



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 712 OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 27th April, 2018)

JOSEPH ATIEMI ONDANG'A.....CLAIMANT

-VERSUS -

NATIONAL HOUSING CORPORATION.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit through the firm of M/s. Obara & Obara Advocates claiming damages for non-payment of salary in lieu of notice, leave, unlawful termination of employment and compensation. He avers that he was employed by the Respondent as a Subordinate Staff and worked under the instructions, directions, supervision and control of the Respondent and/or the Manager of the Corporation.
2. He further avers that on 25th June 2009 and 14th September 2009, he was served with a letter by the Respondent indicating that he had absconded duty and on 4th May 2010, he was served with a dismissal letter dated the same day from the Respondent. He therefore avers that the dismissal letter did not have any complaint against him since he was unwell and was on treatment.
3. The Claimant states that he has not been paid his salary from May 2010 to date amounting to a sum of Kshs. 23,935 and compensation amounting to Kshs.526,570 and avers that the non-payment or withholding of his terminal dues is a violation and contravention of the Employment Act 2007. Further, the Claimant states that he had not gone for leave during the period of two (2) years he was in the Respondent's employment.
4. The Respondent filed their Replying Memorandum where they admitted that the Claimant was their employee and that the reason for the issuance of the said letter to the Claimant was prompted by the Claimant's absconding of duty from 15th to 18th December 2008 and 23rd December to 5th January 2009.
5. They aver that the Claimant was summarily dismissed which was prompted by his gross misconduct hence he is not entitled to payment of any salary from May 2010. Therefore the Claimant's claim is misguided, unmerited and of no consequences in view of the foregoing.
6. The Claimant, in his submission submit that, he applied for annual leave, a copy of the leave application was produced and a leave register issued by the Respondent indicating actual months on which the Claimant's leave was due and the application for leave was received by the Respondent but was not signed.
7. He also submitted that it is also trite in law that an employer cannot dismiss an employee from employment or terminate an employee's employment without giving the employee notice of termination and/or reasons for dismissal. He avers that the Employment Act provides that an employee has to be given a Notice to show cause why he/she cannot be dismissed from employment or a notice of termination of employment.
8. The Respondents filed their submissions where they aver that the Claimant was summarily dismissed for deserting duty and should be denied reliefs sought since he had been unable to prove that he deserves them and a party can only be granted salary in lieu of notice where he or she has been wrongfully or unfairly dismissed.
9. In this case the Respondent states that the Claimant was summarily dismissed under Section 44 (4) of the Employment Act and therefore there was no wrongful or unfair dismissal. The Respondent continues to state that the Claimant was also not entitled to service pay, leave allowance, gratuity and house allowance all which he has failed to prove he deserve due to the wrongful dismissal as it is clear that the Claimant was lawfully and fairly dismissed from the evidence adduced.

10. I have examined all the evidence and submissions adduced by both parties. The issues for determination are as follows:-

1. Whether there were valid reasons to warrant dismissal of the Claimant.

2. Whether due process was followed before dismissal.

3. What remedies are available if any?

11. On the 1st issue, the summary dismissal letter to the Claimant dated 4/5/2010 indicate the reason for the dismissal to be absconding of duty which the Respondent stated mounted to a gross conduct as per the Respondent's Human Resource Manual and Section 44 of Employment Act.

12. Section 44 of Employment Act lists abscondment of duty as one of the basis for summary dismissal. The Claimant was given an opportunity to answer to this misconduct and he stated that he was absent because he was sick and attending treatment and had permission from his supervisor to be absent.

13. The Claimant was however not able to prove by way of evidence the alleged permission given to him. Section 6.1(v) of the Respondent's Human Resource Manual provide as follows:-

"sick leave/convalescent leave

Such leave may be granted by the Management on the recommendation of a medical practitioner. An employee going on sick leave shall inform the head of his department within 48 hours of sickness. Any absence from duty due to sickness must be certified by a registered medical practitioner. Such sick off will be allowed for a maximum of to (2) days"

14. There is no indication that the Claimant had sick off certified by a medical practitioner. It is therefore my finding that he was absent from duty without permission which amounted to a gross misconduct. In view of this, I find the Respondent had a valid reason to summarily dismiss him.

15. The Respondents also took the Claimant to a fair disciplinary process as envisaged under Section 41 of Employment Act 2007. I therefore find that the Claimant's dismissal was fair and justified. I therefore dismiss the Claimant's case accordingly with costs to the Respondent.

Dated and delivered in open Court this 27th day of April, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties