



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1560 OF 2014

CALEB CHOLA OGECHA.....CLAIMANT

VERSUS

SEB ESTATES LIMITED.....RESPONDENT

JUDGEMENT

1. On 16th June, 2004 to 15th June, 2006 the claimant was employed by the respondent at a Guard earning a salary of Kshs.4, 500.00 per month. The claimant was promoted to a Security Services Supervisor and then to Property Manager without any written contract. The claimant was suspended from duty for 3 months vide letter dated 13th August, 2014.

2. The claimant believes that his suspension was a suspension by another name on the reasons that he was suspended without pay or benefits. In cases of suspension an employee earns benefits but the claimant was suspended without any pay; there were no investigations into any misconduct; there was no hearing; respondent rejected offers to settle the matter; and the suspension amounted to unfair termination of employment. There was no notice or warning letter prior to the suspension and allegations that the claimant was not delivering as required was not true.

3. The claim is that the suspension of the claimant without pay has denied him a right to earn a living and to provide for his family. The events leading to the suspension amount to constructive termination of employment.

4. The claimant is seeking underpayment when he was a guard. Until 30th April, 2005 wage was increased to Kshs.4, 836;

From 1st May, 2005 to 1st May, 2006 wage was increased to Kshs.5, 796.00;

Total underpayments being kshs.14, 220.00;

The claimant was entitled to a house allowance Kshs.406, 700.00.

Leave allowance not paid at Kshs.196, 345.00.

Claim for overtime all being Kshs.3, 343,846.00.

Overtime allowance Kshs.2, 355,343.85

Claim for severance pay at Kshs.130, 000.00.

Compensation for unfair termination and costs.

6. The claim is also that his claims are due whether his termination was unfair or unlawful as he was entitled to such dues while in the employment of the respondent.
7. The claimant testified in support of his claim. That upon employment by the respondent he worked as a Guard for 2 years and was promoted over the ranks but was not issued with an employment contract upon promotion. In August, 2014 he was suspended from duty for 3 months without notice or being given reasons for the same or a hearing. He had by then served the respondent for 10 years. Since suspension, the same has not been lifted or the claimant been given a letter of termination thus the claims set out in the Memorandum of Claim.
8. The claimant is seeking overtime pay and allowance on the grounds that as a guard he reported to work at 6am and left at 6pm. He worked for 7 days a week and public holidays without compensation. The suspension has never been lifted.
9. On cross-examination the claimant testified that upon employment he was paid Kshs.4, 500.00 per month until his promotion as a property manager from February, 2006. On 13th August, 2014 he was suspended on allegations that he was not attending to his duties by failing to visit some houses. There is evidence from his colleague that he was at Mlolongo on the due date to see some tenants. The client Greatwall had construction work on-going but the respondent refused to listen to his defence. He made effort to negotiate the matter but opted to seek legal advice and file claim as the respondent refused to oblige.

Defence

10. In response the respondent's case is that they never terminated the claimant from his employment he was only suspended to allow for investigations vide letter dated 13th August, 2014. At the time the claimant was not physically visiting sites as required of his role as property manager and was thus not delivering reports as expected. The respondent suspended the claimant so as to investigate matters that had come to their attention.
11. The reasons for suspension were given to the claimant and did not amount to a termination of employment. Upon suspension, the respondent got notice to sue on 14th August, 2014, which was a day after and the same was drawn on unfounded conclusions as at the time the claimant had only been suspended and investigations had not been completed.
12. The claimant was paid all his dues and allowances and nothing owes from the respondent. The claimant has never been terminated from his employment and refused to report back upon suspension and the claims made should be dismissed with costs.
13. In evidence, the respondent called Edwin Gitau, the managing director who testified that he employed the claimant on an annual contract as a Guard and then promoted him in 2005 as a supervisor working for 5 days a week.
14. In January, 2010 the claimant was promoted to property manager and his salaries increased. On 13th August, 2014 the claimant was suspended as he was not on duty. He had been given a motorbike from which he was drawing fuel but there was no work done for the respondent. The suspension was to allow the respondent conduct investigations and it emerged that the claimant he never visited the property sites yet his mileage was high and that he was never at work as required.
15. When the suspension lapsed the claimant refused to report back to work. At the time the claimant had 3 years leave days due. 67 days are due. The respondent did a leave audit and a schedule done on 4th December, 2012 with a letter to all employees went on leave.

16. At the close of hearing, both parties filed written submissions.

17. Putting into account these submissions the questions that emerge are whether the claimant was unfairly terminated from his employment; whether there was constructive termination; and whether there are any remedies due.

