



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 204 OF 2017

JOHN KARANJA MUIRURI.....CLAIMANT

VERSUS

NJUCA CONSOLIDATED COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant's suit was filed seeking recompense for unfair and unlawful dismissal from employment, underpayment, non-payment of terminal dues and compensatory damages. The Claimant averred that he was employed by the Respondent in 2011 as a security officer earning Kshs. 12,000/- a month. He averred that the sum of 12,000/- was an underpayment as the gazetted minimum wage for a security officer during the relevant period was in the region of Kshs. 17,000/- and he therefore was seeking Kshs. 5,000/- for every month worked. He averred that sometime in September 2016 he was verbally instructed to report to the manager at the Thika head office and clear with the Respondent and that his services as a security officer had been terminated. He averred that he reported the matter to the Thika Labour Officer and was belatedly issued with a termination letter which did not state the reasons for the termination. It was averred that the termination was illegal, unfair, wrongful and inhumane. He averred that he did not go on leave for the 5 years he was in employment and that he was not paid for overtime worked for which he claimed Kshs. 1,011,000/-. He sought the September 2016 salary Kshs. 17,000/-, one month salary in lieu of notice Kshs. 17,000/- and underpayment for 5 years at rate of Kshs. 5,000/- per month, service pay for 5 years Kshs. 42,500/-, 12 months salary compensation Kshs. 204,000/-, interest on the sums claimed from the date of filing the suit till payment in full plus costs of the suit.

2. The Respondent averred that the Claimant was relieved of his duties on 7th September 2016 after he engaged in unauthorised and fraudulent acts where he had loaded an assortment of good in a scrap metal vehicle. The Respondent averred that prior to the dismissal the Claimant was given a hearing where he was accosted with the allegation and he failed to give an explanation for the illegal acts and a decision was made to relieve him of his duties and he was instructed to clear with the Respondent. The Respondent avers that the Claimant failed to clear with the Respondent and instead went to the Thika labour offices where the Respondent was invited for a conciliation meeting and that the meeting took place on 1st February 2017 and the Labour Officer upheld the dismissal. The Respondent averred that the Claimant cleared with the Respondent and was issued with a clearance certificate, his terminal dues paid as well as the salary for the days worked in September. The Respondent averred that the Claimant never worked overtime and that he took his leave days and any leave day not taken was duly compensated. The Respondent averred that the Claimant's NSSF dues were paid and therefore he was not entitled to any service pay.

3. The Claimant testified on 15th February 2018 and stated that he was employed by the Respondent in October 2010 as a watchman and was a supervisor 3 months later. He testified that he earned Kshs. 400/- a day and worked every day from 5.00am to 9.00pm. He stated that he heard the payment was supposed to be 17,000/- and that he reported the dispute to the Labour Office and the Respondent did not respond to the letters from the Labour Office. He testified that he was not told of the reason for his dismissal. He received notice pay for 7 days, pay for 7 days worked, 6 days leave accrued after the meeting at the Respondent's boardroom. He stated that the tabulation of dues was incomplete as he did not receive notice, underpayment, compensation for unfair dismissal, public holidays, overtime and rest days. He thus sought legal services and the matter was pursued by his lawyers. He stated that he was at the farm perimeter where he was loading on instructions of a director Sally. He testified that he was not heard by any panel and that he cleared the same day.

4. In cross-examination he stated that he was paid 400/- a day and did not have the legal notice. He stated that in attendance at the meeting were the personal assistant to the CEO, HR and the labour officers. He testified that no explanation for non-payment was given. He confirmed that he received payment and signed the discharge certificate.

5. In re-examination he stated that he had leave pending for 3 years and that he signed for the final dues because of the problems he had which was not a bar to his seeking more pay.

6. The Respondent called the HR officer Mike Murimi who stated that he had recorded a statement dated 9th October 2017. He testified that he knew the Claimant a former employee of the company who was a security supervisor. He stated that the Claimant the dismissal was on

account of the incident that had occurred. He stated that the Claimant was present at the conciliation meeting and he acknowledged receipt of payment. He testified that the Claimant was loading some scrap metal and items that were not to be sold and had no explanation for that. He stated that the Claimant signed the discharge upon receipt of the cash and he was not coerced to do so. He stated the Claimant could have opted not to sign.

