



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.384 OF 2017

DUNCAN NDEGWA MURIUKI.....CLAIMANT

VERSUS

LASIT LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent on 1st October, 2005 as a Tractor Driver on a gross wage of Ksh.13,445.00 inclusive of a house allowance.

The claimant was dismissed vide letter dated 11th July, 2017 on allegations that he failed to show cause why he should not be dismissed and which was not true.

2. The claim is that there was no notice to show cause issued to the claimant and the resulting dismissal was without basis.

3. The claimant is seeking the following;

a) Notice pay at Ksh.13,445.00;

b) 2 years accrued leave ksh.26,890.00;

c) House allowance Ksh.290,412.00;

d) Compensation, and

e) Costs.

4. The claimant testified that upon employment he served diligently and on 11th July, 2017 he was at work in Ol Kalou when he was called back to the office and directed to take leave. After 3 days he was recalled back by his supervisor Mr Wanderi and told to explain why he had not complete the allocated farm work at Ol Kalou and the claimant explained that he had been recalled and directed to take leave.

5. After a week the claimant was called by the watchman and issued with letter of summary dismissal over allegations that he had failed to show cause when notice had been issued.

6. The claimant also testified that he was not resident within the respondent's premises and had been forced to rent a house for 3 years. From 2005 to 2014 he was housed by the respondent and following post-election violence he left and looked for alternative housing. He only took a few days of leave and the rest were not paid for.

7. The claimant also testified that when he was sent to Ol Kalou on 4th July, 2017 there were heavy rains and was not able to finish farming with the tractor within the allocated time. He had informed his supervisor about his hardship and when another tractor driver was sent to replace him, he took his leave days.

8. He was recalled from leave and issued with a notice to show cause and then sent away only to be called and issued with a letter of summary dismissal. The claimant had hoped to be called to give his evidence which was not done.

Defence

9. The defence is that the claimant was paid a daily rate and was allocated a house within the respondent premises from the year 2005 to 2011 when the claimant opted to get own accommodation.

10. In May, 2017 the claimant was allocated ploughing duties at Ol Kalou but went on a go slow and or worked without due diligence and sometimes working fewer hours than was required. The assignment ended up taking longer than expected. The claimant was recalled and told to show cause why he had neglected his duties through absenteeism from work. The claimant declined to show cause and instead absconded duty from 14th June, 2017.

11. As a resulting of absconding, on 11th July, 2017 he respondent dismissed the claimant from his employment. The claimant had 21 leave days computed at ksh.6,783.00 which he declined to collect.

12. The claims made for notice pay, house allowance and compensation are not due and should be dismissed with costs.

13. The respondent called Donald Mongare the Personnel Manager and who testified that the claimant was sent for work at Ol Kalou but it was discovered that he was not working well. The tractor he was to use had stopped and the claimant was found to be away most of the time. When his supervisor found him at home there was no proper explanation for not attending at work. A replacement was therefore sent and the claimant issued with a show cause notice which he failed to give a response and absconded duty from 14th June, 2017. The respondent dismissed the claimant.

14. Mr Mongare also testified that the general manager called the claimant for a meeting but he declined to attend. The respondent was not left with any option save for summary dismissal.

5. The second witness for the respondent was Peter Mwangi a Tea Clerk and employee of the respondent and who testified that all the employees are accommodated within the premises and when he was employed in the year 2008 he was a neighbour to the claimant. The claimant was in house No.3 and the witness in House No.2. in the year 2011 the claimant opted to leave the house and get alternative accommodation outside the company premises.

16. Both parties filed written submissions.

17. The respondent has not attached the letter of summary dismissal with regard to the claimant. The reason(s) leading to the summary dismissal of the claimant were left based on the evidence of the parties.

18. It is the duty of the employer to submit all the work records when a suit has been filed with the court. this is a mandatory requirement under section 10(7) of the Employment Act, 2007. Without such work records, the case by the claimant as to facts leading to dismissal and based on section 47(5) must be taken as the truth.

19. The claimant testified that while at work in Ol Kalou on June, 2016 he as recalled back to the office and directed to take leave. He was then recalled and issued with a show cause notice but did not reply as he opted to take to the director.

20. Where an employee is issued with a show cause notice, it is imperative under work relations to respond even where the employee finds himself wrongly accused. Without a response to a show cause, the employer is left at large to take action and infer insubordination for failure to abide lawful instructions.

21. A show cause notice is not inference of guilt. The requirement to show cause why a disciplinary action should be taken by the employer is as such. The employee should show cause as required.

22. in the case of **Jackson Butiya v Eastern Produce Cause 335 of 2011** in which the court held;

An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say ‘I refused to talk with those people and therefore I was not heard, order them to pay me.’ It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law.

The procedural fairness requirements set out under Section 41 of the Employment Act, 2007 are fulfilled by asking an employee facing disciplinary proceedings to respond to a show cause letter and to attend an oral disciplinary hearing. The employee is not at liberty to decline to respond to the allegations levelled against them and if they have any issues with the process, they must raise them directly with the employer within the timelines provided.

23. In this case therefore where the claimant failed to show cause on the premise that he should talk to the managing director, he squandered a chance of safeguarding his employment. He cannot cry foul for the resulting action taken against him, that of summary dismissal. Such action was justified for failure to abide lawful instructions and failure to attend work as required.

24. On the remedies sought, notice and compensation are not due to a case of justified summary dismissal.

25. The respondent admits owing the claimant 21 leave days. The claimant was not clear and specific as to what times he took leave and was recalled back to work.

I take the account and record of the respondent as correct. The leave day's dues owing at Ksh.6,783.00 should be processed and paid to the

claimant.

26. On the claim for house allowance this is premised on the evidence that the claimant was accommodated and or housed by the respondent until the year 2011 when, due to post election violence he decided to get alternative housing and accommodation outside what the respondent had provided him with. In accordance with section 31 of the Employment Act, 2007 the respondent as the employer had obliged until the claimant opted out of the offered accommodation he cannot claim for a house allowance outside the provided housing and where he has opted out on his own volition whatever the explanation for it as it was not with the approval of the respondent that such opting out would be compensated.

Accordingly the claims are without merit and are hereby dismissed. The respondent shall process the due leave days' pay and issue the claimant with a Certificate of Service. each party to bear own costs.

Dated and delivered in open court at Nakuru this 22nd of November, 2018.

M. MBARU JUDGE

In the presence of: