



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2091 OF 2011

FREDRICK WABWIRE MULAA AND 3 OTHERSCLAIMANT

VERSUS

JESMIRAS LUBRICANTS.....RESPONDENT

J U D G E M E N T

1. The Claimant's in their memorandum of claim dated 9th December, 2011 averred that they were employed by the respondent as general workers and carried their duties meticulously until 2nd February, 2009 when they were asked by the Manager to report to her office and were told about an incident of theft which led occurred involving some unknown persons and the cashier.
2. They were subsequently told to report to work at the start of March 2009 so that an investigation into the theft incident could be carried out to which they obliged and reported back at the start of March but were continuously by turned away and asked to report later. They were eventually advised verbally that they were no lawful respondent's employees. They were however never paid their terminal dues.
3. The Claimant averred that the termination amounted to summary dismissal and was unlawful unfair and without due process. The Claimants therefore sought to be paid their terminal dues as calculated in the statement claim. The respondent on its part pleaded that it was correct the Claimants were its employees but denied that they executed their duties meticulously or diligently or at all. The respondent further stated that the Claimants were requested not to report to work to pave way for investigations by police after preliminary investigations indicated that the robbery could have been planned, executed and or aided by the respondent's employees which request the Claimant's obliged.
4. The respondents further averred that the Claimants were requested to wait for the police investigations report but instead responded with a letter from their advocates demanding their terminal dues. According to the respondent therefore, the Claimants voluntarily left the respondent's employment and demanded their terminal dues. At the hearing only the Claimant's through the 2nd Claimant attended to give evidence. It was his evidence that they used to work for the respondent as customers service workers. He adopted his witness statement as the evidence in Chief and also produced his colleague's statements.
5. According to him, they were never told the outcome of the investigation. He confirmed there was a theft incident but they were not involved. They were never issued with notices to show cause and that they were never subjected to any disciplinary hearing. During the time they were employed, it was his evidence that they worked from Monday to Saturday and during public holidays. Further they were not registered for NSSF. He denied they absconded duty. No letter was written to them to resume work.
6. In cross-examination he stated that he was employed in 2004, Martin in 2000 but could not remember when the rest of his colleagues were employed. It was his evidence that when the theft incident took place, he was not serving customers and the police were never called. He further stated that they never wrote a letter asking to be employed but their lawyer wrote a letter of demand asking for compensation for unlawful termination.
7. It was not disputed that the Claimant were asked on 2nd February, 2009 to stay away from work pending investigations into a robbery incident which took place at the respondent's premises. They were to stay away until the beginning of March, 2009. According to the Claimant's when they reported back at the beginning of March, 2009, they were not allowed back to work but continuously turned away and asked to report later.
8. According to the respondent however, when the Claimants were asked to stay away pending investigations, they instead went to their lawyer who issued a demand letter stating they were terminated. They therefore demanded to be paid their terminated dues.
9. The respondent further averred that the Claimant absconded duties. The demand letter on behalf of the Claimant was issued on 22nd April,

2009. The respondent never attached any response to the demand letter clarifying the reason why the Claimants had not been recalled to work. This was only pleaded in a response to the claim. The respondent went on further to allege that the Claimants voluntarily left employment.

10. On a claim for unfair termination or wrongful dismissal for employment the burden for justification for reasons for termination or dismissal is cast upon the employer. Further a justification for dismissal on account of unauthorized absence or absconding duty must be backed by evidence of attempts to contact the employee and Show Cause letter or messages conveyed to the employee, to Show Cause why his service should not be terminated on account of absconding duty.

11. The Court is of the view that the claim that the Claimants voluntarily left employment is not true when the Claimant's lawyers issued a demand letter on 22nd April, 2009 the respondent never responded to the same to explain why the Claimants had not resumed duties.

12. To this extent the Court is of the conclusion that the respondent has failed to discharge the burden cast upon it by law which is to prove and or justify the reasons for termination of employment. The court therefore awards the Claimants as follows: _

- (i) One month's salary in lieu of notice
- (ii) Unpaid salary for February, 2009
- (iii) Service pay for at the rate of 15 days' pay for each complete year of service
- (iv) Six months salary as compensation for unfair termination

13. The claim for untaken leave is rejected. Since though pleaded, the Claimant never led any evidence that they never went on leave.

14. Neither the Claimant nor the respondents attached any pay slips for the salaries the Claimant earned. Let the parties compute the decretal sum using the above parameters and

15. return to Court within 30 days from the date of this judgement for recording of final orders.

16. Mention on 4.2.2020 at Nairobi for recording of final orders.

17. It is so ordered.

Dated at Nairobi this 22nd day of November, 2019

Abuodha Jorum Nelson

Judge

Delivered this 22nd day of November, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge