



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO.1828 OF 2014

(Before D. K. N. Marete)

PETER NZOMU KALOKI.....CLAIMANT

VERSUS

RAHAB KALOKI.....RESPONDENT

JUDGEMENT

This matter was originated by a Claimant's Memorandum of Claim dated 10th October, 2014. The issues in dispute are therein cited as;

- 1. Unlawful and illegal summary dismissal*
- 2. Refusal by the Respondent to pay the Claimant his dues and benefits after dismissing her.*
- 3. Unlawful, discriminatory and malicious dismissal without any valid and justifiable reason.*

The respondent in a Statement of Defence dated 18th December, 2014 denies the claim and prays that this be dismissed with costs.

The claimant's case is that he was employed by the respondent in November, 2011. He worked until August, 2013 when he was unlawfully, wrongfully dismissed from employment. Then, he earned Kshs.9,000.00.

The claimant's further case and averment is that his dismissal was wrongful, oppressive, malicious and amount to bad labour practice and therefore unconstitutional. He has employed all reasonable efforts at an amicable resolution of the issues in dispute but the respondent has been unco-operative.

The claimant's other case is that prior to his dismissal, he had never been issued with a warning letter for incompetence, misconduct, failure to comply with the respondents working procedures and on any wrong doing. He submits his case as follows;

4. SUBMISSIONS

The Claimant submits that the Respondent's action of summarily dismissing him was wrongful, unlawful, discriminatory, unfair and amounts to a bad labour practice on the following grounds:-

- 4.1 The dismissal was not founded on any justifiable and valid reason*
- 4.2 There was no procedural fairness in the manner the Respondent dealt with the Claimant while dismissing him.*
- 4.3 There was no claim leveled or founded against the Claimant that could have led to his dismissal.*

He prays as follows;

- 1) A declaration that the summary dismissal was wrongful, unfair and discriminatory.*
- 2) The equivalent of years*
- 3) Kshs.216,000.00*

4) Two salary being Damages for wrongful dismissal Kshs.9,000.00

5) One month's salary in lieu of notice

6) Certificate of Service

7) Costs of the claim

8 Leave allowance pay Kshs.17,220.00

9) Severance pay for 2 years Kshs. 12,300.00

The respondent's case is a denial of the claim.

Her further case is that she has never employed the claimant and that if he was employed by a company, he was only employed by a company where she is a director.

The respondent's further case is that she is not in any way responsible for the claimant's woes and if at all, he is to blame as he conducted his duties negligently thus compelling the said company to terminate his services. He was to blame for the robbery that occurred and was executed by people who had been in the premises when no one should have been there. She puts it thus;

8. That further, the claimant was on duty when the entrances to the stores were being locked on the material night of the robbery and failed to search everywhere in order ensure that there was nobody who was left inside the building when the building was been locked up as he is expected to do.

11. That the claimant is to blame for his own woes since he conducted his duties negligently as he failed to carry out his duties as after the robbery took place the entrance when the premises were being locked up and therefore enabling the theft and that he also failed to alert the surrounding occupants or relevant authorities of the robbery which took place while he was on duty.

12. That the claimant is to blame for his own problems as the claimant was grossly negligent in carrying out his duties as after the robbery took place the entrance to the premises was left open and yet the claimant failed to alert the relevant authorities as to this occurrence and yet the claimant know very well that the entrances to the building should have been locked.

16. That on the contrary and without prejudice to the preceding clause, the respondent avers that it is the claimant who conducted his duties with gross negligence, actions which culminated in him being detained for investigations and thus necessitating the company that hired him as he could no longer work due to his incarceration and incompetence at his work.

The matter variously came to court until the 19th October, 2018 when the court directed on disposal by way of written submission. This was agreed *inter partes*.

The issues for determination therefore are

1. Whether the claimant was an employee of the respondent- Did he work for her in May, June and July 2013?
2. Whether there were valid and fair reasons for the suspension and dismissal of the claimant?
3. Whether the dismissal of the claimant, if at all, was wrongful, unfair and discriminating and unlawful?
4. Whether the claimant is entitled to the relief sought?
5. Who bears the costs of this claim?

The 1st issue for determination is whether the claimant was an employee of the respondent- Did he work for her in May, June and July 2013. The claimant did not file any written submissions in support of his case.

The respondent in her written submission dated 7th November, 2018 reiterates her case of not having employed the claimant. It is her case that the claimant was employed by Superiorfone Holding Company Limited, a company where she is a co-director.

It is the respondent's further case that on 21st August, 2013, while the claimant was on night duty, he failed to prevent or even alert the relevant authorities or surrounding occupants (neighbours) of a robbery that took place in the company premises. It was the duty of the claimant to ensure that all entrances to the stores were locked and also that no one was inside the building when it was being locked out.

It is her further case that the claimant conducted his duties negligently thereby occasioning the breaking of the company store which matter was reported to Kamukunji police station vide OB/NO 12/22/8/2013. He was thereafter suspended from work by Superiorfone Holdings Company Limited vide a letter dated 22nd August, 2014. This offence is tantamount to gross misconduct under section 44 (4) (g) of the Employment Act, 2007.

The respondent displays evidence of the claimant's employment by Superiorfone Holdings Company Limited in her lists of documents dated 24th April, 2014 and a supplementary list dated 18th October, 2018 which establishes such relationship.

In finality, the respondent submits that the claimant has not established a case of employment by the respondent. Further, he has not adduced any evidence that he worked for Superiorfone Holdings Company Limited in November, 2011 and what is available is that he worked for three months in May, June and July 2013.

The respondent further submits a case of justifiable reason for suspension and dismissal of the claimant. This was as a consequence of his misconduct and is supported by the witness statement of Hussien Waqo who at the time was the security manager of Superiorfone Holdings Company Limited and also Boru Golo, the claimant's colleague guard at Terry house on the night of 21st August, 2013 and during the handover to day guards the following morning when the theft was discovered. The claimant's case is therefore not sustainable and would not suffice in the circumstances.

I agree. Firstly, the claimant has not identified his tormentor. He has sued the wrong party. Secondly, the claimant does not in any way adduce evidence in support and proof of his case. He merely lays down the claim and stops at that. I therefore find that the claimant was not an employee of the respondent and hold as such. And this answers the 1st issue for determination. It in turn stifles the claim to nothingness.

The 2nd and 3rd issues for determination fall off the wayside on such a determination of issue No.1. They are not worthy of any determination.

The 4th issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of employment by the respondent, the claim collapses *in toto*. He therefore becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the same.

Dated and signed this 29th day of November 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 3rd day of December 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. No appearance for the claimant but claimant was in person.
2. Mr. Mwangi holding brief for Okabi instructed by Kimandu & Ndegwa Company Advocates for the respondent.