



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 33 OF 2015

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

PATRICK ARUWA OPIYO.....CLAIMANT

-VERSUS-

WELLS FARGO LIMITED.....RESPONDENT

J U D G E M E N T

By his Memorandum of Claim dated 4th February, 2015 the Claimant alleges that he was unfairly dismissed by the Respondent and seeks the following remedies -

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| a. 1 month's salary in lieu of notice | Kshs. 35,033 |
| b. Unpaid salary for August, 2014 | Kshs. 35,000 |
| c. Housing allowance shortfall 3043 x 18 | Kshs. 54,774 |
| d. Overtime 2,160 hrs x 97.31 per hour | Kshs.210,198 |
| e. Compensation for unfair termination | |

35,033 x 12 Kshs.420,396

Kshs.775,430

- b. Costs of this suit.
- c. Interest on (a) and (b) at court rates.

The Respondent filed defence on 10th March 2014 admitting that it summarily dismissed the Claimant but denying that the summary dismissal was unfair. The Respondent denied owing the Claimant the sums set out in the claim or any other sum.

The case was heard on 20th September, 2016. The Claimant was represented by Bruce Odeny instructed by Bruce Odeny & Company Advocates. The Respondent was represented by Mr. Owino instructed by Walker Kontos Advocates. The claimant testified for himself while the Respondent called 2 witnesses, DEBRA AUKO its Regional Business Director and STEPHEN KANGETHE the Respondent's Human Resource Manager. The parties thereafter filed and exchanged written submissions.

Claimants Case

The Claimant testified that he was employed by the Respondent on 25th February, 2013 as a driver. He was confirmed on 7th May, 2013 and worked until 1st September, 2014 when he was issued with a letter of summary dismissal. The reason for dismissal was that on 14th August, 2014 he left the vehicle assigned to him and was found sitting in a different vehicle within the compound. He was further accused of being rude to his boss. The claimant's letter of summary dismissal cited previous warnings issued to him that were valid at the time of dismissal.

The Claimant denied leaving the vehicle assigned to him unattended. He explained that he was assigned vehicle No.KBA 060V Nissan Double Cabin but was found sitting in another, a probox whose registration number he could not recall. He testified that there was no requirement that should not sit in any other vehicle within the compound.

The Claimant was issued with a suspension letter on 15th August, 2014. The Claimant testified that he responded to the letter of suspension in which he explained that there were bedbugs in the vehicle assigned to him. He further explained that the vehicle he was sitting in and the one assigned to him were parked next to each other.

The Claimant testified that he was called to a disciplinary hearing but was not allowed to be represented by the union although he had reported the matter to his union and the union had written to the Respondent seeking grounds of the Claimant's suspension, which the Respondent did not respond to.

The Claimant testified that his summary dismissal was unfair and he was not paid terminal benefits.

Under cross examination the Claimant stated that he was a back-up driver in alarms department and that when a client calls the alarm he is expected to respond urgently. He stated he was supposed to be in the vehicle. He stated that he was trained but was never told he was supposed to sit in the vehicle as there was a different person who was supposed to sit in the vehicle and man the radio. He stated that the driver is allowed to sit outside the car with the crew and it is the radio guard who is supposed to sit in the car. He stated that on the material day the alarm radio in the vehicle was not working. He denied knowledge of the two warning letters alleged to have been issued to him by the Respondent.

The Claimant stated that when the Branch Manager found him in a different vehicle she asked him to see her the following day. He stated that he was unwell and had taken medicine and informed the Branch Manager by telephone that he will not be able to report early. He stated that when he arrived at the office the Branch Manager started quarrelling with him and asked him to hand over the car keys and his uniform.

He denied telling the Branch Manager that the incident was a small issue or that he did not know why he was being summoned. He denied having an issue with the Branch Manager because she was female. He stated that when he was suspended he handed over all Respondent's property in his possession.

Respondent's Case

Debra Auko testified that she was the Regional Business Director of the Respondent but at the time material to this case was the branch manager.

She testified that on 14th August 2014 she was in the office working late. Her office is next to the control room. At around 9pm she heard the control room calling the alarm response vehicle but there was no response. The controller informed her that the vehicle was in the compound. She decided to walk down to the alarms vehicle from her office which is on 1st floor.

