



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2128 OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 27th June, 2019)

GODFREY OTWORI ONKUNDI.....CLAIMANT

VERSUS

RAVINE ROSES LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed an Amended Statement of Claim Amended on 28th December, 2018, seeking damages for unfair termination from the Respondent's employment. He states that he was employed by the Respondent in the year 2008 as a general worker at its Eldama Ravine Branch earning a monthly salary of Kenya Shillings: Four Thousand Three Hundred. He further states that the salary was subject to increment as provided for in his appointment letter.

2. The Claimant was confirmed as a General Worker vide the confirmation letter dated 1st April 2008. He diligently and dutifully rendered services as a General Worker until on or about 22nd October 2011, when he was maliciously and without lawful cause or any lawful excuse terminated from his employment.

3. The Claimant further states that prior to his termination the following events took place. First, in the first week of September 2011 he was verbally suspended by the Respondent's Human Resource Manager pending investigation on loss of company property.

4. Second, on 19th September 2011 he was informed that investigations were complete and he was asked to resume duty immediately, which direction he complied with. Third, on 22nd October 2011 the Human Resource Manager terminated him without lawful cause or any lawful excuse.

5. The Claimant avers that the Respondent's termination of his employment was wrongful and unfair for the following reasons:

a) There was no notification by the Respondent of the intention and reason for considering termination of the Claimant's employment.

b) The Respondent never heard and/or accorded the Claimant an opportunity to make representations against any accusations if any prior to termination.

c) There were no reasons given for the termination of employment.

d) The termination is in breach of Section 41 as read with Section 45 of the employment Act, 2007.

6. The Claimant further avers that the termination was out of discrimination on tribal basis and is therefore in breach of Article 27 of the Constitution of Kenya 2010 that provides for equality and freedom from discrimination.

7. In his Amended Statement of Claim the Claimant prays for the following:-

a) A declaration that the termination of the Claimant from his employment was unfair and unlawful.

b) The Claimant to be paid his full salary and allowances during the period of termination.

Evidence

18. The Claimant, CW1 in his evidence stated that he was employed by the Respondent in January, 2008 as a General Worker and was thereafter promoted to the position of mechanic earning a monthly salary of Kenya Shillings Five Thousand. He further testified that his last pay was Kenya Shillings Ten Thousand Eight Hundred and Fifty Three as per the attached payslips.
19. CW1 further testified that he continuously worked for the Respondent herein upto September 2011 when his services were suspended due to a theft that occurred at the Respondent Company. It was his evidence that he was called by the Human Resource Manager on 20th September, 2011 and was informed that his services were not required by the Respondent.
20. CW1 averred that he was not informed of the reason for his termination prior to his termination. He further urged the Court to allow his Claim as drawn.
21. On cross-examination, CW1 stated that his appointment letter which he duly signed was from Karen Roses Limited. He further added that his confirmation letter was similarly from Karen Roses Limited and so were the payslips attached as evidence in this matter.
22. On further cross examination the Claimant stated that he was paid a half of his Salary for the Month of September, 2011. He further confirmed to the Court that his total earning was Kshs. 12,853.70/-.
23. CW1 contended that prior to his termination he was not accorded any disciplinary hearing and that he was terminated verbally. CW1 further stated that he did not report the matter to the union as he was not a member of any union.
24. On further cross-examination, CW 1 stated that his suspension from his employment was similarly done in a verbal manner. It was his further testimony that he has never cleared with the Respondent following his termination.
25. CW1 stated that despite applying for leave he never proceeded for any leave as he was informed that there was no one to relieve him.
26. On re-examination, CW1 stated that he was not a member of any union as no union official members were introduced to him by the Respondent.
27. CW2, Peterson Wachira in his capacity as Registrar of Companies and upon receiving summons from the Court attended the hearing and produced the official search for Karen Roses Limited as well as that of Ravine Roses.
28. With regards to Ravine Roses CW2 testified that the same was registered as a business name on 17th November, 1997 and the nature of business is floriculture.
29. He further testified that the two companies (Karen Roses Limited and Ravine Roses) registration numbers C43444 and 274215 respectively are related as Karen Roses Limited is the one that opened Ravine Roses.
30. On cross-examination, CW2 stated that Ravine Roses was registered as a business name and not a company. He further testified that Ravine Roses can contract on its own having duly been registered as a legal entity. He further added that Ravine Roses still exists.
31. CW2 on further cross examination stated that Karen Roses was incorporated on 11th July, 1990. He further confirmed that the shareholding of Karen Roses is indicated in the certificate of incorporation and that Ravine Roses is not a shareholder or director therein.
32. On re-examination, CW2 stated that Karen Roses is a proprietor of Ravine Roses limited.
33. The Respondent called two witnesses.
34. RW1, Beth Obilla, the HR Manager at the Respondent herein testified on behalf of the Respondent. It was her evidence that the Claimant's termination was not verbal as alleged by the Claimant. She further indicated that the Claimant absconded duties and thereafter his services were thereafter terminated on that account.
35. It was her further testimony that the Claimant was employed by Karen Roses and that Ravine Roses does not employ anyone.
36. On cross-examination, RW1 confirmed that the Claimant was a general worker and was engaged between the year 2008 to 2011 when his services were terminated following his desertion from duty.
37. RW1 also confirmed that the Claimant was never invited for any disciplinary hearing by the Respondent. She also confirmed that the Claimant was served with a suspension letter, which indicated the reason for his suspension clearly as well as a termination letter although she stated that she was not aware of how the letters were served upon the Claimant herein.
38. On re-examination, RW1 stated that the Claimant's services were suspended on account of siphoning of fuel and that after investigation there was no sufficient evidence gathered. He however averred that the Claimant absconded his duties with the Respondent.
39. RW 2 Johnston Wanjala Wamalwa, is the Chief Shop Steward of the Respondent Company and works for Karen Roses as a driver. It was his evidence that the Claimant is known to him and that the Claimant never reported any dispute that he had with him as a shop steward.

