



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 412 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JARETI ATITWA EHINDA.....CLAIMANT

VERSUS

MARUTI KOBIL SERVICES STATION.....RESPONDENT

JUDGMENT

Jareti Atitwa Ehinda was employed by the respondent, a petrol station, as a pump attendant in Eldoret in the year 2000. In 2005 he was transferred to the respondent’s petrol station at Kapsabet where he worked until March 2014.

According to the claimant he was asked to go on leave and when he reported back on 1st April he was told to stay at home until he is called back. He was however not called back.

According to the respondent the claimant was sent home to look for money lost while he was at work and never reported back to work.

In the memorandum of claim dated 24th November 2015, the claimant prayed for the following orders –

a) A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the respondent, he was not remunerated as required by law.

b) Payment of the sums of money claimed below –

i. one month pay in lieu notice

i. Basic salary----- Kshs.20,770

ii. Leave dues for the entire period 15 years leave dues

Basic salary x 15 years

20,770 x 15 years----- Kshs.311,550

iii. Severance pay

15 days x years worked x basic/30 days

15 days x 15 years x 20,770/30 days Kshs.155.775

iv. Compensation for unfair termination

Gross pay x 12 months

23,885.5 x 12 months ----- Kshs.286,626

Total Claim

Kshs.774,721

c) Costs and Interests.

d) Any other relieve the Honourable may deem fit to grant.

In the respondent's defence filed on 23rd December 2015 it denies terminating the claimant's employment and states the claimant absconded duty after he was issued with notice to show cause on 1st March 2014.

The respondent counterclaims for Kshs.532,236 being value of products sold and or dispensed which the claimant failed to remit to the respondent as follows –

1. The claimant failed to remit Kshs.155,000.00 being value of such products sold as at 23rd May 2012. The claimant wrote a letter to the respondent on 23rd May 2012 explaining the whereabouts of Kshs.155,000.00 being value of such products sold and binding himself to repay the same.
2. The claimant failed to remit Kshs.8,914.00 being value of such products sold as at 29th August 2012. The claimant wrote a letter to the respondent on 28/8/2012 explaining the whereabouts of Kshs.8,914.00 being value of such products sold and binding himself to repay the same.
3. The claimant failed to remit Kshs.18,550.00 being the day's collection for the car wash and service bay as at 24th January 2013. The claimant wrote a letter to the respondent on 24th January 2013 explaining the whereabouts of Kshs.18,550.00 binding himself to repay the same.
4. The claimant failed to remit Kshs.117,272.00 being value of such products sold as at 4th October 2013. The claimant wrote a letter to the respondent on 4th October 2013 explaining the whereabouts of Kshs.117,272.00 being value of such products sold and binding himself to repay the same.
5. The claimant failed to remit Kshs.232,500.00 being value of such products sold during the year 2012-2013. The claimant wrote a letter to the respondent on 3rd March 2014 explaining the whereabouts of Kshs.232,500.00 being value of such products sold and binding himself to repay the same.

The respondent prays that the claim be dismissed and judgment entered in terms of the counterclaim.

At the hearing the claimant testified for himself while the respondent called one witness, HIRAN PATEL. Parties thereafter filed and exchanged written submissions.

Determination

The issues for determination are the following –

- (i) Whether the claimant was unfairly dismissed or absconded duty.

(ii) Whether the claimant is entitled to the prayers sought.

(iii) Whether the respondent is entitled to the prayers in the counterclaim.

Whether claimant was dismissed or absconded

The claimant testified that he was sent on leave on 1st March 201 and when he reported back on 1st April he was advised to stay at home until he was called back. HIRAN PATEL (HIRAN) testified that the claimant was sent home to go and look for money that was lost but never reported back.

There is no letter sending the claimant home to look for money. There is no letter demanding lost money from claimant. Both the testimony of the claimant and Hiran are in agreement that he was sent home on 1st March 2014 without any letter referring to lost money or unaccounted for items. Both also agree that he was not given a letter of termination.

From the evidence, it is clear that the claimant was by being sent away verbally, unfairly terminated without a hearing as required under Section 41 of the Employment Act. I find and declare accordingly.

The claimant prayed for one month's salary in lieu of notice in the sum of Kshs.20,000. He however testified that his last salary was Kshs.16,000 consolidated. I award him Shs.16,000 as pay in lieu of notice.

The claimant prayed for leave for the entire period he worked for 15 years. The muster roll which is signed by the claimant shows that the claimant took leave as follows –

8th August to 30th August 2009

May and June 2009 leave for 2008/2009 – two months

October and November 2010 – two months

September, October and November 2012 – three months

The claimant further testified that he was sent on leave in March 2014.

I find that the claimant took all his leave and has no outstanding leave. His prayer for payment in lieu of annual leave is thus not proved and is dismissed.

Having not been declared redundant, the prayer for severance pay does not lie and is dismissed.

The claimant prayed for maximum compensation being salary for 12 months. Taking into account all the circumstances of the case I award him 10 months' salary as compensation in view of the length of service and the manner in which his employment was terminated. I accordingly award him Kshs.160,000.

Counterclaim

The respondent counterclaimed for Shs.532,236 as set out in the counterclaim. Apart from the letters signed by the claimant which were produced by the respondent, no other evidence was adduced in support of the counterclaim. The claimant testified that all employees were forced to write similar letters any time there was a shortage and that after the letters were written no action was taken. This is true as the letters are written over a period being 23rd May 2012, 29th August 2012, 24th January 2013, 4th October 2013 and 3rd March 2014 and was not denied by the respondent. All the letters state that he be given time to pay but there is no deduction from his salary.

I find no proof of the counterclaim and dismiss the same.

In the final analysis judgment is entered in favour of the claimant in the sum of Kshs.176,000 with costs. Interest shall accrue from date of judgment on decretal sum.

DATED AND SIGNED AT NAIROBI ON THIS 26TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 6TH DAY OF DECEMBER 2018

MATHEWS NDERI NDUMA

JUDGE