She found the escort and the Crew Commander but the driver was not there. The commander was looking for the driver. The controller followed her to the vehicle and asked the commander why he was not responding. The Commander responded that the radio was not working. A guard told them that the

driver was in another vehicle which was a chase car for cash on transit. The car was supposed to be locked and the keys taken to the office. She testified that the chase car was open and the Claimant, the driver, was inside the car sleeping.

RW1 testified that she ordered the crew to go and attend to the emergency and see her the following morning before going home. In the morning everyone went to see her except the Claimant. When she called the Claimant to ask why he was not at the meeting, he responded that it was not a big issue. When she told him it was a serious issue he said he had malaria and would see her in the afternoon. However when the Claimant reported in the evening he took the car keys and went straight to the car without reporting to her first as agreed.

RW 1 testified that she sent the controller to call the Claimant and asked him why he did not see her. The Claimant responded that he was sick. When she asked him for a sick sheet and why he had reported to work if he had malaria he did not respond. She then asked him to give her the car keys and go home so that the office can discuss his problem. She testified that he refused to hand over the car keys to her. She that asked him if he wanted her to get the key from him by force.

She testified that she asked him to hand over his uniform he responded that she is not the one who issued the uniform to him or who recruited him. She stated that it was at that point that she decided to issue a suspension letter to the Claimant.

She denied that there were bedbugs in the vehicle and stated that all vehicles were fumigated when an incident was reported in Mombasa.

RW1 testified that she called the Claimant for a disciplinary hearing. She testified that after the hearing she handed over the matter to the Human Resource Manager to decide what action to take. She testified that she had issued the claimant with 2 warning letters after several verbal warnings.

RW2 testified that he did not attend disciplinary hearing of the Claimant. He submitted that he is consulted by Branch Managers who have authority to suspend with pay after which the cases are referred to his office. He testified that he is the one who wrote claimant's letter of dismissal and based his decision on Claimant's attitude. He stated that the Claimant had 2 warning letters issued earlier in the year.

Under cross examination RW2 stated that the reason for termination of the Claimant was sleeping. He acknowledged that sleeping was not a ground for suspension of the claimant. He further stated that the issue of warning letters is not mentioned in the letter of suspension. He further conceded that the issue of leaving the vehicle unattended is not mentioned in the suspension letter issued to the Claimant. He stated that the grounds of termination are not captured in the letter of suspension. He stated he was not aware that the vehicle assigned to the Claimant was fumigated or after what intervals the Respondent's vehicles are fumigated. RW2 further conceded that he was not aware the claimant had malaria or that vehicles are protected against malaria.

RW2 stated that he could not recall who was at the Claimant's disciplinary hearing. He stated that during suspension an employee is entitled to his pay.

Determination

I have considered the pleadings, the evidence and written submissions filed by the parties. The issues for determination are whether the summary dismissal of the Claimant was fair and whether he is entitled to the remedies sought.

The Law

The law providing for fair termination of employment is contained in section 41, 43 and 45 of the Employment Act. For termination to be fair, the employer must comply with both section 41 and 43 of

the Act.

Section 41 requires an employer to inform the employee of the grounds upon which the employer intends to terminate the employee's employment. This should be done in a language the employee understands and the employee should be given an opportunity to be accompanied by either a fellow employee or a union shop floor official of his choice. The employer must then hear representations of the employee as well as of the person accompanying him, if any, before a decision is made to terminate employment. Under section 43, the employer must prove that there is valid reason for termination of employment.

In the present case the Claimant was issued with a letter of suspension citing the reasons as stated below

This is due to an incident that happened on the 14/08/2014 at the Kisumu Branch Office where you were found in a chase car and not in your assigned vehicle which contravenes company rules and regulations.

The Branch Manager summoned all the four staff present on the material day but it's only you who did not heed the B/manager's summon amounting to insubordination.

When asked why you did not heed the summon you rudely answered that you did not see the need to see the Branch Manager as you did not find it a big deal, and you also did not appreciate the Branch Manager's tone amounting to insubordination.