40. It was his further testimony that all cases that had disputes were reported to him for amicable settlement and that he was not aware that the Claimant's services had been terminated or otherwise.

41. On cross-examination, RW2 indicated that despite having inducted the Claimant herein he had no evidence to support the claim. He further confirmed that he was involved in all cases where employees of the Respondent were suspended and that the Claimant failed to report any dispute with him.

42. RW2 further confirmed that the Claimant did not go through any disciplinary process.

43. On re-examination, RW2 indicated to the Court that the Claimant left his employment on his own motion and that he failed to inform him of any dispute that may have existed between him and the Respondent herein.

44. The Respondent urged the Court to dismiss the instant Claim with Costs.

Submissions

45. It is submitted on behalf of the Respondent that the Claimant was duly informed in writing of the reason for his suspension and that the said letter was served upon him on 24th August, 2011. It is further the Respondent's submission that the Claimant was not at any time unlawfully terminated and/or discriminated upon as alleged by the Claimant herein.

46. It is further the Respondent's submission that the Claimant has sued the wrong party as he testified having been unlawfully and verbally terminated by Ravine Roses Limited and that there is no evidence of Karen Roses Limited being a shareholder or as director and that the two entities are to be considered separate and distinct.

47. It is further their submission that the instant Claim ought to be dismissed the Claimant having sued the wrong party.

48. It is further submitted that the Claimant is not entitled to the reliefs as sought in his Statement of Claim having deserted duty on 22nd October, 2010 without any justifiable reason and that the Respondent was under no obligation to pursue him to return to work.

49. In conclusion, the Respondent urged the Court to dismiss the Claim in its entirety with costs to the Respondent the Claimant having failed to embrace Alternative Dispute Resolution mechanisms as envisaged by Article 159 of the Constitution of Kenya, 2010.

50. I have examined all evidence and submissions of the Parties herein. The issues for determination are as follows:-

1. Whether the Respondent is the right Party to be sued in this Claim.

2. If so whether the Claimant was lawfully terminated by the Respondent.

3. If not, what remedies to award in the circumstances.

51. As concerns issue No.1, the CW2 testified that Ravine Roses, the Respondent herein is related to Karen Roses. He said Ravine Roses is registered as a business name and not a company but being a legal entity can contract on its own. He indicated that Karen Roses is proprietor of Ravine Rose.

52. From the records produced by the Claimant he was employed by Karen Roses and terminated by Karen Roses. The Respondent Karen Roses Limited is therefore rightly sued as Respondent in this case.

53. On 2nd issue, the Claimant has contended that he was terminated by the Respondent unfairly as he was given no notice nor accorded any opportunity to defend himself against any accusations against him.

54. The RW1 admitted that the Claimant was never invited for any disciplinary hearing before the termination. She indicated the Claimant absconded duty.

55. The Respondents did not indicate that they tried to seek the Claimant and failed to get him on account of being disciplined for absconding duty.

56. It is my finding that there is no evidence that the Claimant absconded duty. The Claimant told Court that he was terminated on 22.10.2011.

57. On 25.10.2011 his Counsel Alfred Nyandieka and Associates wrote a demand letter to the Respondent on this account. The Respondent replied vide a letter of 31.10.2011. If there was an issue of absconding this is the time the Respondent should have raised it which they did not.

58. I therefore find the contention by the Respondent that the Claimant absconded duty not true but find that the Claimant was unfairly and unlawfully terminated by the Respondent who failed to give him any termination letter but verbally dismissed him without any disciplinary hearing.

59. On issue of remedies, I find for Claimant and I award him as follows:-

1. 1 month salary in lieu of notice = 9,438/=

2. 8 months' salary as compensation for unlawful termination = 8 x 9,438= 75,504/=

TOTAL = 84,942/=

3. The Claimant to be issued with a Certificate of Service.

4. Respondent will pay costs and interest at Court rate with effect from the date of this judgement.

Dated and delivered in open Court this 27th day of June, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nduhuu for Respondent – Present

Thuku Onyango holding brief Nyandieka for Claimant – Present