



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 101 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 5th June, 2018)

CHARLES WANJIHIA NDERITU.....CLAIMANT

VERSUS

MAISHA MABATI MILLS LIMITED....RESPONDEDNT

JUDGEMENT

1. The Claimant filed suit through the firm of Betty Rashid & Co. Advocates claiming damages for wrongful and unlawful termination and failure by the respondent to pay full terminal benefits.
2. He avers that on or about 2010, the Respondent employed him as staff in charge of the stores at a monthly salary of Kshs. 31,000 but did not give him an appointment letter as required by law.
3. He commenced his duties and served the Respondent with loyalty and diligence until October 2013 when the Respondent unlawfully and without any reasonable cause verbally suspended the Claimant's employment without giving him any notice and/or payment of his full terminal benefits. These he avers, included 3 months salary in lieu of notice of Kshs. 93,000, service for 4 years of Kshs. 124,000 and General damages for unlawful termination equivalent to 6 months pay of Kshs. 186,000 which totals to Kshs. 403,000/=.
4. The Respondent replied to the memorandum of Claim where they averred that the claimant was employed as a store keeper on 9th January 2002 at a monthly salary of Kshs. 10,674.30 with a letter of employment and not in 2010 with a salary of Kshs. 31,000 as he had stated in his Memorandum of Claim.
5. They also denied that the claimant had served with loyalty and diligence and that his employment was unlawfully terminated without reasonable cause. They contend that the Claimant was guilty of gross misconduct in the course of his employment leading to loss of valuable electric cables which warranted his termination.
6. They further denied that the Claimant is entitled to the terminal dues set out in the claim.
7. The Claimant filed his submissions where he submitted that on the morning of 14th October 2013, he noted that 2 bars of brass were missing and he reported the matter to his immediate boss Mr. Avril who was the General Manager. He was thereafter arrested and taken to Ruiru police station where he was freed on a Kshs. 5,000 cash bail. That after investigations and failure by the Respondent to record statements. He was discharged by the police and his cash bond returned to him.
8. He avers that he was not in exclusive possession of the store key and hence access. He contends that he collected the key from Mr. Avril at 7.00am and returned it at 7.00pm as Mr. Avril resided in the premises and kept the key overnight in case of emergencies. When it comes to security, he states that there are guards in the factory and at the gate and high walls with razor/electric wiring as well as CCTV but there was no footage produced to show what transpired on the fateful day that the 2 brass bars went missing.
9. He further states that the police investigations of the theft allegations by the respondent were found to be baseless and he was not charged with any offence making the claims by the Respondent baseless and malicious. He therefore urges the Court to find his dismissal unlawful and order for his compensation as prayed from the statement of the claim in accordance with the provisions of the law.
10. The Respondent filed their submissions where they submitted that the Claimant's duties were dismissed summarily for gross misconduct where the respondent acted within the purview of the provisions of law.

11. They submit that the Claimant was handed over to the police who refused, neglected/declined to carry out the investigation which led to the abortion of the case and the company suffered a loss as the metal bars were never recovered.
12. Consequently, they state that the Claimant cannot purport to say that given that he was never charged and further that the cash bail was returned to him is an indication that he was innocent as clearly there was some foul play between the claimant and the police.
13. They aver that the claimant did not prove unfair termination and/or wrongful dismissal of his services but on their part, the Respondent has shown reasons for termination.
14. They also state that the Claimant having failed to prove his case on the required standard of probability, the claim of costs and interest of the suit must fail and urged the Court to dismiss the case with costs.
15. I have considered the evidence and submissions of both parties. The Claimant has averred that he was unlawfully and unfairly terminated.
16. The Respondent avers that he was terminated as he was suspected to have been involved in the theft of the brass wires. The Respondent are duty bound to give reasons for the dismissal as envisaged under Section 43 of Employment Act.
17. These reasons should be valid and based on tangible evidence. The Respondent have contended that the Claimant colluded with the police and that is not why he was never charged. That is a serious allegation but the Respondents do not explain why they did not hold their own internal investigations to ascertain the truth and even subject the Claimant to internal disciplinary hearing.
18. The Claimant submitted that the key to the store was with one Avril overnight at the time the bars were stoles. The Respondent never contested this fact. The Claimant also raised the issue that there was enough security in the premises including CCTV. This, the Respondents never contested. No CCTV, footage was availed to show what happened. The guards on duty were never called to give evidence.
19. The only Respondent's witness even stated in evidence that the cables were about 100 meters long and about 15 cables were stolen a contradiction to what was reported to the police that 2 brass bars were stolen.
20. In essence I find the Respondent did not establish they had valid to dismiss the Claimant. The Claimant was never issued with any dismissal or termination letter.
21. In the same vain, the Claimant was never subjected to any disciplinary process by the Respondent and if there was, evidence of the same has not been submitted in Court. It is therefore my finding that the Claimant was dismissed without valid reasons and without due process and I therefore find his dismissal unfair and un justified as provided for under Section 45(2) of Employment Act 2007 which provides as follows:-

2) *"A termination of employment by an employer is unfair if the employer fails to prove:-*

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

22. In terms of remedies, I find for Claimant and award him as follows:-

1. *1 months' salary in lieu of notice being 18,135.03/=*

2. *Damages for unfair termination equivalent to 6 months salary = 18,135.03 x 6 = 108,810.18/=*

Total= 126,945.21/=

3. *The Claimant is also entitled to costs of this suit plus interest at Court rates with effect from the date of this judgement.*

Dated and delivered in open Court this 5th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Oguttu holding brief for Rashid for Claimant

No appearance for Respondent