It is not clear from the suspension letter whether the accusation was sitting in a chase car, or failing to heed branch Manager's summons, or stating that the issue was not a big deal, or insubordination.

The grounds for summary dismissal were however as follows -

1. On 14th August 2014 while on duty you left your assigned back up vehicle unattended without permission nor informing the control room contrary to operating procedure.
2. On 14th August 2014 while on duty you were found by the branch Manager sleeping at 2100hrs inside a chase car and when summoned to the office you declined to go.
3. You have two valid warning letters in your file, in a duration of one year which you have worked for the company.

None of these grounds were in the letter of suspension for which the Claimant was asked to show cause why disciplinary action should be taken against him. The proceedings of the disciplinary hearing are not availed to the court to confirm what charges the Claimant was required to respond to at the disciplinary hearing. It is therefore not clear whether they were those in the letter of suspension or in the letter of dismissal. While testifying in the case, RW2 cited different reasons being attitude and arrogance. These are not cited in the Claimant's letter of suspension or summary dismissal.

From the foregoing it is not clear what grounds the Claimant was responding to or the grounds that were used to terminate the employment of the claimant. It also means that the grounds of termination were not responded to by the Claimant.

The Respondent further did not give the Claimant an opportunity to be accompanied by either a colleague or union official of his choice during the disciplinary hearing. This information should have been conveyed to the claimant in the letter inviting him for disciplinary hearing to enable him consult with such person before the hearing date.

It is manifest from the evidence on record that apart from the flaws in the procedure, the grounds for termination were never proved as those grounds were not the subject of the suspension letter that the claimant responded to or the disciplinary hearing that the Claimant was taken through. The only

conclusion that the court arrives at in the circumstances is that the summary dismissal of the claimant was unfair for both want of procedure and proof of valid reason.

Remedies

The Claimant prayed for one month salary in lieu of notice at Shs.35,033. His current gross salary is Shs.16,749 (basic plus house allowance). I award the Claimant one months' salary in lieu of notice in the sum of Shs.27,949. The sum is based on gross salary consisting of basic salary, house allowance and normal overtime taking into account that the Respondent's normal working hours 12 hours which is inclusive of normal overtime.

The Claimant's letter of summary dismissal states that he would be paid salary up to (including) 1st September, 2014. This should include full salary of 12 hours per day as his official working hours according to the Respondent was from 6 to 6 whether he was working during the day or night.

The letter further states the claimant is entitled to overtime carried forward from 23rd to 31st August 2014. The Respondent has however not stated the actual sum payable.

I award the Claimant the total sum offered by the Respondent in the letter of summary dismissal.

The letter further states the Claimant is entitled to 10 days accrued leave. No documentation was produced to prove that the Claimant had taken any leave from date of appointment on 25th February, 2013. I award him leave for the total period worked of 18 months at 26 days per year as per Regulation of Wages (Protective Security Services) Order. He is entitled to 39 days leave. At Shs.638.57 per day (see paragraph 60 of Respondent's submissions) this amounts to Shs.24,904 which I award him.

The Claimant did not explain how he arrived at the figure of Shs.54,774 on account of house allowance shortfall. I do not find any shortfall in the house allowance as the Claimant was paid house allowance at 15% of the basic salary as prescribed by law. The prayer is therefore rejected.

The Claimant further prayed for overtime at 2,160 hours. No evidence was adduced to support the prayer. I have confirmed from the claimant's payslip that he was paid overtime together with salary every month. Apart from the overtime stated in the letter of dismissal the claimant is not entitled to any other overtime and the claim is dismissed.

On compensation for unfair dismissal, I have to consider the length of service and all other relevant factors set out in section 49(4) of the Employment Act. In the circumstances of his case, it is my opinion that 3 months gross salary is reasonable in the circumstances and I award the claimant Shs.83,847. I have used the figure of Shs.27,949 which includes basic salary house allowance and standard (or normal) overtime, taking into account claimant's normal working hours of 6 to 6 i.e. 12 hours per day.

The Respondent shall also pay claimant's costs and interest from date of judgment.

Dated and signed and delivered this 23rd day of February, 2017

MAUREEN ONYANGO

JUDGE