



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1615 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

ELLY OCHIENG OKOTH.....CLAIMANT

VERSUS

WELLS FARGO LIMITED.....RESPONDENT

JUDGMENT

By his statement of claim dated 4th October 2013 the claimant avers that he was unfairly terminated by the respondent. He prays the following remedies –

- a) Kshs.13,187/= per month from August 2010 to the time of payment in full.
- b) 3 months' salary in lieu of notice.
- c) Damages for unlawful termination;
- d) Costs of the claim
- e) Interest on (a) and (c) above

The respondent filed a response to the claim on 8th November 2013 in which it denies the averments in the claim. The respondent states that the claimant deserted duty and was dismissed as a result.

At the hearing of the case the claimant testified on his behalf while the respondent called its Human Resources Manager, MR. STEPHEN KANGETHE (RW1).

Claimant's Case

The claimant testified that he was employed by the respondent as a security guard in 2008. That in August 2010 there was an incident at a place adjacent to his place of work. He was called to explain what happened, was suspended and reported to the police by the respondent. He was not paid salary during suspension. He was arraigned in court but was later acquitted. He attached a copy of the proceedings and ruling as Appendix 2 of the claim.

The claimant testified that upon acquittal he communicated with the respondent by letter but there was no response. He was never served with a letter of termination.

Upon cross-examination, the claimant stated that he was summoned by the respondent. When he arrived a Mr. Hinga questioned him then took him to the police station. He stated that after being arraigned in court he did not go back to work as the respondent had taken back his uniform. He stated that he only saw the letter of termination in court. He denied that he deserted duty. He stated he has never received his terminal dues.

Under re-examination, the claimant stated that he attempted to go back to work but was denied access.

Respondent's Case

The respondent's witness RW1 testified that the claimant who was an employee of the respondent last reported for duty on 8th September 2010. He testified that the claimant's employment was terminated after he was picked by police, that thereafter he did not report back to work. He denied that the respondent instigated the claimant's arrest. He denied that the claimant was suspended verbally and insisted the claimant's employment was terminated. He further denied the claimant was asked to surrender his uniform when he reported back to work.

RW1 testified that the claimant's dues were tabulated and a certificate of service prepared. That a cheque of Kshs.10,146 was prepared and issued on 23rd December 2010 but both the cheque and certificate of service were never collected by the claimant. He stated the claimant was free to collect the same at his convenience.

He stated the claimant worked for only 8 days in August and is not entitled to pay for days he did not work, that having been summarily dismissed, the claimant was not entitled to notice. He further testified that the claimant is not entitled to compensation as he was not unfairly terminated.

He urged the court to dismiss the claim with costs.

Under cross examination RW1 stated that the claimant was dismissed for deserting duty after failing to report to work for 22 days, that the letter of termination dated 1st November 2010 was brought to the attention of the claimant. RW1 however stated he could not remember when the claimant collected the letter.

He stated that the respondent was served with a demand letter on 13th June 2011 but did not respond. That the letter was referred to its lawyers who advised the claimant to collect his cheque.

Submissions

The claimant submitted that the reason given for termination of the claimant's employment being desertion of duty from August 2010 was neither valid nor fair, that the respondent's witness testified that the respondent was not aware of the claimant's criminal proceedings yet the proceedings of the criminal case indicate that the respondent's Operations Manager is the one who presented the claimant to the police station on 8th September 2010 to answer criminal charges. It is further submitted that the respondent did not respond to the claimant's letter seeking reinstatement after his acquittal.

It is further submitted for the claimant that there was no proper procedure in the termination and communication of termination to the claimant. That desertion means wilful and unjustified abandonment of a person's duties or obligations as per Black's Law Dictionary (Ninth Edition) which was not the case with the claimant as he had a criminal case for the period he was away. That the claimant was thus not guilty of desertion as defined in law.

It is submitted that there was no evidence that the respondent tried to contact the claimant before dismissing him.

The claimant relies on the case of **Mary Chemweno Kiptui –V- Kenya Pipeline Company Limited** in which the court stated that

“the duty rests upon the employer to prove the reason or reasons termination and failure to do so such termination shall be deemed to have been unfair.”

The respondent did not file written submissions even after being granted leave to file the same out of time.

Determination

The issues for determination according to the claimant, which the court adopts, are the following –

- a. Whether the termination was based on valid and fair reasons
- b. Whether claimant is entitled to the remedies sought in the statement of claim: and: -
- c. Who should bear cost of the suit:

Fair Termination

The respondent produced a letter titled “*Desertion*” and a certificate of service, both dated 1st November 2010. During the hearing RW1 was unable to confirm if the two were ever delivered or collected by the claimant. He stated that the claimant was notified about the same but when asked by counsel for the claimant the mode through which the claimant was notified he was unable to confirm.

As pointed out in the claimant's submissions, desertion of duty connotes wilful and unjustified abandonment of a person's duties or obligations. The claimant testified that he was summoned to the office, asked to explain what happened and then taken to the police where he was arrested and later arraigned in court. This is confirmed in the criminal proceedings in Chief Magistrates Court, Makadara Criminal Case No. 3382 of 2001. PW5, PC CYRUS WAMBUA testified that “*After five days, the Operations Manager came to the office with the guard. It is the accused person before court*”. This corroborates the evidence of the claimant that it is the respondent who took him to the police.

The claimant was therefore not wilfully absent from work. He did not desert work. He was not absent without valid reason. Desertion was therefore not valid reason for the termination of his employment. Further, the respondent knew where he was and could have served him with a notice to show cause or invited him for a disciplinary hearing. In addition, RW1 could not explain what happened to the claimant's uniform. The nletter of desertion offers to refund the uniform deposit which means the uniform was returned. Thus the claimant's assertion that his uniforms were withdrawn at the time he was taken to the police by the respondent has not been controverted.

The claimant having not been taken through any form of disciplinary process and the reason for the termination of the claimant's employment having been invalid, the termination of the claimant's employment was unfair both substantively and procedurally. I find and declare accordingly.

Remedies

The claimant prays for three months salary in lieu of notice. This was not provided for in his contract of employment and I award him one month's salary in lieu of notice as provided in Section 35 of the Employment Act.

He is entitled to damages in the form of compensation which I award him at 4 months' salary in lieu of notice based on his gross salary of Kshs.13,187 being Kshs.(13,187 x 4). I have taken into account the length of service, the manner in which the claimant's employment was terminated and the fact that he was dismissed without any terminal benefits.

The claimant is further entitled to the following as set out in his letter of termination –

1. Kshs.4,000/= being refund of uniform deposit.
2. Salary for days worked up to 7th September 2010
3. Overtime for the days worked up to 7th September 2001
4. Overtime carried forward from 23rd August 2010 – 31st August 2010.
5. Payment in respect of forty two (42) days accrued leave.
6. Less one (1) month's pay in lieu of notice.

The claimant is thus entitled and is awarded to the following in total–

1. Notice Kshs.13,187.00
2. Compensation Kshs.39,561.00
3. Uniform refund Kshs.4,000.00
4. Salary and overtime for 8 days worked Kshs.4,058.00
5. Overtime carried forward Kshs.3,060.00
6. 42 days leave Kshs.18,461.80
7. Leave travelling allowance as per contract Kshs.1,700.00

Total Kshs.84,027.80

The respondent shall in addition pay claimant's costs.

In view of the fact that the payment of salary and overtime was due upon termination and the respondent indeed prepared a cheque on 1st November 2010, items 3, 4, and 5 shall attract interest from date of filing suit while the rest of the decretal sum shall attract interest from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF JUNE 2019

MAUREEN ONYANGO

JUDGE