



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 303 OF 2015

(Before Hon. Justice Mathews N. Nduma)

BENSON C. WEPUKHULU.....CLAIMANT

VERSUS

UKWALA SUPERMARKET.....RESPONDENT

J U D G M E N T

1. The Claimant seeks –

(a) Severance pay.

(b) Unpaid leave.

(c) Leave allowance for 11 years.

(d) One month's notice and

(e) Unpaid leave days. Total claim is the sum of Kshs.456,149 as set out in statement of claim dated 6th August, 2015 and filed on 12th August, 2015.

2. The Claim is opposed vide a Memorandum of Defence filed on 10th September, 2015.

Facts of the Claim

3. The Claimant filed a witness statement dated 6th August, 2015 and testified under oath. The facts of the claim are that the Claimant was employed by the Respondent on 1st September, 2003 as a shop assistant. He worked continuously until 24th April, 2015. At the time of leaving he earned a monthly salary of Kshs.32,462.

4. He was entitled to 21 days leave. He went on leave and at times was paid in lieu of leave. On 31st December, 2014 the Claimant was summoned by the shop manager and accused of wrongly using a bonus card called 'Zawadi Card' meant for shop customers and not employees of the Respondent.

5. The Claimant was aware that he was not allowed to use a 'Zawadi Card', so he used his wife's card. He stated that he did not know it was wrong to use a spouse's card. His wife was a customer at the shop and therefore obtained points through her card upon buying items and would use the gained points to do other purchases. The Claimant admitted the mistake and wrote a letter of apology and promised to repay the benefit obtained by him vide his wife's card. The Claimant was initially suspended for 7 days. Upon return he was asked to sign a blank voucher which the Respondent's Manager would use to receive the money.

6. At the end of the first month, Kshs.10,000 was deducted. He was left with a salary balance of Kshs.13,000 upon deduction of statutory dues. The deductions were done for four (4) months and the claimant was demoted from the position of supervisor he held to a shop attendant.

7. The Claimant complained about excessive deductions to no avail. He reported the matter to the union and the union wrote to the employer. They held a meeting but it bore no fruit. He was called to the office and given letter of dismissal. The Claimant did not produce the letter of dismissal but he refused to sign it and was sent away and told not to come back.

8. The Claimant prays for payment of one month salary in lieu of notice, Severance pay for 12 years worked, leave for the year 2015 in the sum of Kshs.20,789 and unpaid leave travelling allowance at the rate of Kshs.3,000 per year for 11 years.

Defence

9. RW1 Dominic Ochishe Wesonga testified in support of the defence case. He told the court that he was a Manager at Lake side wholesale and retail shop. In 2015, he worked for the Respondent as Manager in charge of IT. The Claimant was his colleague. The Respondent discovered some Zawadi Cards were used regularly every day. Customers were interrogated. It was discovered that some staff had given cards to relatives and the staff would have the cards swiped all the time when a customer who had no zawadi card made a purchase. The Claimant was using his wife's card for that purpose to his benefit and to the loss of the Respondent. The Claimant and his wife were summoned. The Claimant admitted the offence and agreed to refund the gained benefit in instalments. The Claimant reported the deductions to the union. The union wrote to the Respondent.

10. The Claimant was given a show cause letter. He did not respond to it and did not even take it. He left work and never came back. The Claimant was not dismissed. The Claimant went on leave and was not owed any days. The Claimant absconded and is not entitled to payment in lieu on notice. The Claimant was always paid leave allowance whenever he went on leave. NSSF and NHIF was paid on behalf of the Claimant and so he is not entitled to payment of gratuity or severance pay.

11. The letter of apology dated 31st December, 2014 was produced from various employees including the Claimant. Evidence of cashed leave was produced but no evidence of payment of leave allowance and leave days for 2015 was produced by RW1.

Determination

12. The Claimant has not pleaded or tendered evidence of having been declared redundant. The claim for severance pay is misconceived. Gratuity is also not payable since the Claimant was registered with NSSF and deductions were made and remitted during his 12 years of service.

Dismissal

13. There is no evidence that the Claimant was dismissed from work. He has not made any claim for damages or compensation in respect of a dismissal. The allegation has no merit.

Unpaid Leave

14. The Claimant left his employment on 25th April, 2015. He claims Kshs.20,789 for the prorated leave not taken for the year 2015. No evidence to rebut this claim has been tendered by the Respondent. The court awards the Claimant accordingly:-

(a) Leave Allowance

Leave allowance is payable upon an employee going on leave to cater for travel expenses. There is evidence that the Claimant encashed several of his annual leave days. No evidence was tendered in respect of which years leave travelling allowance of Kshs.3,000 was unpaid. This claim has not been sufficiently proved and is dismissed.

(b) Notice Pay

There is no prove of termination of employment or dismissal. The Claim for payment in lieu of notice is unwarranted and is dismissed.

(c) The claim for unpaid leave days on private basis is unknown in law and is dismissed for lack of merit.

15. In the final analysis judgment is entered in favour of Claimant in respect of untaken leave days for the year 2015 in the sum of Kshs.20,789. The rest of the claims are dismissed for want of proof. The award is payable with interest at court rates from date of filing suit till payment in full. The respondent to pay half the costs of the suit.

Dated and Signed in Kisumu this 20th day of September, 2018

Mathews N. Nduma

Judge

Appearances

Claimant in person

M. M. Omondi for Respondent

Chrispo – Court Clerk