



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.113 OF 2016

PETER MAINA KINYANJUI.....CLAIMANT

VERSUS

WOOLMART SUPERMARKET LIMITED.....RESPONDENT

JUDGEMENT

In January, 2007 the claimant was employed by the respondent as a general staff until 5th August, 2017 when he was dismissed without hearing or notice. prior to the summary dismissal the claimant was arrested and charged in court in criminal case over alleged involvement in theft and collusion with other employees.

The claim is that termination of employment was unfair and contrary to the rules of natural justice causing him loss and damage and without a source of livelihood and holds the respondent liable to pay compensation.

The claimant is seeking the remedy of reinstatement back to his employment pending the hearing of the criminal case; 3 months' notice pay; pension; service payment for the years worked; damages for unlawful termination of employment; leave allowance; letter of service; salary for May and any other relief the court may find necessary to grant..

The claimant testified in support of his case that on 25th April, 2015 he was in stores when the chief cashier called him. He had been working as a storekeeper at the time. The cashier, Ms Alice called him and sent him to DTB Bank at 10am a walking distance from the respondent's premises but a short distance on the road a fast moving car stopped and he was hijacked and taken away.

The claimant also testified that previously he had been sent to the bank by Ms Alice but in this case before he could reach the bank he was attacked. He did not know how much cash he was carrying. He was taken to the Crater by the hijackers, hit on the head and left there. At 2pm he managed to walk back to work without the cash or his phone which were all stolen.

The claimant went to the human resource officer who directed him to report to the police and where he was arrested for 4 days and upon release he was suspended by the respondent on the grounds that this was to allow for investigations. He was never charged in court.

At the time the claimant had not taken his annual leave. Since the suspension the respondent has told him to wait for police investigations. At the time the basic wage paid was ksh.9,700.00 per month.

In defence, the respondent alleges that a notice to show cause was issued but he never received it. The alleged notice to show cause is dated 28th May, 2015 while he was still in custody. The hearing notice dated 2nd June, 2015 was not issued or received by him. The address used does not belong to him. The letter of suspension was hand delivered.

The claimant also testified that following his attack he was hit on the stomach and has been ailing since and on medication. Since May, 2015 he has suffered as he has not been paid.

The claimant also testified that upon injury by the cash robbers, being put in custody by the police he was admitted in hospital and remained absent for a while. When he went back in the year 2018 he found a letter sent to Post Office Box number 2336 Nakuru which he does not know.

The defence is that the claimant was employed as a general worked and assigned various duties among them to deposit funds in the respondent's bank as directed by the head cashier. The head cashier would follow him or any other employee to the bank to assist in the banking process.

On 25th May, 2015 the claimant and his colleague were assigned to deposit Ksh.550,000.00 at DT Bank and while the head cashier followed the claimant was not in the bank and could not be traced and his phone was off. After several hours the claimant reported back and said he had been robbed off the money and upon interrogation it was found the explanation was not adding up and the matter was reported to the police who arrested him.

The defence is also that while the respondent awaited for police investigations they proceeded with internal disciplinary proceedings and on 28th May, 2015 the claimant was issued with a letter of show cause to respond by 15th June, 2015 which he failed to do and on 22nd June, 2015 he was issued with a hearing notice for the 13th July, 2015 but he failed to attend. On 15th July, 2015 the claimant was dismissed for gross misconduct.

The claimant was invited to exonerate himself but failed to attend. The claims made are without merit and should be dismissed with costs.

Ms Alice Njeri maina testified that she on 25th May, 2015 she gave the claimant cash to take to the bank but he disappeared and upon return he alleged to have been robbed. The matter was reported to the police and he was arrested, later he was suspended and invited to a hearing which he failed to attend.

Ms Lucy Wacuka also testified that she is the human resource manager for the respondent and conversant with the claim herein. The claimant was employed by the respondent upon his application which gives his personal contacts. The respondent had no knowledge of change of contacts particulars and address.

Ms Wacuka also testified that the claimant was arrested following an alleged robbery and loss of cash as he was sent to bank by the respondent in the course of his employment but instead disappeared. On the material time, 25th May, 2015 the witness was away and when called back to the office she followed up the robbery incident with the police and the claimant. The cashier, branch manager and the claimant's supervisor all recorded statements.

Upon the arrest of the claimant he was issued with a letter of suspension, a notice to show cause and which he failed to address, he was invited for a hearing and he failed to attend. Under the law, the respondent was justified to issue letter of summary dismissal. The claimant was paid his May, 2015 salary; the owing leave days and issued with Certificate of Service. Nothing owes.

At the close of the hearing, both parties filed written submissions.

It is common cause that on 25th May, 2015 the claimant was sent to the DTB Bank to bank money, the property of the respondent as part of his work duties. He never reached the bank for what the claimant testified to be a hijacking incident and as a result he was robbed cash and his phone. The respondent also confirmed that the claimant was sent to the bank by Ms Alice maina but he never reached and the matter was reported to the police. The respondent lost ksh.550,000.00 which was not banked by the claimant.

By letter dated 26th May, 2015 the claimant was suspended for the reasons that;

... Following your disappearance with cash money which you had been given by the chief cashier to taken to Diamond Trust bank for banking.

The police are investigating the matter and we shall communicate to you when the investigations are completed.

The claimant testified that the letter of suspension was hand delivered to him. He proceeded on suspension and that there was no further communication from the respondent.

