



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 99 OF 2016

(Before Hon. Justice Mathews N. Nduma)

AGGREY KIMIYA MUKIZA.....CLAIMANT

VERSUS

ROY PARCELS SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The claimant seeks a declaration that his termination from employment was unlawful and unfair and prays for compensation for the loss. In addition the claimant seeks grant of terminal benefits set out in the statement of claim filed on 21st April 2016 and set out under paragraph 9 as follows:

- (a) One month salary in lieu of notice Kshs. 10,107.
- (b) Unpaid leave for 3 years Kshs. 30,321.
- (c) Service pay Kshs. 20,214
- (d) Overtime Kshs. 302,277.

2. The claimant testified under oath that he was employed by the respondent on 1st February 2011 and worked continuously until 5th February 2016 when he was dismissed for absence. The claimant added that he had asked for leave of absence to go and obtain a birth certificate of his child who was due to attend class one. The reason for dismissal contained in the letter was absence. The claimant had informed his supervisor Mr. Mutisya that he had spoken to the Human Resource Manager Mr. Chege that he required permission to go and get birth certificate for his child. At the time the claimant spoke to Mr. Mutisya, Mr. Chege had taken leave. The claimant testified that he traveled on 28th December 2015 and returned on 5th January 2016. That he worked from 5th January 2016 until 20th February 2016 when he received a letter of dismissal. Claimant stated that he was not given notice. CW1 insisted that he did not abscond duty since he had obtained permission to go home. CW1 the claimant earned a gross salary of Kshs. 9,024 at the time of dismissal. He worked as a loader. That he reported to work at 7 am and worked until 10 pm to midnight. He was based at Eldoret and was transferred to Nairobi. Claimant stated that he was not paid overtime. That he worked for 5 years and used to be given Kshs. 100 for lunch. That he did not go for leave except once in the year 2015.

3. The claimant denied any loss of goods as alleged by the respondent or at all. CW1 said his salary was deducted for loss of Kshs. 600 worth of goods which loss he denies. The claimant prays to be awarded as prayed.

4. Under cross-examination by Mr. Chepkwony for the respondent, the claimant states that he had requested for 4 days leave. Mr. Chege asked the claimant to continue working on that day he sought leave and then speak to Mr. mutisya in the evening before he left. Claimant informed Mr. Mutisya that Mr. Chege had given him the go ahead and Mr. Mutisya told him to go as per request. This was 24th December 2015 and 4 days were to end on 30th December 2016. Claimant came back on 4th January 2016.

5. Claimant admitted that he went on leave between 6th to 29th June in 2015. He admitted that even though he delayed for 2 days, he was given a warning letter for late reporting. Claimant admitted that in December he again got late by 4 days. Claimant agreed that he explained verbally why he had come late. Claimant stated that the truck he loaded returned to base late hours at times. The loading also went on from 8 am to 7 pm at times.

6. RW1 Joseph Chege the Human Resource Manager testified that he knew the claimant well. That the claimant worked as a loader. That on 24th December 2015, the claimant asked for off duty to go home and process a certificate for his child. RW1 stated that he asked the claimant to come back at 5.30 pm and fill a leave form. That the claimant did not return. RW1 stated that he had asked the claimant to get permission from Mr. mutisya if he was not there in the evening. RW1 stated that the claimant did not get permission as agreed. That the claimant left on 24th December 2016 and came back on 5th January 2016. RW1 said that the claimant and other workers were to return to work on 27th December 2019. That the company was inconvenienced by his absence since the company had skeleton staff at the time. RW1 produced a warning letter dated October 2015, given to the claimant for loss of customer goods. RW1 also produced another warning given to the claimant for exceeding leave by 4 days. RW1 stated that the dismissal was justified. RW1 added that the claimant was dismissed and was not entitled to notice or payment in lieu of notice. That claimant worked from 8.30 to 5.30 and so he did not do overtime. That customers closed at 5 pm and so claimant did not work at night. RW1 stated that the claimant was not owed any service pay as NSSF was paid for him. RW1 added that compensation was not merited and the suit be dismissed in its entirety.

Determination

7. The issues for determination are:

(a) Whether the summary dismissal of the claimant was for a valid reason and implemented following a fair procedure.

(b) Whether the claimant is entitled to the reliefs sought.

Issue (a)

8. The conclusion by the court is that the claimant obtained leave of absence on 24th December 2015 to proceed home and obtain a birth certificate for a child who was due to start form one in January 2016. The claimant proceeded home but did not return to work after 4 days. At the time, RW1 had placed him on a list of employees to be on standby during the holiday season. According to RW1, the claimant ought to have returned on 27th December 2015.

9. The court takes judicial notice that between the 24th to 27th December 2015 just like in any other year all public offices are closed for Christmas holiday and Boxing Day on the 26th December 2017. The claimant was entitled to be on holidays as of right between the 24th and 27th December 2017.

10. The claimant had clearly explained the purpose of seeking leave and therefore needed to be at home when government offices were open to allow him to get a birth certificate for his son. The four days granted to him meant therefore necessarily excluded public holidays.

11. Was it a dismissible offence for the claimant to delay reporting to office in the manner he did taking into account the explanation given? The claimant ought to have returned to work after 4 working days and explained that he required more time to obtain the birth certificate to enable his child to go to school. The claimant did not do so and took the liberty of staying away from work up to 5th January 2016 without letting the employer know his whereabouts.

12. In terms of *Section 44 of the Employment Act 2007*, an employer is justified to dismiss an employee if:

“Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work”

13. Personal matters like obtaining a birth certificate for a child to enable him be admitted to form one is a compelling reason to seek leave of absence from work but permission once granted does not entitle an employee to extend the number of days granted without reverting back to the employer for possible extension of the off days. In the present case the claimant notwithstanding having a recent warning for absence without permission took the liberty to again extend his leave of absence without permission. Whereas, the time of the year and the purpose of the absence are mitigating factors, the employer was in the court’s considered view entitled to terminate the employment of the claimant. The summary dismissal of the claimant without payment in lieu of notice was in the court’s view gross punishment. The court converts the summary dismissal to a normal termination and grants the claimant payment in lieu of one (1) month notice in the sum of Kshs. 10,107.

Issue (b)

14. The claimant testified that he was only granted annual leave in the year 2015 but was not granted leave for the rest of the years he worked for the respondent. RW1 provided no evidence to the contrary. The claimant claims payment in lieu of 3 years leave in the sum of Kshs. 30,321. The court finds that the claimant has proved this relief on a balance of probabilities and is awarded accordingly.

Service pay

15. The claimant was registered with NSSF and the statutory dues were paid according to his pay slip. The claim for service pay is thus refused on these grounds.

Overtime

16. The claimant did not adduce precise evidence on the specific days he worked overtime and was not paid. RW1 testified that the claimant did not work overtime and was not entitled to the relief sought. The claimant has not proved this relief on a balance of probabilities and the same is dismissed.

17. In the final analysis judgment is entered in favour of the claimant as against the respondent as follows:

(a) One month salary in lieu of notice Kshs. 10,107.

(b) Payment in lieu of leave days not taken for three years Kshs. 30,321

Total award Kshs. 40,428

(c) Interest at court rates from date of filing suit till payment in full.

(d) Costs of the suit.

Judgment Dated, Signed and delivered this 19th day of September, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Chepkwony for claimant

M/S Betty Rashid for Respondent

Chrispo – Court Clerk