



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET

CAUSE NO.270 of 2017

ISAAC NDURO MURITHI.....CLAIMANT

VERSUS

MOGAS KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. On 6th October, 2017 the claimant filed his Memorandum of Claim, the respondent was served on 24th October, 2017 but there was no appearance or defence filed. The Process Server, Bernard Marando filed returns to confirm service upon the respondent. There is an Affidavit of Service filed on 17th November, 2017.

2. Pursuant to Rule 15(3) of the Employment and Labour relations Court (Procedure) Rules, 2016 the court satisfied that the respondent was aware of these proceedings and failed to attend proceeded and heard the claimant on his evidence.

3. The claim is that the claimant was employed by the respondent company as a pump Attendant and Fore Court Leader from 11th July, 2008 but on 15th August, 2015 he was charged in Criminal Case No.4713 of 2015, Eldoret Magistrates Court on allegations he was not aware of. The respondent then proceeded to terminate employment unlawfully and without due cause.

4. On 16th August, 2015 the claimant reported for work but the respondent advised him to stop until the criminal case against him and pending in court was determined. On 9th June, 2017 the criminal case was determined and the claimant acquitted and when he reported on duty he was informed that he had been dismissed. Such was without any justification, it was unprocedural and unfair. There was no payment of terminal dues.

5. The claimant is claiming;

a) A declaration that the termination process was unlawful;

b) Compensation at Kshs.211,680.00

c) Notice pay kshs.17,640.00;

d) Payment of salary from June, 2015 to June, 2017 Kshs.405,720.00;

e) Service pay Kshs.79,380.00;

f) Certificate of service

g) Costs.

6. The claimant testified in support of his case. Upon employment the claimant was issued with a letter of appointment dated 11th July, 2008 and worked diligently and after 5 years was awarded for long service with the respondent. The claimant was moved to different locations/stations of the respondent and his last station was in Eldoret as a Team Leader from 26th July, 2014. The last salary paid was Kshs.17, 640.00 per month the respondent also paid for other dues with NSSF and MHIF.

7. On 15th June, 2015 while the claimant was at work, a fellow employee disappeared with cash; property of the respondent and the claimant who was the team leader was arrested and charged in court. He was later acquitted and when he reported back to work he was told to await the outcome of the criminal case and upon acquittal the respondent informed him that he had since been dismissed from its employment. No

dues were paid; there was no notice or hearing.

8. The claimant also confirmed to the court that upon his arrest, he never went back to work. He has since never been back to the respondent.

9. At the close of the hearing, the claimant relied on his witness statement, pleadings and evidence.

Determination

10. The failure by the respondent to enter appearance, file a defence or attend in these proceedings leave the court with the claimant's case only. There is no challenge to the claims made. Such will be accessed on their lawfulness and merit.

11. The claimant testified that following theft at work by a fellow employee under his supervision, he was arrested and Charged in Criminal Case No. 4713 of 2015, Eldoret Magistrates Court. He has since been acquitted.

12. Though there is no defence setting out the circumstances leading to the claimant being charged in Criminal Case No.4713 of 2015, Eldoret Magistrates Court, termination of employment between an employer and employee should be procedural and based on the applicable law, the Employment Act, 2007. Even where there are criminal proceedings against an employee, internal disciplinary measures must be undertaken by the employer to address any misconduct at work.

13. in **David O. Owino versus Kenya Institute Of Special Education[2013] eKLR** in addressing the question of whether an employee acquitted in criminal proceedings should be taken as having been absolved of blame held that;

The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.

14. The Court of Appeal similar held in **Kibe versus Attorney General - Civil Appeal No 164 of 2000** that an acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. This was given emphasis in the case of **Attorney General & another v Andrew Maina Githinji & another [2016] eKLR**;

... Distinction between internal disciplinary proceedings of an employer and criminal proceedings was upheld for the reason that the internal disciplinary proceedings are anchored on the contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required.

15. The employer must ensure the provisions of section 43 of the Employment Act, 2007 are addressed before dismissing an employee. There must be a valid and genuine reason leading to termination of employment. The subject employee must be issued with notice and a hearing in accordance with section 41 of the Act.

16. Where the employer fails to follow due process, such as happened in this case, the termination of employment is unfair in terms of section 45 of the Employment Act, 2007.

17. Notice pay is due in a case lacking in procedural fairness and in accordance with section 35 of the Employment Act, 2007. The claimant is awarded Kshs.17, 640.00 his last month salary.

18. Compensation is also due in a case of unfair termination of employment where substantive justice and fairness were not addressed. The claimant is awarded

12 months gross salary at kshs.211, 680.00.

19. The claim for salary from August, 2015 to June, 2017 I on the basis that since the claimant was arrested, he was advised to return upon the determination of his criminal case. The claimant however contradicted these averments upon question by the court and testified that since his arrest, he never went back to work. As the claimant offered his labours to the respondent until 15th August, 2015 and following unfair termination of employment such has been addressed by the court and redressed, such a claim for salaries alleged owed from the date of arrest to the end of the criminal trial has no merit.

20. On the claim for service pay, the claimant testified that the respondent paid statutory dues to NSSF and NHIF and though these were stopped, the payments due are not to the claimant but to the statutory bodies in accordance with section 35 of the Employment Act, 2007.

21. Upon termination of employment, every employee is entitled to a Certificate of Service in accordance with section 51 of the Employment Act. This should issue to the claimant unconditionally.

Accordingly, judgement is entered for the claimant against the respondent;

a) A declaration that the respondent unfairly terminated the claimant's employment;

b) Compensation awarded at Kshs.211, 680.00;

c) Notice pay Kshs.17, 640.00;

d) Certificate of Service be issued in accordance with section 51 of the Employment Act, 2007.

e) Costs of the suit.

Delivered in open court at Eldoret this 26th day of September, 2018.

M. MBARU JUDGE

In the presence of:

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