily signed a discharge voucher. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 11.12.2018 when the claimant testified as Cw1 and the respondent called her Director of Operations, Mr. Jonathan Musomba who testified as Rw1. Thereafter both parties filed written submissions. The issues for determination arising from the pleadings are:-

(a) Whether the termination of the claimant's services was unfair and unlawful.

(b) Whether the reliefs sought should be granted.

Claimant's Case

4. Cw1 testified that he was employed by the respondent as a security Guard on 23.3.2006 and worked continuously until 7.3.2015 when his services were unlawfully terminated. He further testified that on 13.2.2015, it was alleged that while on his duty as night Guard at Carnivore Restaurant, he sold tickets to patrons. That after investigation were done, he was cleared of the said allegations.

5. Cw1 further testified that on 6.3.2015 he reported to work but the HR Manager verbally suspended him for 2 weeks without citing any reason. However when he reported back after the 2 weeks suspension, he was given a dismissal letter dated 14.3.2015. The letter cited the reason for the termination as absconding duty. He contended that the termination was unfair because he was not accorded any disciplinary hearing before the dismissal and he was not given any right of appeal.

6. Cw1 further testified that after the dismissal he was paid Kshs.14,163.90 via a cheque. He contended that the said sum was in respect of salary for the days worked plus refund of his uniform levy. He therefore prayed for reliefs set out in his statement of claim.

7. In cross examination, Cw1 contended that he started with a 3 months contract after which he worked continuously. He denied ever signing the written contract produced by the respondent. He further disowned the signature in the said contract. He maintained that he worked for the respondent for 9 years and he never signed the contract filed in court by the respondent.

Defence Case

8. Rw1 testified that the claimant was employed by the respondent under fixed term contracts and the last one was from 26th April 2014 to 25th April 2015.

9. Rw1 further testified that the claimant was assigned duty as night guard at Carnivore Restaurant, the respondent's client. That on 13.2.2015, the client filed a complaint that the claimant was selling tickets to patrons for an event that was held at the Restaurant. That as a result the claimant was served with a charge sheet and asked to show cause why disciplinary action should not be taken against him. That thereafter the claimant was found innocent but the client was not comfortable with the claimant serving in the night shift and as such, he was allocated guarding duties during the day shift.

10. Rw1 further testified that on 5.3.2015, he informed the claimant about the change of his shift from night to day effective from 6.3.2015, but he flatly refused and stated that he would better quit than to work during the day shift. That true to his word from 6.3.2015, the Claimant failed to report to work and also failed to pick calls from Rw1. That after waiting for over one month, Rw1 terminated the claimant's services by the letter dated 14.4.2015 which he served by post and the claimant received the letter because he produced as exhibit herein. That the letter gave him the right of appeal but no appeal was preferred.

11. Rw1 further testified that the claimant came to the office on 21.5.2015 to demand his terminal dues which were computed as Kshs.14,163.90 made up of leave for 10 months being Kshs.9,163.90 plus refund of uniform levy of Kshs.500 per month for 10 months equaling to Kshs.5,000. He contended that the claimant received the cheque and acknowledged it as full and final settlement.

12. Rw1 further testified that the claimant knew that he was serving under fixed term contract because before renewing the contract in 2014, he applied for the renewal by letter dated 3.4.2014 which was produced as exhibits by the respondent. He blamed the claimant for breaching the contract by absconding work.

13. In cross examination, Rw1 maintained that the claimant deserted work and failed to pick his calls. That he only showed up in May 2015 demanding for his dues which was paid in full. He further contended that the claimant was a member the NSSF and all his dues were remitted as per the law.

Analysis and determination

There is no dispute that the Claimant was employed by the respondent until 14.4.2015 when he was dismissed.

Unfair and unlawful termination

14. Under section 45(2) of the Employment Act termination of Employment is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. A valid a fair reason must relate to the employee's conduct, capacity and compatibility or based on the employers operational requirement. Fair procedure refers to, but no limited to according the employee a hearing before terminating her for a cause.

