



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1823 OF 2013

JACKSON MBIHANI INDUMBA.....CLAIMANT

-VERSUS-

METAL CROWN LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed the Memorandum of Claim herein on 14th November, 2013 alleging that his contract of service was unfairly terminated by the Respondent and refused to pay his benefits. He therefore seeks the following remedies from the respondent:

a) Declaration that he has suffered unfair termination. b) Reinstatement to his job without loss of benefits.

c) Salary for the entire period he has been out of employment.

d) In the alternative, he be paid the following:

i. 40 days salary in lieu of notice.....Kshs. 18,080.00

ii. 26 accrued leave days.....Kshs. 11,752.00

iii. Loss of expected salary for 11 years..... Kshs.1,251,492.00

iv. Salary for 6 days worked in July 2013.....Ksh.2,712.00

v. Service pay for 3 years.....Ksh. 79,640.00

Total Kshs. 1,363,676.40

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e) General damages for wrongful detention for 4 hours.

f) Certificate of service to be issued to the Claimant within 14 days g) Costs of this suit plus interest at court rates

2. The Respondent filed defence on 16th January, 2013 denying the alleged unfair termination of the claimant’s employment and averred that she fairly terminated the claimant’s services for stealing food stuff from the kitchen where he was employed. She further averred that after the termination she paid the claimant all his terminal dues on humanitarian grounds. She therefore prayed for the suit to be dismissed with costs.

3. The suit was disposed of by written submissions on the basis of the pleadings, statements and documents filed.

Claimant’s Case

4. The Claimant stated that he was employed by the Respondent in February 2010 as a general labourer on casual basis but from 19.10.2012 earning Kshs.9,481 per month and he was to retire at the age of 60 years.

5. He further stated that he work diligently for the Respondent until 6th July, 2014 at 4.30 p.m when on his way home he carried waste materials from the kitchen for disposal in the dustbin but on the way he met a security guard and gave the waste to him after he requested for the same. He further stated that the respondent's General Manager Mr. Gurdip intercepted him and took him to the kitchen for inspection and after finding nothing missing he had him detained at the security room from 5.00 p.m to 8.00 p.m when he was released him and directed him to report back on 8.7.2013.

6. Upon reporting to work on 8.7.2013 he was summoned from the kitchen at 10.00 am by the Mr. Gurdip and ordered to remove his dust coat. Thereafter he was given a suspension/show cause letter falsely accusing him of stealing respondent's property and he left but responded by his letter dated 9.7.2013 explaining what happened on 6,7,2013. On 15.7.2013 he was called back by the respondent's secretary at 10.00 am the same day but on arrival he served with a termination letter and a clearance form.

7. He contended that his termination was unfair because it was based on malice and falsehood and he was not accorded any hearing. He also contended that he was humiliated through bodily search and unlawful detention for 4 hours at the respondent's premises.

The Respondent's Case

8. The Respondent's HR manager, Mr. Stephen Muriithi filed a written statement. He produced a warning letter dated 20.5.2013 to prove that the claimant did not have a clean record. He stated that on 6.7.2013 the claimant was caught by security guards while carrying away food items from the respondent's kitchen and on 8.7.2013 he was served with a show cause letter but his response was not sufficient to exonerate himself from the offence of theft of company property and he was terminated.

9. He relied on the bundle of documents filed by the respondent to prove that the termination of the claimant's services was fair and that he was paid all his terminal dues totalling to Kshs.34,876 which he accepted on 10.7.2013.

10. In its written submissions the Respondent submitted that fair procedure does not need to be oral and that a show cause letter he was served with was sufficient opportunity given to him to exonerate himself. She relied on *Kenya Revenue Authority vs Manguiya Salim Murgani [2010]eKLR* to support that submission. She further submitted that she has proved a valid reason for terminating his dismissing the Claimant as required by section 43 and 45 of the Employment Act.

11. On the reliefs sought the respondent submitted that prayers should be declined because they are unfounded.

Analysis and determination

12. There is no dispute that the claimant was employed by the respondent as a General Worker until 15.7.2013 when he was terminated for the offence of stealing food items from the respondent's kitchen where he was working. The issues for determination herein are:

a) Whether the Claimant was unfairly terminated by the respondent or he deserted the employment.

b) Whether the Claimant is entitled to the reliefs sought.

Unfair termination of employment.

