



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 325 OF 2016

(Before Hon. Justice Mathews N. Nduma)

WILLIAM LIKUYI OMBONYA.....CLAIMANT

VERSUS

MOHAMMADI GLASS AND HARDWARE..... RESPONDENT

JUDGMENT

1. The claimant was employed as customer service agent at Kshs. 12,600 per month. He worked from 2011 to 22nd August 2016. She worked from 7 a.m to 6 p.m. The claimant testified that he was not paid salary for the month of August 2016. That he worked over 8 hours daily and was not paid overtime. That he was not given annual leave in the year 2011. The claimant prays to be paid in respect of these items as set out in the statement of claim. The claimant said that he was summarily dismissed without notice, notice pay, notice to show cause nor was he called to a disciplinary hearing. The dismissal followed an incident at the shop on 18th August 2016 when a client purchased a steel door and was to pick it after hours. The claimant was left with the door outside the shop waiting for the client. The client came at 6 p.m and upon inspecting the door the client alleged that it did to have a wall pass. Claimant called one Abdul to inquire about the wall pass but the call was not returned. The client also called Mr. Abdul three times but he did not take her calls. Mr. Abdul returned the call at 7 p.m but at that time the client had left without the door. The claimant left the door in the neighbouring shop to be attended to the following day. On 19th August 2016, Mr. Abdul was furious, he said the claimant was incompetent as he could not convince the client to take the door and that the wall pass was in the lock box. The claimant explained that the wall pass should have been fixed on the door. The claimant had no way of knowing where the wall pass was. Mr. Abdul summarily dismissed the claimant for that reason. The claimant pleaded with Mr. Abdul in vain. Mr. Abdul told him that he would tell all Asian shops in Kisumu not to employ the claimant. The claimant was offered Kshs. 37,000 severance pay and NHIF contributions provided he signed a disclaimer. The claimant declined the money and left.

2. On 22nd August 2016, the claimant returned to the shop hoping Mr. Abdul had changed his mind but he stood by the dismissal and the offer upon signing a disclaimer. The claimant wrote a demand letter vide his advocates which was not heeded to hence the suit.

3. RW1 Abdul Quadir testified under oath that the claimant was his employee. RW1 testified that the respondent was Abdul Quadir trading as Mohammadi Glass and Hardware. The respondent's name was amended by consent of the parties. RW1 testified that the claimant was employed in 2011 as a casual worker and his job was to carry tiles from the shop to the client's outside. His salary was Kshs. 12,900 per month. RW1 stated that he summarily dismissed the claimant after giving him about four (4) warnings before. RW1 stated that the claimant was hijacking customers from the shop to rival businesses. That the claimant had stolen goods from the shop in the past and had admitted the theft. RW1 stated that he was ready to pay the claimant Kshs. 59,000 as terminal benefits. RW1 testified that the claimant instead, insisted that RW1 buy him a motor cycle worth Kshs. 100,000. RW1 declined to do that hence the suit. RW1 relied on a witness statement dated 19th July 2018, defence statement and annexures '1' to '3' to the defence statement.

4. RW1 admitted under cross examination that the claimant was employed in the year 2013 but not 2014. RW1 stated that he had no letters of warning he allegedly gave the claimant. RW1 alleged that the claimant told clients that the shop products were not genuine and took clients to competitors. RW1 said that he sold floor tiles. That the claimant had taken a loan of Kshs. 23,000 and the balance owing at the time of dismissal was Kshs. 10,000. RW1 produced unclear handwritten letter dated 2nd June 2013 in which the claimant is alleged to have admitted theft of floor tiles from the shop.

5. RW1 insisted that he gave the claimant verbal warnings. RW1 admitted the alleged letter of warning produced was in 2013 and the dismissal was 3 years later in 2016. RW1 stated that the claimant did not change.

6. RW1 admitted he did not pay NSSF for the claimant but he paid NHIF. RW1 stated he was still ready and willing to pay the claimant Kshs. 59,360 being terminal benefits. RW1 stated he paid the claimant salary for August 2016. That the claimant owed Kshs. 22,000 to the respondent. RW1 said that the claimant went on leave though he had no documents to prove that. RW1 said the claimant reported daily at 8.00 am and clocks off at 5.30. That claimant was paid Kshs. 100 for transport daily. RW1 denied any overtime was worked and or deserved to be paid.

