



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT NAIROBI

Cause NO.447 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 22nd October, 2018)

ALBERT OYIEYO ONCHARI.....CLAIMANT

-VS-

MARKET MASTER LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed a Memorandum of Claim dated 6th March, 2012 against the Respondent on 18th March 2012 through the firm of J.M Onyancha and Associates alleging unfair termination and failure by the Respondent to pay him his terminal dues which he computed as follows:-

- a. Service charge and unpaid leave allowances totaling Kshs 43287/= as set out in paragraph 11.**
- b. Compensation for wrongful dismissal equivalent to 12 months salary.**
- c. Any other or further relief the honorable court may deem fit to grant.**
- d. The Respondent to pay the cost of this proceeding.**
- e. Interest on the above at court rate.**

2. The Claimant's case is that he was employed by the Respondent as a security guard and served the Respondent diligently until the 1st December 2011 when the Respondent terminated his services on false accusations. It is the Claimant's testimony that he was an employee of the Respondent since the year 2006 working as a casual worker and after three (3) months, was promoted as a permanent employee. Further, the Claimant did testify that in the year 2010, he offered the Respondent normal services and overtime by working extra hours as time off which the Respondent did not pay.

3. The Claimant further testified that he did offer his services diligently without any complain from the Respondent with loyalty and full dedication until 1st December, 2011 when he was unfairly, procedurally and unlawfully terminated from his services.

4. The Claimant stated that on 6th October, 2011, his wife was hospitalized and he was given 14 days paternity leave. He resumed work on the 1st of December 2011 and then one Peris Oloo called him to her office and issued him with a dismissal letter without any explanation at all. He avers that he was not given any hearing before the dismissal hence this claim.

5. Further, the Claimant supported his claim by filing list of documents and witness statement on 20th April, 2017. When cross-examined by Counsel for the Respondent, the Claimant testified that he had sought 2000 Kshs to help him during the period. He paid a bill of 1800kshs and used 200 Kshs as fare back home. He admitted that he was a member of NSSF but the Respondent failed to make remittances for 8 months.

6. He also stated that he was a member of the benevolence fund and used to remit 200 Kshs but the Respondent deducted 300 Kshs per month.

7. The Respondent opposed this claim. The Respondent filed a Memorandum of Defense through Mbugua Atundo and Macharia Advocates

which response was also supported by the list of witnesses, witness statement and list of documents. The Respondent claimed that the termination of the Claimant was done following the laid down processes and asked the court to find so and dismiss the claim accordingly.

8. I have examined all the evidence and submissions of both parties. The issues for determination are as follows:-

a. Whether the Respondents had a reasonable cause to terminate the claimant and whether they followed due process.

b. Whether the claimant is entitled to remedies sought

9. In determining the issue No. 1 above, I note that the claimant was summarily dismissed for gross misconduct under Section 44 of the Employment Act 2007 for the reason that he sought money to pay for his wife's medical bill when no such bill existed. The Respondent contended that this was in breach of their code of rules demanding integrity and honesty. The Claimant testified that he actually sought assistance to pay for the bill but it was not even provided for by the Respondent and so he had to seek help elsewhere.

10. Section 44(4) states as follows:-

“(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

- a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;**
- b. during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;**
- c. an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;**
- d. an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;**
- e. an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;**
- f. in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or**
- g. an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.**

11. Whereas dishonesty can be a misconduct, the same is not listed amongst matters that can be deemed to be of gross misconduct and which could lead to summary dismissal. It is even admitted by the Respondent that they did not even give the Claimant the 2000 Kshs he asked for. The Respondent in my view had no valid reason to summarily dismiss the claimant on this account which is not as provided by law and even after failing to assist him after his wife had a baby.

12. Other than having no valid reasons, the Respondent also failed to give the Claimant any hearing. He was condemned unheard and this is also against the law as provided for under Section 41 of the Employment Act 2007.

13. I therefore make a finding that the Respondent's decision to summarily dismiss the Claimant was unfair and unjustified and therefore null and void.

14. I find for the Claimant in terms of remedies and award him as follows:-

1. 1 month's salary in lieu of notice=14,425/=.

2. 12 months' salary as compensation for unlawful dismissal given the circumstances under which the dismissal was done and without any valid reasons=12 x 14,425=173,100/=.

3. Unremitted NSSF contributions=3,200/=.

4. Village market benevolent fund over deduction of 100 per month=2,700/=.

TOTAL=193,427/=

5. The Respondent will also issue the claimant with a certificate of service.

6. The Respondent will pay costs of this suit with interest on above amounts at court rates with effect from the date of this judgement.

Dated and delivered in open Court this 22nd day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant – Present

No appearance for Respondent