



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 377 OF 2017

WILSON WACHIRA MATHENGE.....CLAIMANT

VERSUS

HASHI ENERGY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for his dismissal. He averred that he was employed as a pump attendant and was later promoted to station manager and at time of dismissal was a customer attendant earning Kshs. 22,652/-. He averred that his employment was terminated on 20<sup>th</sup> March 2016 without a hearing. He avers that he was not paid the March 2016 salary nor were his leave arrears for 2013-2016 paid. The Claimant avers that prior to his dismissal the Respondent did not prove the allegations of theft by servant and he was not served with a reasonable notice to show cause before his services were terminated. He thus sought general damages for unlawful dismissal, arrears for March 2016 salary – Kshs. 22,652/-, unpaid leave arrears for 3 years – 2013-2016, 1 month's salary in lieu of notice – Kshs. 22,652/-, costs of the suit and interest at court rates.

2. The Respondent filed a defence in which it averred that the Claimant was its employee who had been employed as a pump attendant but later promoted to station manager Nyeri Station. It stated that an audit was conducted in January and February 2016 which revealed loss of products including LPG gas cylinders of various sizes amounting to Kshs. 790,600/- following which the Claimant was issued with a show cause notice dated 18<sup>th</sup> March 2016 requiring an explanation as to why disciplinary action should not be taken against the Claimant. The Respondent averred that the Claimant for reasons known best to him failed, refused and/or ignored the notice to show cause and absented himself from work from 18<sup>th</sup> March 2016. The Respondent tried to contact him using the contacts he had given being his mother and spouse and he was dismissed after a week of absenteeism. The Respondent in the meantime reported the loss of stocks to the Police. It averred that the Claimant failed to collect his final dues duly computed by the Respondent as well as the certificate of service.

3. He testified and indicated to the court that he was charged in a criminal case relating to the loss of stock and that the criminal case is ongoing. He testified that he was dismissed without being afforded a hearing or being given a reasonable opportunity to show cause. The Respondent also availed a witness, the HR Manager of the Respondent. He testified that the stock take was taken in the presence and with participation of the Claimant and therefore he knew what led to the termination. He stated that the Claimant was given a show cause but he failed to respond and that he later wrote an email proposing to settle the loss.

4. The Claimant's submissions filed are that the issues for determination are whether he absconded duty or was unlawfully dismissed from employment. The Claimant submitted that he was summarily dismissed from his employment and that his summary dismissal was unlawful. He relied on the case of **Njoroge Njuguna v Time Trek Security Services Limited [2018] eKLR** where Radido J. stated that absconding from work without permission or lawful cause is a misconduct warranting summary dismissal but after going through the requirements of Section 41(1) and (2) of the Employment Act, 2007. The Claimant submits that the dismissal was contrary to the provisions of Section 41 of the Employment Act as no notice to show cause was issued or a hearing accorded to him. The Claimant submitted that the Respondent did not prove there were valid reasons for the termination in terms of Section 43(1) of the Employment Act and therefore he was entitled to the reliefs sought in his claim.

5. The Respondent on its part submitted that the Claimant was dismissed after stock taking revealed there were missing cylinders and upon a notice to show cause being issued to the Claimant he absconded from work and consequently summarily dismissed. The Respondent submitted that the dismissal of the Claimant was lawful and that the Claimant had confirmed in evidence that he had absconded from duty after the stock take. The Respondent cited Section 47(5) of the Employment Act and submitted that the Claimant had failed to meet the threshold set out in Section 47(5). Reliance was placed on the case of **Daniel Mueke v Bhogals Auto World [2014] eKLR** where the court held that by leaving the work station and not returning, the claimant in that case had repudiated the contract of employment and therefore was in breach of the contract. The Respondent also cited the case of **George Ogweno v Autolitho Limited [2018] eKLR**. The Respondent therefore sought the dismissal of the Claimant's suit with costs to the Respondent.

6. The Respondent has shown that the Claimant was dismissed on 25<sup>th</sup> March 2016 for absconding work. On his part he asserts he was dismissed without cause. The dismissal followed an audit carried out at the station. The Claimant was required to show that his dismissal was unjustified. The Respondent is said to have abridged the requirements of Section 41. From the Claimant's testimony, he was summarily dismissed on 20<sup>th</sup> March 2016. He was arrested on a Friday and charged with theft after incarceration over a weekend. He did not resume work leading to his dismissal. He was entitled to a hearing but by being absent he could not ascribe the failure to accord him a hearing to the Respondent. He had worked for 18 days in March 2016 for which he was entitled to receive pay. He was entitled to leave dues for the period amounting to Kshs. 66,901.14 and added to the sum due for days worked being Kshs. 15,630/- he would be entitled to this less the sum due for notice as he left without giving notice. He is therefore only entitled to recover Kshs. 82,531.14 less statutory deductions. He will also have the costs of the suit capped at Kshs. 40,000/-. In the final analysis I enter judgment for the Claimant for:-

a. Kshs. 82,531.14 less statutory deductions.

b. Costs of the suit capped at Kshs. 40,000/-.

It is so ordered.

**Dated and delivered at Nyeri this 13<sup>th</sup> day of December 2018**

**Nzioki wa Makau**

**JUDGE**