



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT MOMBASA
CAUSE NO 233 OF 2013

CHRISTOPHER AMURABU SUNGUTICLAIMANT

VERSUS

SAFI SAFI HOTEL LTDRESPONDENT

JUDGMENT

Introduction

1. This is a claim for Kshs. 340000 being terminal dues plus compensation for unfair termination of the claimant's employment contract by the respondent on 31.5.2013. The respondent has denied the alleged unfair termination and averred that it is the claimant who terminated the contract without notice.

2. The suit was heard on 2.12.2015 and 18.7.2016 when the claimant testified as CW1 while the respondent called her Director Mr. Michael Kinyanjui Kaiga as RW1. Thereafter both parties filed written submissions.

Analysis and determination

3. After careful consideration of the pleadings, evidence and the submissions presented to the court, it is clear that the claimant was employed by the respondent from 3.8.2011 when she was registered as a company to 31.5.2013; that on from 28.5.2013, the claimant was suspended from work by the RW1, who also directed him to see him on 30.5.2013; and that when he returned to the office on 30.5.2013 as directed, RW1 never showed up until 31.5.2013 when he was dismissed for siding with the junior staff to agitate for annual leave. The issues for determination herein are:

(a) Whether the claimant deserted without notice or he was unfairly terminated by the respondent.

(b) Whether he is entitled to the reliefs sought.

Unfair Termination vs Desertion

4. RW1 testified that the claimant misconducted himself severally by sleeping while on duty and also attending work while intoxicated as consequence of which, he him with three warning letters and he apologized in writing. That on 2.6.2013, he gave the claimant a suspension letter after which he deserted employment. The claimant has denied attending work while intoxicated. He has however admitted that he slept at work place during the night shift when there were no customers with the permission of the RW1.

5. After careful consideration of the evidence adduced, I find on a balance of probability that the claimant

never deserted employment without notice but he was unfairly dismissed by the RW1 on 31.5.2013. I therefore dismiss the evidence by the RW1 that the claimant was suspended on 2.6.2013 because that was hearsay evidence. He alleged that the claimant was served with the suspension letter dated 2.6.2013 by the hotel manager Mr. Mwangi which service RW1 never witnessed.

6. I however find the evidence of the Cw1 consistent and believable when he says that he fell in trouble with RW1 when he started agitating for employees' right to annual leave. That when RW1 could not bear his reminders, he suspended him on 28.5.2013 and later dismissed him on 31.5.2013 without notice and paying him any terminal dues and issuing him with a Certificate of Service.

7. Under section 45(2) of the employment act, termination of employment by the employer is unfair if, the employee fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case the reason for the summary dismissal cited by the claimant was his agitation for annual leave for himself and other employees.

8. In proceedings to challenge termination of employment like this one, the employer has the burden of proving and justifying the reason for the termination. In this case the RW1 denied that he dismissed the claimant and made no effort to prove and justify the reason for terminating the claimant's contract employment as required by section 43, 45(2) and 47(5) of the said Act.

9. On the other hand, the claimant has contended that he was dismissed without following a fair procedure because he was never accorded any fair hearing as required by the law. Under section 41 of the employment Act, an employer wishing to dismiss his employee for reason of misconduct, poor performance or physical incapacity, is required to first explain the reason to the employee in a language he understands and in the presence of a fellow employee of his choice and thereafter invite the employee and his chosen companion to air their defence for consideration before deciding to terminate his employment contract.

10. In this case the foregoing statutory procedure was not followed. The employer merely suspended the claimant for three days and there after dismissed him verbally. In my view, the procedure prescribed by section 41 of the Act is coined in mandatory terms and gives no discretion to the employer to deny his employee oral hearing before dismissal. Consequently, I hold that, the termination of the claimant's contract of employment unfair within the meaning of section 45(2) of the Act because the respondent failed to prove on a balance of probability that the termination was grounded on a valid and fair reason and that she followed a fair procedure.

Reliefs

11. Under section 49(1) of the Act read with subsection (4), I award the claimant one month's salary in lieu of notice plus 6 months' salary as compensation for unfair termination based on his undisputed gross salary kshs. 20000 per month. In making the said compensation, I have considered the fact that the claimant never worked for the respondent for many years. I have also considered the fact that the claimant had reasonable expectation to continue working for the respondent for more than the months cushioned by the compensation

12. I also award the claimant pay in respect of for the two years served between 2011 and 2013 being 42 days equaling kshs 32307.70. The claim for service pay is however dismissed because the claimant admitted in evidence that his employer contributed NSSF in favour.

Disposition

13. For reasons stated above, judgement is entered for the claimant in the sum of Kshs.172, 307.70 plus costs and interest.

Dated, signed delivered at Mombasa this 27th January 2017.

O.N. MAKAU

JUDGE