Reason for termination

15. In this case, the reason cited for the dismissal was the claimants misconduct of absconding duty. Rw1 testified that on 5.3.2015, he notified the claimant that his shift had been changed from night to day shift. That the change of shift was occasioned by the client's discomfort with the claimant's service during the night shift.

16. The claimant admitted that there was a complaint from the client that he was selling tickets to patrons, which was not true. The foregoing admission corroborates the evidence by Rw1 that a decision was made to change the claimant from night shift to day shift but he declined.

The claimant has not rendered any evidence to rebut the evidence by Rw1 that he was informed about the change of shift on 5.3.2015 after which he absconded work. The evidence by Cw1 that he was suspended verbally for 2 weeks by the HR Manager has not been substantiated. He has also not proved that he reported back to work after the alleged 2 weeks suspension. Instead I find the evidence by Rw1 consistent when he stated that the claimant never reported to work from 6.3.2015 until 21.5.2015 when he went to demand his dues. The said evidence is corroborated by the acknowledgement of Kshs.14,163.90 vide cheque dated 21.5.2015 produced as defence exhibit.

17. After careful consideration of the evidence presented to the court and the submission by counsel, I find on a preponderance of evidence that the respondent has proved a valid and fair reason for dismissing the claimant as required by section 43 and 45 of the Employment Act. The reason was that the claimant absconded duty from 6.3.2015 after his shift was changed from night to day at the request of the client has was assigned to guard.

18. Under section 44(4) (a) of the Act, the employer is entitled to summarily dismiss his employee who absents himself from the place assigned for performance of his work without leave or good cause. In this cause the claimant has not proved that he absented himself from work with leave or for any good cause. Consequently I return that the dismissal of the claimant was justified.

Procedure followed

19. Under section 41 of the Employment Act, before dismissing the employee for misconduct, poor performance or physical incapacity, the employer must first explain in a language that the employee understands and in the presence of another employee or shop floor union official of his choice, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their views for consideration before the termination is decided.

20. In this case, the said hearing was never conducted. Rw1 explained that he made several call to the claimant but he never picked and after waiting for one month the claimant never showed up and as such he served him with a dismissal letter dated 14.4.2015. That the letter gave the claimant right to appeal but he never appealed but instead showed up on 21.5.2015 demanding for his dues.

21. I have perused the dismissal letter produced by the claimant. It confirms that the claimant was given a right of appeal within 14 days of the date of the letter. I am satisfied by the explanation given by Rw1 that the failure to accord the claimant a hearing before the separation was due to the claimant's own absence and failure to pick calls. I am further satisfied that the employer still gave claimant a chance of being heard on appeal but he failed to seize the opportunity after receiving the letter which he later produced as exhibit herein. He did not deny the alleged failure to pick calls from RW1.

22. In my view, I opine that where employer's efforts to accord a hearing to his employee is frustrated because of desertion, the termination of the employee's service is fair if the employer grants the employee a right of appeal or review of his case after the employee becomes aware of the termination of his contract. In this case I find and hold that the employer has proved on a balance of probability that she followed a fair procedure before dismissing the claimant as required by section 41 and 45 of the Employment Act.

23. Having found that the employer herein has proved that the dismissal of the claimant was grounded on a valid no fair reason and that a fair procedure was followed. I return that the dismissal of the claimant by the letter dated 14.4.2015 was fair and lawful within the meaning of section 45 of the Employment Act.

Reliefs

24. In view of the foregoing holding, I dismiss all the prayers sought by the claimant for lack of merits and legal basis.

Conclusion and Disposition

25. I have found that the dismissal of the claimant was substantively and procedurally fair. I have further found that the reliefs sought are not merited. Consequently, I dismiss the suit with no costs.

Dated, Signed and Delivered in Open Court at Nairobi this 3rd day of May, 2019

ONESMUS N. MAKAU

JUDGE