



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NUMBER 865 OF 2013

CORNEL OTIENO OMONDICLAIMANT

VERSUS

GOGNI RAJOPE CONSTRUCTION COMPANY LIMITED ...1ST RESPONDENT

CEBAUD ENGINEERING SERVICES LIMITED.....2ND RESPONDENT

JUDGEMENT

1. The claimant pleaded that he was on 9th January, 2012 employed by the respondent as Assistant Projects Engineer at a gross salary of Kshs 200,000 per month. The contract was for two years renewable.
2. By a letter dated 24th July, 2012 the claimant claimed the respondent sent him on compulsory leave without any good reason or justifiable cause and without according him an opportunity to be heard in his defence. Further by a letter dated 30th August, 2012 the 1st respondent purported to terminate the claimant's service by claimant the contract had expired.
3. The respondent in its response to the claim pleaded that the claimant was dismissed for lawful and proper reasons including incompetence, negligence and or fraudulent acts causing the respondent loss. The respondent further pleaded that prior to dismissal, the claimant was accorded a chance to defend himself but his response was not satisfactory leading to him being sent on compulsory leave in accordance with respondent's employment policy to pave way for investigations.
4. The respondent followed with a notice to show cause dated 30th July, 2012 had delivered to the claimant asking the claimant to make a response to the charges against him within 14 days but the claimant failed to do so leaving the respondent with no option but to dismiss the claimant. According to the respondent the claimant stated that he was no longer interested in formal employment having secured alternative employment.
5. The respondent further pleaded that it retained dues which would have otherwise been paid to the claimant but for his serious misconduct and breach of contract leading to massive loss to the respondent.
6. At the trial the claimant further stated that he was in charge of site management for projects and was allocated a vehicle for use in that respect. He further stated that there was another car a Toyota Premio which he could use when his vehicle had broken down. It was his evidence that at the material time he used the Premio for one week when his was in the garage and later asked the driver to take it back to Mr Kenneth Osengo when he got his official car back.
7. It was further his evidence that he was allocated petty cash and was required to submit petty cash and was required to submit petty cash reports. This was done on his behalf by the site accountant. On 24th July, 2012 he was sent on indefinite compulsory leave but prior to that the respondent's director Mr Juma came to the site where the engineer was but found he was not around since he was inspecting road works.
8. It was his evidence that Mr Juma called him and asked that he come immediately to the site office. He came as requested and found Mr Juma in the company of two foremen, storekeeper and site accountant. According to him Mr Juma sought to know what challenges they faced at the site and then he informed him that the major challenge was sourcing of murram for the road.
9. Mr Juma then asked about the prime mover used to ferry murram on the southern by pass and why the vehicle was reported overloaded and he answered him that the driver would be the one best to know that. Mr Juma further asked who release the Premio to Ken and he said he was the one. The Director then asked who between the claimant and Ken was more senior and he replied that he did not know. Mr Juma thereafter asked him to handover everything to one of the foremen and proceed on leave so that he could see if the site could run better without the claimant. The claimant denied receiving the show cause letter and that he was asked on any issue of money.

10. In cross-examination he stated that he was in charge of supervision of works and management of resources. He further stated that he used to keep daily record of activities and resources on site. He further also stated that the respondent's director complained about management of petty cash. He however said he did not file any report showing there was no mismanagement of petty cash.

11. The respondent's witness, Engineer Hannington Raburu Juma testified that on 20th May, 2012 he went to the site in Syokimau where the claimant was supervising and found a backhoe tractor missing when he asked the whereabouts, the claimant told him it had been hired out to a Mr Deepak and wanted to surrender money paid for the hire to him. He told the claimant that was not procedural and that any hire of equipment had to be authorized by the Managing Director.

12. Mr Juma further informed the court that on 14th July, 2012 he received a call from Engineer Adumbo that a vehicle belonging to the second respondent had been carjacked somewhere in Ongata Rongai. The vehicle was assigned to the claimant and the claimant had given the same to Mr Osengo one of their employees based in Kisumu. Mr Juma further testified that on 23rd July, 2012 the claimant called and told him the quarry owner needed Kshs 120,000/= before he could allow collection of stones.

