



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.102 OF 2017

ZABLON BISONGA MOSE.....CLAIMANT

VERSUS

REAL CAREERS LIMITED.....RESPONDENT

JUDGEMENT

On 2nd March, 2017 the claimant filed the Memorandum of Claim. Summons were served upon the respondent on 3rd May, 2017 and returns filed to this effect through Affidavit of Morris Linyonyi Ayiego. There was no appearance of defence filed. Hearing directions were issued and the respondent served with notice but there was no attendance.

The court heard the claimant under the provisions of rule 15 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

The claimant was employed by the respondent in October, 2011 as a Mason and paid a daily wage of Ksh.545.00 which would be computed and paid at end month.

The claimant worked until 1st November, 2016 when his employment was unprocedurally terminated without notice hearing or payment of the owing terminal dues. The claimant made effort to have the respondent to hear him but this was rejected and hence he filed suit.

The claimant is seeking the following;

- a) Notice pay at Ksh.10,005.00;
- b) Unpaid salaries for October, 2016 ksh.10,005.00;
- c) Unpaid leave allowance ksh.55,045.00;
- d) Unpaid NSSF contributions Ksh.11,200.00;
- e) Compensation; and
- f) Costs.

The claimant testified that he was employed by the respondent as a Mason in the workshop. A colleague brought in goods in the workshop and the respondent claimed that they were stolen goods and caused the arrest of the claimant together with other employees. The claimant was taken to Central Police station and given bond of Ksh.5,000.00 and upon release, he reported back to work but was sent away on a promise that he would be recalled back. The police charged Geoffrey Ngunjiri for the stolen goods and bonded the claimant to be a state witness as he found not culpable for the alleged stealing by servant.

The claimant also testified that despite repeated reporting back to the respondent, they have failed to allow him back at work and or pay his due wages.

There was no defence filed to challenge the claims made by the claimant. The claim shall therefore be assessed based on the pleadings, evidence and the applicable law.

The claimant confirmed that following allegations of theft by servant by the respondent, he was arrested in November, 2016 but upon investigations his workmate Geoffrey Ngunjiri was found culpable and charged. The claimant has since been bonded to attend as a state witness.

However upon return to work the respondent has refused and or failed to admit him back with a promise to recall him later which has not happened.

Where an employee is charged with a criminal offence, whether found guilty or not, the employer is bound by the provisions of section 35, 41, 43 and 44 of the Employment Act, 2007 to address any resulting misconduct on the shop floor. The procedures required in addressing criminal conduct with regard to an employee are foundationally different and should be held s spate from workplace misconduct. even where the employee is arrested and charged, the employer has a duty in law to issue notice to the employee and give him a hearing. The matters being addressed in the criminal case may apply as evidence for the employer but due notice and hearing as an internal mechanism must apply.

In the case of **Caliph O Ogega versus National Social Security Fund Cause 280 of 2013** where the court held;

Before any employee is terminated or dismissed, such an employee must be taken through a fair procedure. This is per section 43 and 47 of the Employment Act where such an employee must receive notice with an outline of the reasons for such termination. A hearing of the employee is paramount in fair employment and labour relations based on section 35 and 41 of the Employment Act. ... Due process must be followed.

With regard to criminal proceedings against an employee following a criminal incident at the workplace the Court of Appeal in the case of **Attorney General & Another versus Andrew Maina Githinji & Another** held;

...the internal disciplinary proceedings are anchored on the contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required.

It is therefore necessary for an employer to ensure due process for the employee within the meaning of the Employment Act, 2007 where there is alleged misconduct. the employee must be issued with notice in accordance with section 35, given a hearing in terms of section 41 and termination of employment be based on valid and genuine reasons. Where there is no due process or a substantive reason(s) leading to termination of employment, the same is held unfair in terms of section 45 of the Employment Act, 2007.

In this case where the claimant was arrested and later reported to work but sent away without notice, hearing or being given any reasons as to why his employment was no longer required, such was contrary to the clear provisions of section 41 read together with section 43 of the Act. the termination of employment was unfair.

Notice pay is due to the claimant on the finding that there was no due process before employment terminated. On the daily wage paid, the claim for notice pay at ksh.10,005.00 is awarded.

Compensation is due to an employee unfairly terminated in his employment. A gross pay of three months is hereby found reasonable and appropriate all at kshs.30,000.00.

For days worked in October, 2016 the wages due are payable whatever the reasons leading to termination of employment. However, the claimant by his own evidence testified that he was arrested and was not at work in October, 2016. That following the criminal charges and arrest, the respondent caused him not to be at work. The claimant fell short of giving the date and days he was not at work. Despite there being no defence to challenge the claim for full month pay the claimant by his own evidence compromised this claim.

The claim for leave is not explained and was left bare. No explanation. No details as to how such arose. The evidence that the claimant was issued with a contract of employment in the year 2014 then removed any other claims for leave due outside of such period. The claimant ought to have elaborated how the claims made for leave then arose.

The claims made for NSSF contributions amounting to Ksh.11, 200.00 are on the basis that the claimant's is entitled to such pay. However, these are statutory dues to a statutory body and where there is no remittance of such contributions by the employer, the remedy is not for the employee to be paid such statutory dues. A claim for service pay should have been made.

Accordingly, judgement is hereby entered for the claimant for compensation at ksh.30, 000.00; notice pay Ksh.10, 005.00; and costs of the suit.

Dated and delivered at Nakuru this 18th day of December, 2018.

M. MBARU JUDGE

In the presence of:

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