The respondent on the other hand testified that the claimant was issued with letter of show cause why disciplinary action should not be taken against him on 28th May, 2015 through his postal address P.O. Box 2336-20100, Nakuru and there was no response. This was followed by a hearing notice dated 22nd June, 2016 and the claimant failed to attend a disciplinary hearing scheduled for the 13th July, 2016. This was then followed by letter of summary dismissal.

The defence was that the claimant was reached through the contact and postal address he had given when he was employed being P.O. Box 2336-20100, Nakuru but he failed to attend.

An employer has the prerogative to send the employee on suspension to allow for investigations. Where the employee is suspected of committing a criminal offence, the employer in conjunction with the relevant agency has the liberty to commence or cause to be filed a complaint with the police to allow for investigations.

In the case of **Leonard Matu Wanjau versus Agriculture, Fisheries & Food**

Authority (Pyrethrum & Other Industrial Crops Directorate) Cause No.313 of 2016 (Nakuru) the court held that the employer was entitled to conduct internal investigations and where necessary invite other government agencies to address the criminal elements of the matter. This is allowed as the employer retains the sole prerogative to undertake internal disciplinary procedures against any employee suspected of having committed a criminal offence to the employer's detriment.

The rationale is aptly captured in the case of **Thomas B. Miningwo versus Egerton University** that;

The purposes and objectives of a criminal trial are different from disciplinary proceedings within the employment relationship. Different legal principles apply.

In this case the claimant was sent on suspension following a hand delivered letter. The show cause notice, the hearing notice and summary dismissal letters were all sent through the Postal address given in his application letter at P.O, Box 2336 Nakuru.

Section 10 of the Employment Act, 2007 has the following mandatory provisions at section 10(2) requires the employer to issue the employee with a written contract of service/employment taking into account the following details;

(2) A written contract of service shall state—

(a) the name, age, permanent address and sex of the employee;

(b) the name of the employer;

(c) the job description of the employment;

(d) the date of commencement of the employment;

(e) the form and duration of the contract;

(f) the place of work;

(g) the hours of work;

(h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;

(i) the intervals at which remuneration is paid; and

(j) the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and

(k) any other prescribed matter.

Therefore, the employment contract *shall state* the following;

Name;

Age;

Permanent address; and

Sex [gender] of the employee.

These provisions are couched in mandatory terms.

The respondent has sought to rely on the letter of application the claimant did on 1st January, 2007 stating that his postal address is P.O. Box 2336 Nakuru.

In the letters of show cause, hearing notice and summary dismissal all are sent to the claimant through *P.O. Box 2336-20100, Nakuru*.

The new change and location from P.O. Box 2336 Nakuru to *P.O. Box 2336-20100, Nakuru* is not given. Whereas the claimant box is noted at 2336 Nakuru the respondent has additional details of *2336-20100 Nakuru*.

Where a contract of employment is amended for one reason or the other, the employee must be informed and issued with written details in accordance with section 11 and 13 of the Employment Act, 2007.

As the question of service upon the claimant was particularly challenged and noting that the claimant was emphatic that he never received the subject notices to show cause, hearing notice and the letter of summary dismissal, the explanation by the respondent that these letters were sent through the given postal address came into attention. Indeed where the respondent as the employer has not submitted the employment contract setting out the requirements with regard to the particulars of the claimant as under section 10(2) of the Employment Act, 2007 to take and apply a postal address other than the one stated in any written contract of employment was unreasonable, irrational and not justified in the circumstances. Where it was deemed necessary to issue the claimant with a hand delivered letter of suspension, nothing stopped the respondent in the absence of a written contract of service to recall him and issue the notices sent to a strange postal address.

The court finds, The last communication given to the claimant is the letter of suspension. This resulted in unfair labour practice and contrary

to article 41 of the Constitution, 2010.

The claimant is seeking reinstatement to his position pending the hearing and determination of his criminal case. During the hearing no details were given as to the status of any criminal case. In fact the claimant testified that he was arrested but not charged in court. the remedy of reinstatement and the rationale is therefore lost.

Also, where the claimant was suspended vide letter dated 26th May, 2015 it has since been over 3 years for the court to allow for reinstatement a period required to be put into account by the provisions of section 49 of the Employment Act, 2007 read together with section 12 of the Employment and Labour Relations Court Act, 2011. The remedy is not available.

The claimant is seeking 3 months compensation but there is no contract of service defining terms and conditions of employment and without particulars of his address and or any changes thereof. On the finding that there as unfair labour practice committed against the claimant, section 35 of the Employment Act, 2007 allow for one month pay in lieu of notice.

Both parties have not set out the exact wages earned by the claimant as of 26th May, 2016 save that the respondent by letter dated 15th July, 2015 terminated employment.

The claimant proceeded to file suit on 22nd March, 2016 without any letter of demand setting out what claims are made.

Accordingly, the court finds the respondent unfairly terminated the claimant's employment and without wage details the matter is hereby referred to the County Labour Officer, Nakuru to tabulate the owing dues in the following order and taking into account the last gross wage paid;

- a) **Compensation awarded at three (3) months gross wage;**
- b) **Notice pay awarded at one (1) months gross wage;**
- c) **Pay for May, June and until 15th July, 2015;**
- d) **Pay for earned leave days up and until 15th July, 2015;**
- e) **A certificate of service shall be issued in accordance with section 51 of the Employment Act, 2007;**
- f) **The paid dues above shall be subject to the provisions of section 49(2) of the Employment Act, 2007.**
- g) **Each party shall bear own costs.**

Mention on 23rd January, 2020 to confirm the Labour Officer tabulations above.

Delivered at Nakuru this 28th day of November, 2019.

M. MBARU

JUDGE

In the presence of: