



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1239 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 2nd July, 2018)

LABAN MUTHOKA KISUA CLAIMANT

VERSUS

NAKUMATT HOLDINGS LIMITEDRESPONDENT

JUDGEMENT

1. The Claimant filed suit on 2nd August 2013 through the firm of Nyabena Nyakundi & Co. Advocates seeking damages for wrongful dismissal and terminal dues.
2. He avers that on or about March 1999, the Respondent offered him employment as a Cashier at its establishment and later on as a Customer Care Officer at a basic salary of Kshs.3,640 and house allowance of Kshs.546 which was subsequently increased from time to time until it reached Kshs.58,830 per month and house allowance of Kshs.2,500. The contract of employment was done orally and was never reduced into writing by the Respondent in contravention of the mandatory provisions of Section 9 of the Employment Act, 2007.
3. He further avers that he worked for the Respondent with due diligence and faithfulness until on or about 29th January 2013 when the Respondent unlawfully and wrongfully dismissed him from employment without any notice or payment in lieu thereof.
4. He states that he is not aware of any theft in the Respondent's premises as alleged and the particulars of the alleged theft were not brought to his knowledge. On or about 20th January 2013, he wrote to the Respondent and denied any involvement or knowledge of the alleged theft of the Respondent's property and stated that the allegations were malicious due to the fact that he may have had differences with the Security Manager Mr. Maina.
5. He states that in the letter of dismissal dated 29th January 2013 the Respondent alleges that he refused to report at the Head Office on 10th January 2013 to defend himself which allegations are not true as he has never been summoned to attend any staff disciplinary meeting on 10th January 2013 as alleged.
6. He also states that he has never been taken to any police station in regard to the theft allegations and continues to state that he used to work for longer hours and was not adequately compensated by payment of overtime.
7. He further states that the Respondent refused to pay his dues and as a result, he instructed his advocates on record who wrote a demand letter to the Respondent and sought for the terminal dues. But despite demand to sue being made, the Respondent has refused to make good his claim and therefore making this suit necessary.
8. The Respondent filed their Memorandum in Response to Statement of Claim where they denied each and every allegation in the Claimant's Statement of Claim and state that the contract of employment was by letter of employment that the Claimant himself signed as accepting the terms and conditions of his employment.
9. They aver that he was dismissed from employment due to gross misconduct involving theft of company property which he was well informed and proceeded to respond by a written statement. They state that he has never reported to his supervisors any differences he has had with the security manager and is trying to use this flimsy excuse to evade liability of his gross misconduct involving theft of company property.
10. They further aver that he was issued with an invitation letter to a disciplinary session which he refused to acknowledge receipt. They

also state that he was only authorized to work between the ordinary hours of 8.00 am to 5.00 pm and was never required to work over-time nor was he entitled to any over-time benefits.

11. They deny owing the Claimant any dues and further aver that he was paid his terminal dues which he signed for indicating he did not have any further claims hence he is not entitled to the same.

12. They state that the Claimant was terminated for gross misconduct involving theft of the Respondent's property after the relevant procedures for termination of employment were adhered to.

Submissions

13. The Claimant filed his submissions where he submits that he was unfairly terminated from his employment due to gross misconduct where he is alleged to have stolen from the Respondent's company which termination was against Section 43(1) of the Employment Act 2007. He avers that the Respondent failed to identify either of the stolen/lost items nor adduce evidence of a complaint lodged with the police as theft by servant is a criminal offence in laws of contract.

14. He further avers that having established that his dismissal was substantively and procedurally unfair he is therefore entitled to not only terminal dues but also compensation for unfair loss of employment as well as costs of the claim and interest at Court rates.

15. The Respondent filed their submissions where they submit that the Claimant was lawfully dismissed from employment and with cause where they have proved reasons for termination in accordance to Section 43(1) of the Employment Act 2007.

16. They aver that they performed its obligations as an employer fully and without fault by giving the Claimant due notice and the opportunity for a fair hearing. They aver that his non-compliance with the requisite procedure was a major misjudgment on his part, if at all he was innocent.

17. They further aver that the cause of his dismissal was gross misconduct of theft therefore he is not entitled to compensation for unfair loss of employment or salary in lieu of notice. They therefore pray that the Honourable Court will dismiss their prayers as against them and costs of this claim and interests.

18. I have examined all the evidence and submissions from both parties. There are 3 issues for determination:-

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

2. Whether due process was accorded to the Claimant before dismissal.

3. What remedies to award in the circumstances?

19. The Respondent have stated in their pleadings that the Claimant was dismissed following theft he was involved in at their premises. The Respondent however failed to call any evidence to rebut the Claimant's case.

20. In **CA No. 140/2008 at Nairobi** JJA Visram, Mwilu (as she then was) and Otieno Odek rendered themselves as follows:-

“In Dev Raj Sharma vs Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification and that the few exhibits should be confirmed to articles which have been fairly probed and admitted in evidence. In the Nigerian case of Michael Hausa vs the State (1994) 7-8 SCAN 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of evidence...”

21. Since the Respondents did not call any evidence nor lead evidence to admit their documents or pleadings there is no evidence submitted by them before Court. That means that the evidence of the Claimant stands alone.

22. Considering the Claimant's evidence, I note that he was employed by the Respondent in 1999. He was never issued with an employment letter as envisaged under Section 9 of Employment Act 2007. The payslips issued to him are however proof the employment relationship and at time of dismissal he was earning 58,830 as basic salary and a house allowance of 2,500/= and travelling allowance of 1,050 – total gross was therefore Kshs.62,380/=.

23. He was accused of stealing some goods from his employer and issued with a show cause letter indicating that he wanted to steal certain items from the employer. He denied all these issues. There is no indication that he was taken through a fair disciplinary hearing. The minutes of the disciplinary hearing are not exhibited in Court for Court to examine the nature of the disciplinary hearing process.

24. It is my finding that without any evidence to the contrary, there was no valid reason to warrant dismissal of the Claimant and neither was he subjected to a fair disciplinary process.

25. The dismissal was therefore unfair and unjustified as per Section 45 (2) of Employment Act which states 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.

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

1. 1 months salary in lieu of notice = 62,380/=.

2. 8 months salary as damages for unlawful termination = 62,380 x 8 =499,040/=

Total = 561,420/=

3. The Claimant shall be issued with a Certificate of Service.

4. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Dated and delivered in open Court this 2nd day of July, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties