



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 697 OF 2015

RASHID ALI RASHID.....CLAIMANT

VERSUS

MOMBASA SPORTS CLUB.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's employment contract by the respondent on 13.6.2013. The respondent denied liability for the alleged unfair termination of the claimant's employment and averred that the claimant was dismissed for gross misconduct after being accorded a fair hearing.

2. The suit was heard on 10.10.2016 when the claimant testified as CW1 but the respondent called no witness. However both parties filed written submissions after the hearing.

Analysis and Determination

3. After considering the pleadings evidence and submissions presented to the court, it is clear that the claimant was employed by the respondent from 2001 to 13.6.2015 under consecutive seasonal contracts of two years. The issues for determination are:

(a) Whether the termination of claimant's employment contract was unfair.

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

Unfair Termination

4. Under section 45(2) of the Employment Act, termination of employment is unfair if the employer fails to prove that, it was founded on valid and fair reason(s) and that it was done after following a fair procedure. A reason for termination is valid and fair if it is true and it relates to the employees conduct and the operational requirements of the employees.

5. In this case the reason cited for the termination is captured in the summary dismissal letter as follows:

“On Thursday, 13th June 2013, you were found having stashed a kilogramme of raw meat

into a gunia while attending to cover it up with charcoal and ferry out of the staff kitchen”.

6. The claimant admitted that the said meat was found in the sack he was carrying charcoal with from the kitchen but contended that the meat was put in the sack by another person and without his knowledge. He however did not name the person who put the meat into the sack or any other person who was present at the kitchen when he put the charcoal into the sack but admitted that he is the one who put the charcoal into the sack using a bucket from the kitchen. On a balance of probability I find from the evidence adduced that it is the claimant who stole the meat from the kitchen and put it into the sack containing the charcoal.

7. As regard to the procedure followed in dismissing the claimant, the claimant admitted in his testimony that he was given a fair hearing in the presence of his Union’s Shop Steward before the dismissal. Consequently, in consideration of the finding that there was a valid and fair reason for dismissing the claimant from work, and his admission that he was accorded a fair hearing before the dismissal, I find and hold that he has failed to discharge his burden under Section 47 (5) of the Act of proving that his contract of employment was unfairly terminated by the respondent.

Reliefs

8. In view of the foregoing finding, I decline to make declaration that the summary dismissal of the claimant’s employment was unfair and unlawful. In addition to the foregoing, I dismiss the claim for salary in lieu of notice and compensation for unfair termination.

9. As regards the claim for service of gratuity, the claimant admitted in evidence that he was paid his service gratuity for the period between 201 and 2012. He however prayed for gratuity for the period ending in 2009. The said claim is however dismissed for being statute barred under section 90 of the Employment Act which limits the right to sue in respect of a right under the Act to three years from the date when the cause of action arose. Considering the fact that the claimant was working under distinct seasonal contracts, it is obvious that the right to payment of gratuity under a contract which expired in 2009 is time barred because it arose more than 3 years before the filing of this suit in 2015.

10. As regards the claim for leave, pending days and leave travelling allowance, the respondent has admitted 18 leave and 42 pending days but denied the claim for leave travelling allowance because it is not provided in the contract of employment. I allow the two admitted claims and dismiss the claim for leave travelling allowance for lack of evidence. I therefore award the claimant Kshs.13,280 x 50 = 30,646.15 for leave and the said pending days.

Disposition

11. For the reasons stated above, I enter judgment for the claimant in the sum of **Kshs.30,646.15** plus half costs and interest from the date of filing suit.

Signed, dated and delivered at Mombasa this 20th day of January, 2017.

O.N. MAKAU

JUDGE