



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 477 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ABDULKARIM ALI MOHAMED.....CLAIMANT

VERSUS

COAST MAIL COMPANY.....RESPONDENT

JUDGMENT

The Claimant filed suit seeking damages for unlawful termination. He avers that he was engaged by the Respondent as a booking clerk on 28th August, 2008 earning a salary of Kshs.12,767.

That one of the Respondent's clients complained against him and he was asked to explain after which he was suspended for a month with effect from 11th July 2012. That he was never recalled back to work. That when he tried to go back to work he was told to wait. That he was not given an opportunity to be heard before suspension.

In the Memorandum of Claim dated 25th March, 2014, he prays for:

- i. The sum of Kshs.301,498 being salary from August 2012 – February 2014 and severance pay.
- ii. Compensation for wrongful suspension and dismissal to a maximum of 12 months' wages,
- iii. A refund or proof of the contribution he has been remitting to the NHIF and NSSF.
- iv. Costs of the suit
- v. Interest
- vi. Any other relief as the Court may deem just.

The Respondent denies terminating the Claimant's employment and avers that after a customer complained against him it suspended the Claimant to pave way for investigations. That after sometime they wrote to him to report to work but he failed to do so to date. The respondent prays that the claim be dismissed with costs.

Submissions

It is submitted on behalf of the Claimant that the termination of the contract was unfair for the reason that the Respondent did not issue any termination notice contrary to section 35 of the Employment Act. That no hearing was conducted and no reason for termination was advanced contrary to sections 41 and 43 of the Employment Act.

That there being no reason for termination and due process having been flouted the Claimant urges that the court finds in his favour as prayed in his claim.

On behalf of the Respondent it is submitted that the Claimant was a deserter and was summarily dismissed under section 44(4)(a) of the Employment Act. That the Respondent made all necessary effort to comply with the procedural requirements of section 41 which effort was

not fruitful and thus the summary dismissal was in line with the law. That the Respondent paid the Claimant all his dues and as such the Claim ought to be dismissed.

Issues for Determination

- (i.) Whether the Claimant was unfairly and unlawfully terminated
- (ii.) Whether the Claimant is entitled to the remedies sought.

Whether there was a valid reason for termination

Section 43 of the employment act is to the effect that:

43. Proof of reason for termination

1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

The Claimant in his evidence stated that after a customer lodged a complaint he was sent on suspension and was never recalled back to work. The Respondent on the other hand state that the Claimant abandoned duty, that it wrote a letter recalling him back to work which letter elicited no response.

It is common ground that the Claimant was suspended after a disagreement with a customer. What is in dispute is whether the Claimant deserted duty or he was terminated by virtue of not having been allowed to resume duty after he had been suspended from work.

The only evidence on record of a recall to work is a letter to the Claimant dated 20th May 2013 containing no mailing address. The letter is not signed as ever having been received by the Claimant. There is therefore no evidence that the Claimant received the letter and refused to go back to work after being recalled. The Claimant was sent on indefinite suspension and from the evidence on record, terminated without his knowledge. He learnt of the termination when his advocates wrote to the Respondent who responded by letter dated 4th September 2013, stating that the Respondent considered the Claimant a deserter.

In the case of Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR stated that:

“Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing ... The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognisance of the fair hearing principles as well as natural justice tenets.”

In light of the foregoing the Court finds that the Claimant was unlawfully terminated.

Whether the Claimant is entitled to the remedies sought

(i.) Salary withheld while on suspension

The Respondent in the letter of suspension informed the Claimant that he was on suspension without pay for a month, which turned out to be an indefinite suspension. The Claimant only learnt that he had been terminated by a letter dated 4th September 2013, when his Advocates were informed that the Respondent considered him a deserter. The claimant is therefore entitled to withheld salaries from 11th July 2012 to 2nd April 2013 when the respondent states he reported back to the office and was informed of his transfer. The Court is guided by the case of **Grace Gacheru Muriithi -V- Kenya Literature Bureau (2012) eKLR**, the court stated thus:

“The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction.”

(ii.) Severance pay

The Claimant seeks to be paid severance pay at the rate of 15 days for each year worked. The termination does not arise out of a redundancy. The claim for severance pay therefore does not lie.

(iii.) Damages for unlawful termination

Having found that the Claimant was unlawfully terminated, he is entitled to damages. I award him 8 months' salary as compensation taking into account the length of service and the circumstance under which his employment was terminated.

(iv.) Withheld statutory deductions to NSSF and NHIF

The claimant relied on an NSSF statement as proof of employment. This statement does not contain any gaps, which proves that the Respondent had deducted and remitted the said statutory deductions. As to NHIF deduction, this is a special damage which ought to have been specifically pleaded and proved which in this case was not done. This claim therefore fails.

Conclusion

In conclusion, I award the claimant the following

Salary for the period 11th July 2012 to 2nd April 2013.. Kshs.111,466

Compensation..... Kshs.102,136

Total Kshs.213,602

The respondent shall in addition pay claimant's costs.

The decretal sum shall attract interest at court rates.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE