



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

ELRC NO. 837 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 20th December, 2018)

JOHNSON KUBOBA WAITHAKA.....CLAIMANT

VERSUS

RESORT KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant is suing the Respondent for unlawful, unfair and/or illegal termination and seeks the following prayers:-

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| <i>a. Two months' salary in lieu of termination notice</i> | <i>KShs. 96,000.00 as per letter of engagement.</i> |
| <i>b. Unpaid leave for the year 2010 (10 days x KShs. 1,600)</i> | <i>KShs. 16,000.00</i> |
| <i>c. Annual leave for the year 2011</i> | <i>KShs. 48,000.00</i> |
| <i>d. Unpaid leave for the year 2012</i> | <i>KShs. 2,800.00 (1.75 days x KShs. 1,600)</i> |
| <i>e. Leave allowance for the year 2011 and 2012</i> | <i>KShs. 14,600.00</i> |
| <i>f. Gratuity as per the CBA (48,000 x 9.25 years)</i> | <i>KShs. 347,800.00</i> |
| <i>g. Twelve months wages for loss of employment as</i> | <i>KShs. 576, 000.00</i> |

Provided by Section 15 of the Labour Institutions Act of 2007

TOTAL KShs. 1,101,200.00

h. Interest at court rates.

i. Certificate of service.

j. Cost of this suit.

2. The Respondent denies the allegations set out in the Memorandum of Claim and prays that the suit be dismissed with costs to the Respondent.

The Claimant's Case

3. The Claimant was employed by the Respondent on 18th February 2003 as an accountant at a gross salary of KShs. 48,000.00. The Claimant served the Respondent with loyalty and diligence until 27th March 2012 when the Respondent wrongfully and unlawfully

dismissed him and refused to pay his terminal benefits. The Claimant avers that his termination was unlawful, unfair and/or illegal because: The Respondent did not issue him with a termination notice and refused to grant him leave days, a Certificate of Service and service pay.

The Respondent's Case

4. On 26th March 2012, it came to the attention of the Respondent's management that the Claimant was involved in suspicious dealings which had led to the loss of money. The Respondent conducted enquiries and established that the Claimant and his colleague Joseph Thuo Mwaura had siphoned monies from the Respondent and had received unlawful benefits since as far back as 2011. The Respondent avers that the Claimant breached his fiduciary duty.

5. The Respondent asked the Claimant to explain himself and he failed and/or neglected to do so. The Respondent found that there was reasonable basis to report the matter to the police but upon considering the ramifications of such report on the Claimant and his defendants, it opted for summary dismissal.

6. In summarily dismissing the Claimant, the Respondent wrote to him informing him of its decision of 27th March 2012 and confirmed to him that he would be paid his dues. The Respondent prepared the Claimant's dues totaling KShs. 109,100.00. However, the Claimant has never collected his dues or his certificate of service to date.

The Evidence

7. CW1, Johnson Waithaka Kuboba and the Claimant in this case, reiterated his employment history and terms of service as averred in his Memorandum of Claim. The Claimant stated that on 13th March 2012, he was in the office when he was summoned by the Managing Director and Finance Controller to be asked whether he knew anything about Vegic Ventures and Sunhill Ventures and he informed them that he knew them as suppliers. He was told that money had been lost and was issued with a pen and paper to write what he knew about the two suppliers. He told them that he did not know anything else and was told to wait in the waiting area. The purchasing manager was also summoned. The Human Resource Manager later came to inform them that he had been told to write them a dismissal letter. They were indeed issued with dismissal letters.

8. The Security Manager was called and he demanded for office keys which were handed to him, and thereafter the Claimant and his colleague were escorted to the gate. The Claimant stated that he was not given the opportunity to defend himself and was not paid his salary for the month of March 2012.

9. The Claimant testified that the duty of checking invoices and posting them in Respondent's accounting system was not his duty.

10. Upon cross-examination, the Claimant denied colluding with the two suppliers. The Claimant admitted to receiving money from Mercy, which money he termed as appreciation. He denied having influence on who could be a supplier. Further, the Claimant conceded that his salary was Kshs. 44,500.00, that he was a member of NSSF and had asked for leave. He also stated that he had never gone to collect his certificate of service.

11. During re-examination, the Claimant stated that the money he received was appreciation for always paying Mercy on time. He also stated that he did not know why he had been dismissed and that he had never been told to pick his certificate of service.

12. RW1, Paul Mbugu Kamau and a HR Manager of the Respondent, reiterated the Claimant's offence as per the Statement of Defence. He testified that upon investigation, the supplier had indicated that she had been blackmailed into dealing with the Claimant.

13. Further, the supplier stated that she would give the Claimant and Thuo blank invoices which would be filled and then processed for payment. Thereafter, the two would get a kick back which was paid via M-pesa. He stated that the MD and Finance Contractor (FC) called the Claimant for a hearing. He also called the Claimant himself but the Claimant did not explain anything. Further, the Claimant's colleague was called and he admitted that there had been a scheme.

14. RW1 stated that the Claimant knew the reason for his termination and that gratuity was not payable to the Claimant since he had been summarily dismissed. He argued that the Claimant was not entitled to leave days pending except KShs. 14,100.00 for 2010/2011, KShs. 47,000.00 for 2011/2012 and KShs. 4,700.00 and admitted that the Claimant was entitled to KShs. 7,300.00. He stated that the Claimant was supposed to refund the Respondent money for not filing a police report.

15. Upon cross-examination, RW1 admitted that he was not present when the supplier called on 26th and 27th March 2012. He was not aware if the Claimant had been given the opportunity to ask questions. The supplier was still supplying the Respondent. He stated that the signatures on the invoices were forged but those on the cheques were not. Lastly, he admitted that he did not have a letter inviting the Claimant to a meeting and that the Claimant was entitled to leave days from 2010 to 2012.

