



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 880 OF 2012

PETER MWANGI MAINA.....CLAIMANT

VERSUS

THE STANDARD GROUP LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for:

Kshs.

- a. Unpaid salary for December 2010..... 21,500
- b. One month salary in lieu of Notice.....21,500
- c. Unpaid leave (100 days)66,700
- d. Damages for unlawful termination of employment

2. The respondent denied the alleged unlawful termination of the claimant's service and averred that the termination was lawfully done within the express terms of the contract, which provided for termination by serving on month written notice of payment of one month salary in lieu of notice. It is defence case that she opted for the payment of salary in lieu of notice as communicated vide the termination letter and as such denied that the termination was unfair as alleged by the claimant.

3. The suit was heard on 16.10.2017 and 3.5.2018 when the claimant testified as Cw1 and the respondent called her HR. Manager, M/s Joy Kagwi as the Rw1. Thereafter the claimant filed written submissions but the respondent did not.

Claimant's Case

4. Cw1 testified that he was employed by the respondent as a driver on 9.10.2006 under a 5 years contract but on 25.8.2010 he was appointed on permanent basis. He worked diligently and without receiving any warning until 23.1.2011 when he was served with a termination letter citing late reporting as the reason for the termination. He contended that the termination was unfair and prayed for the reliefs pleaded in his claim including accrued leave of 100 days from 2006 – 2011.

5. On cross examination, Cw1, he denied the alleged late reporting to work or absenting himself from work on 27.11.2010 or at all and contended that he was not given any chance to defend himself before the termination. He admitted that his contract provided for termination by one month notice or payment of salary in lieu of notice. He also admitted that he was served with the termination letter on 3.1.2011 stating that he was going to be paid one month salary in lieu of notice. He contended that he disagreed with the termination and failed to do clearance because he had been adversely affected by the termination.

6. He denied that he was paid his salary for December 2010. He admitted that, his contract of service provided for 25 leave days per year and if not utilized, he could only carry forward to the following year a maximum of 5 leave days. He also confirmed that he had worked for only 4 months after signing his last contract. He denied ever receiving the letters dated 17.11.2010 and 27.11.2010 from his supervisors.

Defence Case

7. Rw1 relied on records to confirm that the claimant was employed by the respondent from 9.10.2006 to 3.1.2011. He testified that the claimant persisted in reporting to work late and at times absented himself from work altogether and upon being served with show cause letters, he failed to respond. As a result he was terminated pursuant to clause 3 of his contract of service which gave the parties the liberty to terminate the contract by serving one month notice or payment of one month salary in lieu of notice.

8. According to Rw1, the termination letter offered payment of one month salary in lieu of notice. However, the claimant never went to clear and collect his terminal dues despite being invited to do so in writing. She therefore maintained that the termination was lawful and the contract of service was never breached in anyway.

9. On cross examination, Rw1 stated that she joined the respondent in 2015 after the termination of the claimant's services. She confirmed from the records that salary to the claimant was being transmitted via his bank account. She contended that claimant's salary for December 2010 was paid and there was a payslip to that effect. She admitted that she had no evidence to prove that the claimant was served with the show cause letter and memos dated 16.9.2010 and 7.11.2010. She however contended that the said show cause memos constituted the opportunity given to the claimant to defend himself. She contended that claimant was entitled to pension but she was not aware whether he collected the cheque for the same. She however admitted that the claimant is still entitled to collect his payment in respect of one month salary in lieu of notice plus 5 days leave less statutory deduction, Kshs.26,000 sacco debt and Kshs.1,000 for the unsurrendered staff card, and upon clearance in line with the company policy.

Analysis and Determination

10. There is no dispute that the claimant was employed by the respondent as a driver from 2006 till 3.1.2011 when his employment was terminated by the respondent. The issues for determination are:

- a. Whether the termination was unfair and unlawful.
- b. Whether the reliefs sought should be granted

Unlawful termination

11. Under section 45(2) of the Employment Act, termination of employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure.