7. In cross-examination he testified that he was employed in 2015 and was the custodian of the employment record. He stated that all the statutory dues were paid and records kept and that the Claimant was employed in 2011. He testified that the NSSF provisional statement produced indicated employment from 17th October 2010 and stated that it could indicate any date but we could not rely on it. He stated the dismissal was on account of theft by servant. He said that there was an attempt and the Claimant was stopped before he stole. The matter was handled internally and that he attended the conciliation meeting where the 2 labour officers attended, the legal officer of the Respondent and the Claimant did not bring any witness. He stated that he could not recall when the Claimant was issued with notice to show cause. He testified that there were 63 days leave due and that the Claimant had worked from 2011 till termination.

8. In re-examination he testified that the Claimant was registered for NSSF on 22nd November 2013 and payments were made. He stated that the issues facing the Claimant were put to him and he was given an opportunity to respond and he didn't satisfactorily reply.

9. The parties filed written submissions and the Claimant submitted that under Section 45(2) of the Employment Act termination of the employee would be deemed unfair if the employer fails to prove that the reason for the termination is valid and that the termination of employment was in accordance with fair procedure. The case of **Donald Odeke v Fidelity Security Ltd [2012] eKLR** was cited where Ndolo J. held that *an employee facing disciplinary action must be given adequate opportunity to respond to any charged before any action is taken against them*. The judge went on to add that *it does not matter what offence the employee is accused of. If the employee is not heard, the termination is ipso facto unfair*. It was submitted that even where the hearing is given the reasons for dismissal must be valid so as to guard against a situation where an employer follows due process with the aim of getting rid of the employee, the reasons for the dismissal must be valid. The Claimant relied on the case of **Kenya Petroleum Oil Workers Union v Kenya Shell Limited [2014] eKLR** where the court held that *these issues go to the substantive fairness of the termination/dismissal. In many instances the practice is developing in the Industrial Court to treat the grounds under the general rubric of whether the termination/dismissal was (un)fair*. The Claimant relied on the case of **Job Rioba Maungo v Riley Falcon Security Services Limited [2016] eKLR** where the court awarded the Claimant the underpayment on proof of underpayment during employment. The Claimant submitted that he was not paid the September pay and was not given notice of the intention to terminate his services. He sought the leave due as well as overtime pay for the period of service which was an accumulated overtime of Kshs. 1,266,000/-, the service pay under Section 35 of the Employment Act as well as compensatory damages as guided by Section 49 of the Act and the case of **Paul Ngeno v Pyrethrum Board of Kenya Ltd [2013] eKLR** where the claimant was awarded compensation equivalent to 12 months salary for unfair termination as well as the case of **Moses Kaunda Moro v CMC Motor Group Ltd [2013] eKLR**.

10. The Respondent submitted that the Claimant signed a discharge voucher and a tabulation of dues and that the Claimant's claim can therefore not succeed. It was submitted that the Claimant at the point of signing the discharge voucher did not present his own calculations or contest the tabulation by the Respondent. The Respondent relied on the case of **Peter Mutinda Katuthi & 33 Others v Malindi Salt Works Limited [2017] eKLR** and **Cosmas Mutua Mwanzia v Bio Foods Products Limited [2016] eKLR** where the courts upheld the discharge vouchers signed by the claimants. The Respondent submitted that in the event the court was of a different view, the compensation that could be awarded under the head of underpayment is nil as the Claimant was earning Kshs. 12,000/- a month which is above the minimum for a day watchman in the agricultural industry (Kshs. 10,107/-). The Respondent adverted to Section 90 of the Employment Act which places a limit on the period for which remedies can be granted. On the termination the Respondent submitted that the reasons were addressed and extensively dealt with by the parties and buttressed by the conciliation meeting that took place, his explanation considered and found unsatisfactory. It was urged that the dismissal be found to have been fair.

11. The court has considered the pleadings, the evidence adduced and the submissions of parties and the authorities cited in coming to this decision. The Claimant was dismissed ostensibly after he was found pilfering. The Respondent asserts that an explanation was sought from the Claimant and when given it was found to be wanting and the Claimant accordingly dismissed. The Claimant was paid some sums and he signed a discharge voucher to the following effect:

I, John Muiruri (formerly employed) as supervisor at Njuca Consolidated Ltd wish to certify that I have received my full and final settlement of my dues and that I have no further claims whatsoever at all against Njuca Consolidated Company Limited, its affiliates, successors and assignors.

The discharge was duly signed and dated 17th March 2017. The Respondent was by this act absolved from a suit such as the one before me. The Claimant should not have signed the discharge voucher as through it he insured the Respondent from any suit such as the claim he filed. The suit would fail on this score alone. I therefore find that the Claimant shut himself out of the remedies he could have pursued for the unpaid leave days, the overtime (if any) or the notice (if any). I dismiss the suit but each party is to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 4th day of June 2018

Nzioki wa Makau

JUDGE