Determination

7. The issues for determination are:

- (a) Whether the summary dismissal of the claimant was for a valid reason and followed fair procedure.
- (b) Whether the claimant is entitled to the reliefs sought

Issue (a)

8. It is not in dispute that the claimant was summarily dismissed on the morning of 19th August 2016. The claimant explained the reason for the summary dismissal was failure by a client to take a door that had not been fitted with a wall pass. RW1 admitted that the door had no wall pass and was in a locker. The claimant explained that he had been left with the door after work to deliver to a client who came to collect the same at 6.00 p.m. That the client and the claimant made telephone calls to RW1 regarding the wall pass but RW1 did not pick the calls. RW1 did not refute the reason the client did not take the door nor that he was called severally and did not take the calls. RW1 instead produced a document made in the year 2013 allegedly warning the claimant for theft. RW1 admitted that the incident he testified about happened 3 years before the dismissal and he had no other evidence of misconduct by the claimant. RW1 only alleged that he had given the claimant verbal warnings for diverting customers from the shop.

9. The testimony by the claimant was consistent, credible and offered explanation why he was summarily dismissed by RW1. The court rejects the version told by RW1 as false in that the issue that led to the confrontation between RW1 and the claimant was failure by a client to take a door that was not complete. It is clear that the claimant was not the person with responsibility to fit the wall pass but was only a carrier of items.

10. The claimant has proved on a balance of probabilities that he was not given any notice, any notice to show cause nor was a disciplinary hearing held to give the claimant opportunity to show he was innocent. RW1 acted unreasonably in the circumstances of the case. RW1 has not proven that he had a valid reason to summarily dismiss the claimant on 19th August 2016. To the contrary the claimant has discharged the onus placed on him in terms of *Section 47(5) of the Employment Act, 2007* to show that the summary dismissal was wrongful and not justified.

11. The respondent violated *Sections 36, 41, 43 and 45 of the Act*. The claimant is entitled to compensation in terms of *Section 49(1) (c) and (4) of the Act*.

12. In this regard the claimant had served for three (3) years. The claimant was summarily dismissed for no fault at all on his part. The claimant did not therefore contribute to the summary dismissal. The claimant was not given notice and the job loss caused him loss and damage. The claimant rightfully declined to sign a disclaimer and so the offer of payment made by RW1 was not in good faith. The claimant wished to continue working but the respondent denied him the opportunity. RW1 admitted that he had not paid NSSF for the claimant for three years which is an aggravating circumstance. The claimant was not compensated for the job loss and career prospects. The claimant had not found alternative employment.

13. The court has considered the case of *Pamela Nelima Lutta vs Mumias Sugar Company Limited (2017) eKLR* in which Maureen Onyango J. awarded maximum compensation to the claimant for unlawful dismissal. The claimant in the present case had served a lesser period and the circumstances differ. The court awards the claimant the equivalent of six (6) months salary in compensation for the unlawful and unfair summary dismissal in the sum of Kshs. 75,600.

Issue (b) Terminal benefits

14. The claimant has proved on a balance of probabilities that he is entitled to the following terminal benefits and the court awards him accordingly.

- (a) Kshs. 12,600 in lieu of one month notice.
- (b) Kshs. 12,600 being unpaid annual leave for the year 2015/2016.
- (c) August salary up to 19th August 2016 in the sum of Kshs. 7,980.

(d) RW1 admitted that the claimant worked from 8.00 am to after 5.30 p.m which is 8^{1/2} hours daily. The normal working hours is 8 hours. Claimant stated that he worked up to six (6) p.m daily. On the day he was dismissed, RW1 did not dispute that the claimant waited for the client up to 7 p.m. The claimant proved that he worked extra hours daily and RW1 told the court that the respondent did not pay overtime. The court is satisfied that the claimant was not paid at least one extra hour daily for three years at Kshs. 60.58 per hour x 26 days x 3 years) in the sum of Kshs. 56,702.88 and the court awards him accordingly.

(e) RW1 admitted that he did not pay NSSF for the claimant for 3 years in terms of *Section 35 (5) of the Employment Act*. RW1 is statutorily bound to pay the claimant minimum gratuity calculated at 15 days salary for each completed year of service for 3 years in the sum of Kshs. 18,900 and the court awards the claimant accordingly.

(f) The court directs the respondent to grant the claimant a certificate of service within 30 days of this judgment.

15. In the final analysis judgment is entered in favour of the claimant as against the respondent in the sum of Kshs. 184,382.88. The award is payable with interest at court rates from date of judgment till payment of the suit.

16. The respondent to pay costs of the suit. The respondent to provide certificate of service to the claimant within 30 days of this judgment.

Judgment Dated, Signed and delivered this 9th day of October, 2019

Mathews N. Nduma

Judge

Appearances

M/S Wafula for claimant

Mr. Andiso for Respondent

Chrispo – Court Clerk