Reasons for termination

12. In this case the reason for the termination was absence from work and late reporting to work on the part of the claimant. The claimant has denied the alleged absence from work and the late reporting to work. No eye witness was called to prove the alleged reason for the termination but only produced personal records showing correspondences that support the existence of the alleged offence.

13. Example of the said correspondences is the memo dated 28.11.2010 from the Senior Transport and Service Officer to the Manager HR and Administration complaining about the claimant's late reporting, absence from work and failure to respond to show cause letters. The memo also indicated that the claimant had been served with a last warning. On the said memo, the Manager HR and Administration endorsed a recommendation for termination of the claimant. Again, the Senior HR officer recommended for the termination of the claimant's services vide another memo dated 2.12.2010 to the Assistant Director legal, HR & Administration. The recommendation was approved on the same day and the grounds for the termination were absence from work, late reporting to work and failure to respond to show cause memos.

14. The aforesaid memos were not objected to by the claimant whose counsel only objected to the further documents filed on 28.3.2018. I therefore find that the respondent has on balance of probability proved that there existed a valid and fair reason for terminating the claimant's case which was gross misconduct under section 44 (4) (a) of the Employment Act.

Procedure followed

15. There is no dispute that the claimant was never accorded any chance to defend himself before the termination as required under section 41 of the Act. All what the Rw1 alleged was that some show cause memos were addressed to the claimant but she adduced no evidence to prove that the memos were served on the claimant. The claimant has denied ever being served with the said show cause memos or warning letter and maintained that he was terminated for the alleged misconduct without being accorded any hearing.

16. Under section 41 of the Act, before terminating the services of an employee on ground of misconduct, poor performance or physical incapacity, the employer must first explain to the employee in the presence of another employee or shop floor union official of his reason for which termination is being considered, and thereafter accord the employee and his chosen companion a chance to air their representations for consideration before the termination is decided. The termination herein having been done on ground of misconduct without according the claimant a prior hearing as contemplated by section 41 of the Act was in deed unfair termination within the meaning of section 45 of the Act and therefore unlawful.

Reliefs

17. Under section 49 read with 50 of the Act, I award the claimant one month salary in lieu of notice plus 6 months salary compensation for the unfair and unlawful termination. In granting the said compensation I have considered the fact that the claimant contributed to his termination through the said misconduct and also the fact that he worked for the respondent for a fairly long period of 4 years.

18. The claim for salary for December 2010 is dismissed for lack of evidence. According to Rw1, the salary was being paid through the bank and there were records to that effect. The claimant never denied that his salary was being paid through his bank account. He is the only person with the legal right to securing a statement from the bank and use it as evidence. His failure to produce the statement for his salary account to dispute the allegation by the defence that his December salary was remitted to his account can only lead to the reasonable inference that the said statement would be detrimental to his case.

19. Finally, the claim for 100 days accrued leave between 2006 and 3.1.2011 is partially successful because although under the contract of service the claimant was entitled to 25 leave days per year, he could not carry forward more than 5 days of the annual leave without prior written approval from the respondent. The claimant has not tendered evidence of any approval to carry forward more than 5 leave days per year. Consequently, I will only award to him 25 leave days for the year ending on 3.1.2011 plus 5 days carried forward from the year that ended on 3.1.2010 totalling to 30 days outstanding leave. Consequently, the claimant will be paid cash equivalent of the outstanding leave being Kshs.21,500.

Conclusion and Disposition

20. I have found that the claimant committed misconduct that entitled the respondent to terminate his services. I have however found that the respondent failed to follow fair procedure before terminating the services of the claimant and that rendered the termination unfair within the provisions of section 45 of the Employment Act. Consequently, I enter Judgment for the claimant in the sum of Kshs.172,000 plus costs and interest from the date hereof less statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 12th day of October 2018

ONESMUS N. MAKAU

JUDGE