13. Under section 45 of the Employment Act termination of employee's contract is unfair if the employer fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure. A reason for termination is valid and fair if it relates to the employees conduct, capacity and compatibility or employer's operational requirements. On the hand the procedure for termination is fair if the employer accords the employee a hearing before termination and thereafter issues him with a certificate of Service and pays any terminal dues payable.

Reason for termination

14. The reason cited herein for the termination of the claimant's employment was theft of the respondent's property. The respondent explained how the claimant was intercepted by the security guards while carrying food items from her kitchen and served with a show cause letter to defend himself. The claimant denied the said offence by his letter dated 9.7.2013 that he carried the food leftovers from the kitchen as waste to throw into the dustbin but on the way, he met a security guard who requested him to give him the same to eat. The claimant's evidence is corroborated by the copy of Occurrence Book entry, which was produced by the respondent showing that the claimant was intercepted by Mr. Gurdip giving a security guard something, which turned out to be food.

15. After considering the evidence presented, it is common knowledge that the claimant removed food items from the respondent's kitchen allegedly to throw to the dust bin but on the way he met a security guard who requested for the same to eat. The General Manager confirmed that it was edible food and not rubbish for the dustbin.

16. Under section 43(2) of the Employment Act, the reasons for termination are those matters which the employer genuinely believed to exist at the time when the termination was done. The fact that the claimant was caught giving the food items to the guard was enough to and not throwing into the dustbin was enough reason for the employer to believe that the claimant had stolen the food items to serve the watchman.

17. Under section 44 (4) (g) of the Act, the employer is entitled to summarily dismiss his employee if he commits a criminal offence or on reasonable grounds, he is suspected to have committed a criminal offence against or to substantial detriment of the employer or his employer's property. As observed above, the claimant gave food items to a security guard to eat without permission from the employer and as such, the employer was entitled to believe that the food items were not refuse for the dustbin but genuine food items stolen from the kitchen to serve the guards. Consequently, I return that the respondent has proved that there was a valid a fair reason for terminating the claimant's services.

Procedure followed

18. The respondent contended that she served the claimant with a show cause letter as the opportunity for him to defend himself. The claimant duly responded to the accusation of theft by his letter dated 9.7.2013. under section 41 of the employment Act, before employer terminates his employee on ground of misconduct, the employer is required in mandatory terms to explain the reason for which dismissal is being considered and give him a chance to defend himself before the dismissal is decided. In my view however, where the employer serves a show cause letter to the employee and the accusations are admitted or substantially admitted, there is no legal obligation to hold disciplinary hearing for the sake of it. In this case, the response to the show cause letter by the claimant was an admission that he removed the offending food items from the kitchen and gave the security guards upon request. Consequently, I find and hold that there was no need to hold any oral hearing about the same matter after the said admission.

19. In view of the finding, that the respondent had a valid reason for terminating the contract of service and that there was no need for oral hearing after the admission of the offence by the claimant, I return that the termination of the claimant's services was fair within the provisions of section 45 of the Employment Act.

Reliefs.

20. In view of the finding hereinabove that the termination of the claimant's contract of service was fair, I dismiss the claim for salary in lieu of notice and compensation for unfair termination. The claimant was lucky to get 40 day's pay in lieu of notice as part of the dues computed and paid after the termination.

21. Likewise, the claim for prospective salary for 11 years has no basis in law and it is dismissed. The claim for leave, and salary for 6 days worked in July 2013 is dismissed because they were part of the dues computed and paid after termination. The payslip produced by the claimant showed that he was a beneficiary of NSSF and as such he is disqualified from claiming service pay by dint of section 35 (6) of the Employment Act.

22. Finally, the claim for general damages for humiliation and detention is dismissed for lack of evidence.

23. The claim for Certificate of service is however granted as provided by section 51 of the Act.

Conclusion and disposition

24. I have found that the claimant was fairly dismissed from his employment and as such, he is not entitled to salary in lieu of notice and compensation for unfair termination. I have further found that the claimant is not entitled to the reliefs sought because they were either paid after the termination or he was disqualified from the same by the law. Consequently, save for the prayer for Certificate of Service, I dismiss the suit with no order as to costs.

Dated, Signed and Delivered in Open Court at Nairobi this 14th day of December, 2018

ONESMUS N. MAKAU

JUDGE