



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NO 442 OF 2013

KAINGU DECHE WASHE.....CLAIMANT

VERSUS

HOTEL SAPPHIRE LTD.....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 23.6.2011. The respondent has denied the alleged unfair termination and averred that there was a justifiable reason for dismissing the defendant from employment. It is further defence case that she followed a fair procedure before dismissing the claimant.

2. The suit was heard on 24.2.2016 when the claimant testified as CW1 while the respondent called her human resource officer Mr. Amos Furaha Thoya 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 defendant was employed by the respondent from 1.5.2004 to 23.6.2011 on short term contract basis which ran consecutively. It is also clear that on 18.6.2011, the claimant absented himself from work and on 21.6.2011 he was served with memo to explain the said absence. Its further clear that after responding to the said memo, the said claimant was served with a summary dismissal dated 23.6.2011 and his terminal dues were calculated and forwarded to the labour office. The issues for determination herein are:

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

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

Unfair Termination

4. Under section 45(2) of the employment act, termination of employment is unfair if the employee fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. In this case the reason cited for the summary dismissal was that the claimant absented himself from work without leave of absence or permission from his supervisor.

5. The claimant has denied the validity of the said reason for his dismissal and maintained that he had a

sick child and had permission from his supervisor Mr. Mbarua not to attend work on 18.6.2011. The said contention was not denied by Mr. Mbarua in evidence either before the dismissal of the claimant or during the hearing herein. Instead, the defence called RW1 who was employed in 2014 long after the dismissal of the claimant.

6. Consequently, if find that the respondent has failed to prove that the claimant absented himself from work without permission or lawful cause. According to the CW1, it was normal for him to seek and get permission from Mr. Mbarua verbally. Under section 43, 45(2) and 47(5) of the said Act, the burden of proving and justifying the reason for the termination of an employee's contract lies on the employer. In this case, the respondent has not discharged that burden of prove on a balance of probability.

7. On the other hand, the claimant has averred that a fair procedure was not followed before dismissing him from work because after responding to the Show Cause Memo, he was never invited to any disciplinary hearing in the presence of a fellow employee of his choice. According to him, he was denied a chance to defend himself of the alleged absence from work without permission. He maintained that on 23.6.2011, he was just served with a dismissal letter without any prior hearing.

8. 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.

9. In this case the foregoing statutory procedure was not followed. The employer merely served a show cause letter to the claimant and considered the written defence as unsatisfactory and then dismissed him. 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, the default to follow fair procedure in addition to failure to prove valid and fair reason for dismissal rendered the termination of the claimant's contract of employment unfair.

Reliefs

10. Under section 49(1) of the Act read with subsection (4), I award the claimant 2 month's salary in lieu of notice plus 10 months compensation for unfair termination. There is no dispute that the claimant worked for the respondent for over 7 years continuously. Under regulation 20(1)(b) of the Regulation of wages (Hotel and Catering Trades) Order an employee in the Hotel industry who completes 5 years of continuous service with the employer is entitled to 2 months' notice before termination or payment of salary in lieu of notice. His gross salary as per the payslip for May 2011 was Kshs.14,521 excluding service charge. I therefore make an award of Kshs.29,142 for notice. In addition I award Kshs.145,210 as compensation for unfair termination. In making the said compensation, I have considered the 7 year service as a fairly long one to warrant a higher award. I have also considered the fact that since the dismissal the claimant has not secured alternative employment.

11. The claim for leave for 7 years, public holidays worked salary for 23 days worked in June 2011 and service pay are declined and instead the claimant directed to content with the payment made to him after the dismissal. I find the said payment reasonable considering the fact that no particulars were pleaded for the public holidays worked and that no evidence of agreement to accumulate leave was adduced. Consequently, the net pay of Kshs.32,791.70 deposited with the labour office is adopted herein as the accrued terminal benefits for the claimant in addition to the award of salary in lieu of notice and compensation for unfair termination ordered above. As regards the claim for service pay no legal basis has been cited to warrant such award.

Disposition

12. For reasons stated above, judgement is entered for the claimant in the sum of Kshs.174,252 plus costs and interest. In addition the claimant will collect the Kshs.32,691.70 deposited in the labour office by the

respondent.

Dated, signed delivered at Mombasa this 13th January 2017.

O.N. MAKAU

JUDGE