



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 557 OF 2015

1. PAUL NYAMAI KIMANGA

2. BENARD WATTIMAH.....CLAIMANTS

VERSUS

PESTLAB LIMITEDRESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimants were employed by the respondent as pest control stewards earning ksh.12000 and ksh.11000 per month respectively. On 2/7/2014, they were told by the respondent's director, One Mr. Kilonzo that some sanitary bins had gone missing and for that reason they should not report back to work until they were called back after investigations were completed. They were never called back and from that day they were never paid any salary. They therefore construed the circumstances to mean that they were unfairly dismissed without any just cause because they were working in the pestlab and not sanitary department where the bins were allegedly stolen from. They have also averred that the procedure followed to dismiss them was unfair and they prayed for compensation and terminal dues amounting to ksh.366,000 and ksh.253000 respectively.

2. The respondent has admitted that she had employed the claimant as pleaded in their suit until he dismissed them for being involved in the embezzlement of company funds. She has further averred that the said reason for dismissing the claimants were valid and that she followed proper legal procedure by giving them a chance to defend themselves before the dismissal. She further averred that she paid the claimants all the terminal dues and legal benefits after the termination of their contracts. She also mentioned that the claimants utilized all their leave days before the dismissal and left nothing outstanding.

3. The suit was disposed of by written submissions on the basis of the pleadings, witness statements and documentary evidence filed. the issues agreed by the parties for determination are:

- a. Whether the termination of the claimant's contracts of employment was procedurally fair.
- b. Whether the reason for the termination was fair and just.
- c. Whether the claimants are entitled to compensation for unfair termination, leave, one month salary in lieu of notice and salary for June 2014.

ANALYSIS AND DETERMINATION

FAIR PROCEDURE

4. It has not been denied that the claimants were suspended from work by the respondents' director, Mr. Kilonzo on 2/7/2014 at 5pm pending investigations into an alleged theft of sanitary bins. It has also not been denied that the claimants were never called back to the office to be given the results of the alleged investigations, or to continue working. They were also not paid their salaries and terminal dues and therefore they formed the opinion that they had been dismissed unfairly without a hearing.

5. Although the respondent has contended that she gave the claimants a chance to defend themselves of the charges of embezzlement of funds, no evidence of such proceedings was produced in court. In addition the defence has not demonstrated that she dismissed the claimants for embezzlement of company funds and not theft of sanitary bins as alleged by the claimants. Without such other evidence, like minutes of disciplinary hearing and a termination letter, the evidence by Mr. Kilonzo alone is not able to prove, on a balance of probability, that the claimants were accorded a chance to defend themselves on a charge of embezzlement of company funds in accordance with Section 41 of the Employment Act.

6. The said Section 41 of the Act provides that before terminating the contract of employment of an employee on grounds of misconduct, poor performance or physical incapacity, the employer shall first explain the reason to the employee, in a language he understands, and in the presence of a fellow employee or shop floor union representative of his choice, and thereafter invite the employees and his chosen companion to air their defence for consideration before the termination is decided.

7. In this case the said procedure was not followed and consequently, I hold that the respondent has failed to prove on a balance of probability, that she followed a fair procedure before dismissing the claimants for the alleged misconduct.

FAIR AND JUST REASON

8. Under Section 43(1) and 47(5) of the Act, the burden of proving and justifying the reason for dismissing his employee lies on the employer and in default, the dismissal becomes unfair within the meaning of Section 45 of the Act. A reason for termination is justified if it is valid and fair. Valid reason is one which is true and that which existed in the subjective construction of the employer at the time of dismissal. On the other hand the reason of termination is fair if it relates to the employees conduct and operational requirements of the employee.

9. The respondent has alleged without proof that the reason for dismissing the claimants was embezzlement of funds. On the other hand the claimants have alleged that the reason cited for their dismissal was theft of sanitary bins. Neither the embezzlement of company funds nor the theft of sanitary bins has been proved by the respondent on a balance of probability. She has not proved that any funds were embezzled or that sanitary bins were stolen. She also not proved that the claimants committed the said offences or they were in any manner connected to the said offences.

10. Although the respondent contends that she was entitled to make a subjective construction of the claimants' conduct and dismiss them for embezzlement of company funds, it is my opinion that such subjective judgment cannot be made in a vacuum. The employer must first adduce evidence to prove that money was embezzled and that the claimants were linked or was reasonably suspected to be linked with the offence.

11. For the foregoing reason, I find and hold that the respondent has not proved on a balance of probability that there existed a valid and fair reason to justify the dismissal of the claimants at the time when they were dismissed from their employment.

RELIEFS

COMPENSATION FOR UNFAIR TERMINATION

12. Under Section 45 (2) of the Act, termination of employment is unfair, if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. As already observed above, the respondent has failed to prove and justify on a balance of probability, the reason for dismissing the claimants and has also failed to prove that she followed a fair procedure before dismissing them. The cumulative effect of the said default on the part of the respondent is that the dismissal of the claimant was rendered unfair within the meaning of Section 45(2) of the Act.

13. Under section 49(1) of the Act, if the court finds that the termination of the employees contract was unfair, it can award the employee salary in lieu of notice plus, compensation of upto 12 months salary for unfair termination. In this case I award each claimant one month salary in lieu of notice. In addition, and in consideration of the length of their respective service, I award 12 months salary to the fist claimant and 6 months salary to the second claimant as compensation for unfair dismissal. In making the award, I have also considered the fact that the claimants did not contribute to their termination through misconduct.

LEAVE

14. The claimants have alleged that they never took any annual leave during all their years of service to the respondent. The respondent has produced 2005/2006 Master Roll for the first respondent to prove that the claimants had utilized all their leave days before termination. I have carefully considered the Master Roll and the other documents produced but I have not seen any evidence that the claimants went for any annual leave. I will therefore award them annual leave but only for one year. The reasons for the foregoing award being that the claimants did not adduce any evidence to prove that they had permission from the employer to accumulate their annual leave or that whenever they applied for the same the employer refused to or postponed the same to future date.

SALARY FOR JUNE 2014

15. The claimants have prayed for their salary for June 2014. The respondent has alleged that she paid all the lawful dues to the claimants after the dismissal. She has however not proved that she indeed paid the salary for June 2014 to the claimants. Consequently I allow that prayer for salary for June 2014.

DISPOSITION

16. For the reasons that the dismissal of the claimants by the respondent was unfair, I enter judgment in favour of the claimants as follows:

FIRST CLAIMANT

Notice	12000
Compensation.....	144000
Salary for June 2014.....	<u>12000</u>
	<u>168000</u>

SECOND CLAIMANT

Notice	11000
Compensation	66000
Salary for June 2014.....	<u>11000</u>

88000

The claimants will also have costs plus interest.

Dated, signed and delivered this 31st March 2017

O. N. Makau

Judge