18. The claim is that the claimant was suspended on 13th August, 2014 which was unfair and maliciously and thus unfair and the claims made should be paid as they are entitlements in employment that have never been paid. The defence is that the respondent suspended the claimant on 13th August, 2014 upon discovery that he was not doing his work well but a day after on 14th August, 2014 the claimant issued demand notice on his claims and proceeded to file claim herein. The claimant did not report back to work and has not been terminated.

19. Both parties agree that the claimant was on 13th August, 2014 suspended. The same was on the grounds that;

It has come to my attention that you are not delivering as expected mainly because you don't [do not] visit sites as often as required considering your position as he property manager. ... you are hereby suspended for three months without pay awaiting further instructions from the office.

20. The employer has the prerogative to take disciplinary action against an employee who is in breach of the employment contract in terms of section 44(3) of the Employment Act. Where an employer has reasonable grounds that require further investigations, clarification, there is the right to suspend the subject employee.

21. In **Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others [2014] eKLR** the court held that;

*... There must be a clear reason why the employee interdiction is necessary, independent of any contention relating to the seriousness of the misconduct. An interdiction or suspension is the employment equivalent of criminal trial arrest.... Thus a suspension or interdiction should only follow pending a disciplinary enquiry only in **exceptional circumstances**, where there is reasonable apprehension that the employee will interfere with any investigation that has been initiated, or repeat the misconduct in question. The purpose of such removal from the workplace even temporarily, must be rational and reasonable and conveyed to the employee in sufficient detail to enable the employee to defend himself in a meaningful way.*

22. The question and rationale of a suspension was also addressed by the court in **Paul Ngeno v Pyrethrum Board of Kenya Ltd [2013] eKLR**;

The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated.

23. **A suspension is therefore only an action taken by the employer removing the employee from the shop floor to allow for investigations. Such may lead to a sanction to show cause or on good grounds have the same appropriately addressed and the employee returned to work with or without warning. A suspension also allows an employer to look at the matters at hand and require the employee to file a reply, make a defence and once concluded, the employee can resume duty or receive a show cause notice.**

24. **In my view, the letter sending the claimant on suspension had sufficient detail as it set out the reasons why such action was taken and thus necessary to investigate his work performance; the suspension was on a timeline of 3 months; and on a condition of non-payment of due salaries. Where the claimant found the conditions given with the suspension as punitive, that should and**

ought to have been addressed separately and specifically as against the reasons and time lines given for the same. The rationale is that an employer cannot be stopped from exerting its right to discipline employees. And where the challenge is that the suspension is not lawful or contractual, then such are matters that can be addressed as held in *Kenya Plantation & Agricultural Workers Union v Finlays Horticulture Kenya Ltd (2015) eKLR*

25. At the time the claimant filed suit, his employment was still subsisting in terms of the letter of suspension. Upon the lapse of the same after 3 months, the claimant failed to report back to work.

26. In this case, the claimant upon receipt of the letter of suspension on 13th August, 2014, the next day, 14th August, 2014 he proceeded to send a demand letter through his advocates requiring the respondent to pay his August, 2014 salary; outstanding leave; overtime; compensation for unfair termination; legal costs; underpayments all within 7 days failure to which the claimant would file suit.

27. On 26th August, 2014 a reminder was sent to the respondent with regard to the demands made. On 8th September, 2014 the suit herein was filed setting the issues in dispute as unfair and unlawful suspension resulting in termination of the claimant and that where the same was found without grounds, then there is a case for constructive termination of employment.

28. The basis of the claim thus being premised on alleged unfair termination of employment but the facts being that there is no termination of the claimant save for the fact that he was sent on suspension for 3 months, and which period only lapsed on 12th November, 2014 but the claimant did not report back to work and even when he was suspended he proceeded to file suit over matters that in fact did not exist lacks foundation and justification. The respondent as the employer had the right to suspend the claimant on good basis which I find was set out in the letter of suspension. Where the claimant wished to challenge his suspension, on its procedure or rationale, nothing stopped him from taking this cause of action.

29. However to file claim on the basis of termination or alleged termination of employment due to the circumstances of the suspension is for the claimant to avoid taking into account the right of an employer to ensure disciplinary matters within employment are addressed by the employer which is part of due process. To file claim on the assumption that the claimant had been terminated from his employment was premature.

30. The foundation of the suit thus lost, the claims made cannot find justification for an award.

31. For the period the claimant was to be on suspension for 3 months, the due salary is payable save that by his demand letter of 14th August, 2014 the claimant is clear that he was not keen on his employment with the respondent. The fact of filing suit and making demands for due wages only confirm that the claimant has come to court with unclean hands.

Save for wages due as at 13th August, 2014 the suit is hereby dismissed with costs to the respondent.

Dated, signed and read in open court this 25th day of May, 2017

M. MBARU

JUDGE

In the presence of:

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