13. He instructed the accounts to arrange for the money but later the claimant told the accountant the money was for a traffic offence. Denis further informed him that there was no such demand from the quarry owner. The incident according to Mr Juma made him to go to the Syokimau site to find out what was happening but when he got to the site he did not find the claimant. He was informed by the claimant's colleagues that he had left the site three hours earlier.

14. According to Mr Juma, he called the claimant and he came to the site office some 45 minutes later and when asked about the Kshs 120,000/= he never gave any satisfactory explanation. He further asked for site reports but the claimant could not produce any. It was his evidence that investigations revealed there were no proper records prompting him to issue the claimant with a notice to show cause why his service should not be terminated but the claimant never responded.

15. He called him and the claimant told him he was no longer interested in working for the 1st respondent as he was pursuing further studies hence no need to respond. It was further his evidence that the claimant was entitled to be paid for days worked in July, 2012 at Kshs 154,838.73. he was also entitled to annual leave allowance less two days which was Kshs 67,307.69.

16. In cross-examination he stated that all vehicles on site were under management of the claimant. He further stated that the termination letter did not refer to the notice of show cause.

17. Under section 43(2), the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee. Having reviewed the pleadings and evidence including testimony of witnesses the court is of the view that there existed reasonable grounds to terminate the claimant's services. The claimant for instance did not deny absence from site when the respondent's director made an impromptu visit. He failed either to inform the Director who was his supervisor of his unscheduled absence from site.

18. Further the allegations against him of unauthorized hire of project equipment and failure to compile and file site reports which were among his responsibilities constituted misconduct which would justify a termination of contract. Under section 41(2) of the Act however, an employer shall before terminating the services of an employee hear and consider any representations which the employee and the person chosen by him may make on the grounds of misconduct.

19. The claimant herein was sent on indefinite compulsory leave to allow for investigation. He was informed that the outcome of the investigations would be made known to him in reasonable time. This letter was addressed to the claimant through his postal address number "P.O. Box 102571-00100- Nairobi". The claimant does not deny receiving the letter

20. On 30th July, 2012 a letter addressed to a similar address was allegedly issued to the claimant asking him to show cause by 15th August, 2012 why his service should not be terminated. The letter listed the charges against the claimant and called upon him to respond to the allegations. The respondent claimed to have delivered this letter personally to the claimant yet there is no evidence and none was alluded to where it was delivered considering that the claimant was on compulsory leave and was not required to report to work besides the claimant denied receiving the same.

21. Curiously again, by a letter dated 30th August, 2012 the respondent purported to terminate the claimants service with effect from 24th July, 2012. If the claimant was to show cause why this services should not be terminated by 15th August, 2012 for what purpose would this have been if by 24th July, 2012 his services had been terminated by the respondent?

22. From the foregoing it is evidently clear that even if as noted earlier in the judgement the respondent had valid and justifiable reasons for terminating the claimant's contract, the process followed in doing so was flawed hence leading to the conclusion that the termination offended the provision of section 41(2) as read together with section 45(2) (c) of the Employment Act.

23. The court therefore awards the claimant as follows:

- a. One month's salary in lieu of notice 200,000
- b. Salary for days worked in July 2012(admitted)
154,838.73
- c. Leave allowance (admitted)

67,307.69

d. Four months salary for unfair termination of service 800,000.00

1,222,146.42

e. Costs

f. Items (a), (b), (c) and (d) shall be subject to taxes and statutory deductions.

24. Concerning the loss incurred by the respondent, this issue was never counterclaimed in the defence and no evidence was led to prove any such loss hence there was no basis for withholding the claimant's terminal dues.

25. It is so ordered.

Dated at Nairobi this 5th day of October, 2018

Abuodha Jorum Nelson

Judge

Delivered this 5th day of October, 2018

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.