16. RW2, Stephen Ndege Nyaririo and a storekeeper of the Respondent, denied that the signature on the invoice dated 7th January 2012 was not his, stating that he discovered that his signature was being forged when he was summoned for interrogation.

17. Upon cross examination, RW2 admitted that the FC had not recognized that the signature had been forged.

18. RW3, Joseph Mureithi and a former store attendant of the Respondent, stated that on 26th March 2012 he was summoned by the FC who showed him invoices that had his signature hence implying that he had received produce yet he was on leave. He asserted that the signatures on the invoices in the Respondent's bundle of documents were forged.

19. During cross examination, RW3 stated that the Claimant was shown the documents in his presence and couldn't explain the invoice. He admitted that the Claimant was not handling invoices and only made payments.

The Claimant's Submissions

20. The Claimant in his written submissions dated 19th November 2018 and filed in Court on even date, submitted that the Respondent violated **Section 41 (1) of the Employment Act 2007**. Further, the Respondent did not give the Claimant a chance to dispute the correctness of the accusation before dismissing him and as such the Claimant should be awarded the 12 months' salary for loss of employment.

21. The Claimant also submitted that the Respondent violated **Section 45 (1) (2) (a) of the Employment Act 2007** by terminating the Claimant's employment unfairly without a valid reason and by not following a fair procedure.

22. The Claimant submitted that he was entitled to leave days as claimed since the Respondent failed to keep records of an employee's annual leave entitlement, days taken and days due as required by **Section 74 (1) (f) of the Employment Act 2007**. The Claimant also submitted that he is entitled to an annual leave allowance of KShs. 7,300.00, the outstanding leave allowance for 2011 and 2012 of KShs. 14,600.00 and 30-days salary for every year completed of service.

The Respondent's Submissions

23. The Respondent in its written submissions dated 20th November 2018 and filed on even date, submitted that the Respondent was justified in summarily dismissing the Claimant and as such the allegation of unfair termination was untrue. Further, the Claimant was granted an opportunity to be heard but his explanation was not satisfactory to the Respondent hence his summary dismissal.

24. The Respondent submitted that the Claimant was not entitled to the amount claimed, as the Respondent has been willing to pay the final dues of KShs. 109,100.00. The Respondent relied on **Section 44 (4) (g) of the Employment Act 2007** to submit that the Claimant was not entitled to two months' payment in lieu of notice as the said section was very clear that gross misconduct leads to dismissal without notice.

25. The Respondent submitted that as per its calculations, the Claimant was entitled to unpaid leave of KShs. 65,800.00 and not KShs. 81,400.00 as claimed. In addition, the Claimant did not pray for leave allowance and he failed to adduce evidence that he was entitled to leave allowance.

26. The Respondent also submitted that the Claimant's salary was KShs. 44,500.00 and not KShs. 48,000.00 as alluded to. Further, the Respondent relied on **Section 35 (6) (d) of the Employment Act 2007** to submit that the Claimant was not entitled to service pay because he was a member of NSSF. In addition, the Claimant had not adduced in evidence the alleged CBA provided for the payment of gratuity, and that if the alleged CBA made such provisions then gratuity was not payable where an employee had been summarily dismissed.

27. The Respondent submitted that the Court cannot grant a prayer under a repealed section. Further, the Claimant was dismissed because of stealing and should not be rewarded by being compensated. Instead, he should be surcharged for the loss he occasioned the Respondent.

28. The Respondent submits that the Claimant's certificate of service and final dues is ready for collection, which can be picked by the Claimant on any day during normal working hours.

29. I have examined all evidence and submissions of all the parties. I note that the Claimant was dismissed on 27.3.2012. The dismissal letter indicates that he was dismissed due to a serious breach of rules and regulations of the company and gross misconduct in performing his duties. They aver that the company had found after investigations that fake invoices were taken to accounts and paid for.

30. Under Section 43 of Employment Act:-

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(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.

31. It is therefore important that the Respondent proves that the Claimant was responsible for issuance of these fake invoices. RW1 indicated that the Claimant was not the one handling invoices but only made payments.

32. The Respondents averred that there were some forged invoices but there was no proof that the Claimant was the one responsible for paying these fake invoices.

33. The Respondents have contended that they investigated the matter and found the Claimant culpable. No investigation report was however produced before this Court to confirm that the Claimant was responsible for making fake invoices.

34. In the circumstances, I do find that the Respondents did not establish that they have valid reasons to dismiss the Claimant summarily.

35. Other than the absence of valid reasons, the Respondents aver that they gave the Claimant an opportunity to defend himself. The

Respondent's RW1 however admitted that he was not given an opportunity to defend himself and did not have any letter inviting the Claimant to a disciplinary meeting. Indeed even minutes of any such meeting were never exhibited in Court.

36. In the circumstances, I do find that the Claimant was denied an opportunity to present his case as envisaged under Section 41 of Employment Act which states as follows:-

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

37. In terms of remedies I do find for the Claimant and award him as follows:-

1. 2 months' salary in lieu of notice as per the letter of appointment = $2 \times 48,000 = 96,000/=$.

2. Leave days pending for year 2010 to 2012 as admitted by the Respondent = 65,800/=.

3. Gratuity as per the CBA = $48,000 \times 9 \text{ years} = 432,000/=$.

4. 8 months' salary as compensation for unfair termination = $8 \times 48,000 = 384,000/=$.

5. Salary due as admitted by Respondent = 43,300/=.

Total = 1,021,100/=

6. *The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.*

Dated and delivered in open Court this 20th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Njeru for Respondent – Present

Claimant – Absent