



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 301 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 17th December, 2018)

BERNARD LANGAT.....CLAIMANT

VERSUS

BOB MORGAN SERVICES LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit through the firm of Namada & Company seeking damages for unlawful and unfair termination on 4th March, 2015.
2. He avers that he was employed by the Respondent as a Security Guard on 18th December, 2008, with a salary of Kshs. 12,300/= per month. That he worked continuously and diligently to the Respondent's satisfaction until 22nd October, 2014, when he received a summary dismissal letter dated 16th October, 2014 on the grounds of desertion which he denies. At the time of dismissal his salary was Ksh. 16,164/=.
3. That the said allegations were false as the Respondent's management were aware that he had fallen ill while at work and had been given permission by his supervisor to seek treatment. He avers that he made follow-up as to why he had been summarily dismissed and was turned away by the security guards who informed him that they had firm instructions from management not to allow him into the Company's premises.
4. The Claimant contends that the dismissal was unlawful and inhumane and goes against express provisions of the constitution as he was not served with a Notice to Show Cause letter, no hearing ever took place to confirm culpability and due process was not followed. He prays for Notice pay, unpaid salary from May, 2014 to October, 2014 and 12 months' damages for the unlawful dismissal.
5. The Respondent filed a Reply to the Memorandum of Claim wherein they admit the employment relationship and state that the relationship was governed by the terms and conditions outlined in the Guarding Annual Contract of service date 7th March, 2013 and the letter of appointment dated 4th March, 2014.
6. That on 2nd May, 2014, the Claimant had been designated to man the Respondent's client's site (ICRC Logistics Office). That on 9th May, 2014, the Respondent received a report from its control room as reported by CRO Khaemba that the Claimant had deserted duties from 2nd May, 2014 to 9th May, 2014 and his whereabouts were unknown.
7. As a Result, the Respondent aver that they withheld the Claimant's salary until 16th October, 2014, when the Claimant reappeared. That after the disciplinary hearing he did not offer any justifiable explanation for his absence.
8. They contend that the Claimant's conduct amounted to gross misconduct which led to his termination vide a summary dismissal letter dated 16th October, 2014. They aver that they paid him his terminal dues. That the Claimant did not appeal the decision despite being informed of this right in the dismissal letter.
9. It is also the Respondent's contention that the Claimant failed to produce any certificate of incapacitation as required in the contract of service in addition to not informing the Respondent of his absence. That the Claimant is not entitled to the prayers sought and the Claim should be dismissed with costs.

Evidence

10. The claimant led evidence as pleaded and supported by the documents annexed to the Memorandum of Claim. He stated that he informed the Respondent of his illness in October, 2014, when he purportedly resumed duty. That he did not desert duty and the Respondent did not write to him between May 2014 and October 2014, inquiring of his whereabouts and neither was he summoned to a meeting. He urged the Court to allow his claim.

11. RW1 one Dennis Michieka, the Human Resource Manager of the Respondent stated that he did not receive any notice of the Claimant's illness during the period in question. That his last day of work was 1st May, 2014. On 9th May, 2014, a report was made that the Claimant had deserted work by his supervisor wherein he alleged that the Claimant had been absent for 7 days and he could not establish the Claimant's whereabouts.

12. That a decision to dismiss him was made on 16th October, 2014 and he was given a chance to appeal which right he did not exercise. That the Claimant reappeared on 23rd October, 2014 after the dismissal letter was issued. Treatment records availed did not show that the Claimant was on bed rest and neither did he produce any evidence that he had been given sick off.

13. He admitted that the Respondent did not hold a disciplinary hearing as they could not trace the Claimant.

Submissions

14. The Claimant submits that the mandatory procedure under Section 41, 43 and 45 of the Employment Act was not adhered to and as such they are entitled to the prayers sought.

15. The Respondent on the other hand submits that Section 30 of the Employment Act is clear that an employee must produce a certificate of incapacity to work duly signed by a qualified medical practitioner if sickness is in issue.

16. Further, that Section 31 of the Employment Act requires the employee to notify the employer as soon as is reasonably practicable. That from the evidence available nothing shows that the Claimant notified the Respondent of his sickness thus his supervisor declared him a deserter.

17. As to the prayers sought, the Respondent submits that notice pay is not due as the Claimant deserted duty without notice. Unpaid salary is not payable for the Claimant did not offer any services for the impugned period and the Respondent was forced to hire alternative services. They urge the Court to dismiss the claim with costs.

18. I have examined all the evidence and submissions from both parties. The issues for determination by this Court are as follows:-

1. Whether there were valid reasons to warrant dismissal of the Claimant.

2. Whether the Claimant was accorded due process before dismissal.

3. Whether the Claimant is entitled to the remedies sought.

19. On the 1st issue, the Respondent have averred that the Claimant was dismissed for being absent from duty for 7 days. The Claimant admitted that he was absent during the said period but that he had been unwell. He came back to work and stated as much and that is when he was dismissed.

20. Section 44(4) of Employment Act lists absenteeism as one reason that would lead to summary dismissal. Though the Claimant may have informed his employer as much and also brought a sick sheet to the effect, this the Claimant failed to do and therefore the Respondent had a valid reason to dismiss him.

21. A valid reason notwithstanding, the Respondents were still required to subject the Claimant to a fair disciplinary process. The Respondent contends that they did not subject the Claimant to a fair hearing because he had absconded. There is however no indication that they sought for the Claimant or even contacted him through his last known address. The failure to accord the Claimant a fair hearing is therefore not excusable.

22. Section 45(2) of Employment Act 2007 states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure..".

23. It is apparent that the criteria set out in Section 45(2) above was not therefore met and I therefore find the Claimant's dismissal unfair and unjustified.

24. In view of the fact that the Claimant partly contributed to the dismissal by being absent from duty and failing to communicate to the Respondent the reason for his absence, I will award him:-

1. 6 months' salary as compensation for unfair termination = 6 x 16,378 = 98,244/=.

2. I will also award him 1 months salary in lieu of notice = 16,374/=.

3. The Claimant is also entitled to his NSSF and NHIF dues deducted and remitted = 400 x 70 months = 28,000/=.

4. Also his May 2014 to October 2014 salary = 3 x 16,374 = 49,122/=.

Total = 191,740/=

5. 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 17th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mukeli holding brief Namada for Claimant – Present

Respondents – Absent