



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.745 OF 2014

MAURICE OUMA OTIENDE.....CLAIMANT

VERSUS

REAL CARRIERS LTD.....RESPONDENT

JUDGEMENT

The claimant was employed the respondent on 4th December, 2012 as a Fitter/Mechanical in the maintenance department earning a gross wage of Kshs.23, 047.00 per month. The claimant worked for one (1) year and 8 months

The claim is that during the course of employment the claimant was not allowed to take annual leave and contrary to section 28 of the Employment Act, 200 (the Act).

On 16th July, 2014 the maintenance supervisor Haron Angaluki called the claimant on his phone but he could not be reached as he had switched it off. The claimant was at work in different section and when he was through he returned to his department and when the supervisor saw him he was sent home without any explanation.

It was the company policy that all phones be switched off and only use the company phone. The claimant waited for one week without being recalled back to work and when he called the respondent he was informed that his employment had been terminated.

The claimant reported the matter to the labour office for conciliation and when the respondent was invited to a meeting, this was ignored. They also failed to pay the terminal dues.

The claimant is praying for the following dues;

- a) Notice pay Kshs.23,047.00;
- b) Leave days due kshs.26,887.00;
- c) Compensation Kshs.276,564.00
- d) Costs.

The claimant testified to support his claim.

In response the respondent's case is that while in employment the claimant did not have respect for his supervisor and had habit of not carrying out orders given to him by Haron Angaluki. The claimant had the habit of insubordination within the workplace and disobeying lawful orders as given to him and absenting him from work without permission. On the day the claimant was sacked, he had left the workplace without authority and during normal work hours and gone to take early lunch at 11.30am and due to his disappearing act, the claimant violated the code of conduct thus liable to summary dismissal. When the claimant was called to explain his actions he admitted that he was absent and refused to take his supervisor's call.

The defence is also that the respondent has no policy that all phones should be switched off and the claims made are not justified, the summary dismissal was justified and case should be dismissed.

The respondent filed the witness statement of Petersonn Mugo.

Despite the hearing being confirmed in the presence of the respondent's representative, they opted to be absent.

No evidence was called to support the defence.

Summary dismissal of an employee is allowed under the provisions of section 44 of the Act subject to adherence to the procedures outlined under section 41(2) of the Act. where an employee is absent at his work station or at the place required, the employee fails to abide lawful instructions of the employer, such an employee must be notified of his misconduct, called upon to give an explanation and based on such defence, the employer can then decide on a sanction.

In this case the claimant admitted that on 16th July, 2014 he was not at his work station. His supervisor called him but his phone was off as per company policy.

When the claimant returned to his station, the supervisor called him and sent him away.

The claimant did not explain himself as to why he was not at his work station and why he had been in a different department. Where his supervisor required him, he should have been found at the allocated work station.

Despite the respondent not calling any evidence, the conduct of the claimant on this particular day cannot be justified. Upon employment, the claimant was required to abide the instructions of the employer. His absence from the work station and without the knowledge of the supervisor cannot be justified by switching off his phone or by not picking his phone. The fact that the supervisor was looking for the claimant meant that he was not where he was required to be.

On this basis, the respondent should have notice the claimant of his misconduct and required him to show cause why he should not be dismissed for gross misconduct. sending the claimant away was tantamount to denial of due process as required under section 41 of the Act.

The fact that the defence is also left bare does not help the respondent's case at all. No employment record was attached. No warnings to the claimant on his misconduct with regard to being absent from work, disobeying lawful orders or disrespect to his supervisor was submitted for the court to see the veracity of this conduct.

Ultimately, without according the claimant due process, such violated the provisions of section 43 and 45 of the Act. the resulting dismissal of the claimant without notice or giving him a hearing was unfair.

Notice pay is due to an employee dismissed without due process. The claimant is awarded notice pay at Kshs.23,047.00. This is also found as sufficient compensation noting the claimant was not without blame.

Leave is due under the provisions of section 28 of the Act. without any work record by the respondent to show that the claimant took annual leave or was paid in lieu thereof, such is payable as claimed at Kshs.26,887.00.

For days worked the claimant is entitled to the salary due but this only arose in his submissions. This was not pleaded and cannot arise once hearing has closed as this denied the respondent the right to reply thereto.

Accordingly, judgement is hereby entered for the claimant against the respondent for the payment of notice pay at Kshs.23,047.00; leave due Kshs.26,887.00; and 50% costs.

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

M. MBARU JUDGE

In the presence of: