



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 785 OF 2015

JOSEPH MWINAMO MUHOLOCLAIMANT

VERSUS

SERENDI KENYA LIMITEDRESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal benefits plus compensation for unfair termination of the claimant's employment contract by the respondent on 6/12/2014. The respondent has admitted to having terminated the claimant's employment on 1/1/2015 but avers that the termination was fair because the claimant had committed gross misconduct on 6/12/2014.

2. The suit was disposed of by written submissions on the strength of each party's pleadings, witness statements and documentary evidence filed.

CLAIMANT'S CASE

3. The claimant stated he was employed by the respondent as a Security Guard on 5/6/2011 earning Ksh.12548 per month. On 6/12/2014, he reported to work at 6am as usual and at 8am, he opened the gate for the manager who went in. After a few minutes, the manager called him and informed him that somebody had attempted to steal coconut oil. The offence was committed at the backside gate where Juhudi was guarding. The manager also asked him whether he knew the thief and he answered in the negative. Shortly thereafter, police came in and arrested his fellow guard and the claimant continued with work until the following Monday when he was suspended for one week to pave way for investigations.

4. When he reported back after the one week, he was told to go back home and wait until he was called back. He was never called back and the claimant served two demand letters but the same were ignored, hence the claimant brought this suit. He contends that the termination of employment was unfair because he was never informed of the results of the investigations and that he was never paid his dues. He denied that he was served with the termination letter dated 1/1/2015.

RESPONDENT'S CASE

5. Mr. James N. Kigo, the respondent's General Manager filed witness statement on behalf of the respondent. He confirmed that the claimant was employed by her from 5/6/2011 earning ksh.10925 per month. On 6/12/2014, Mr. Kigo went to the respondent's premises in Uknda and caught Mr. Ali Shaban

Juhudi a night guard and Mr. Twalib Ngare, the Expeller Machine Operator, red handed having siphoned coconut oil from the respondent's reserves into jericans and having loaded them onto Mr. Juhudi's motorcycle ready for departure. Mr. Kigo then called police who came and arrested Mr. Juhudi and Mr. Twalib and they confessed to the offence and implicated the claimant as their accomplice in the offence.

6. Mr. Kigo contended that the claimant was the night guard on the 6/12/2014 and breached the terms of his employment contract by failing to inform him immediately he saw the jericans of oil being filled with stolen coconut oil and being loaded on the motorcycle. He therefore served the claimant with termination letter on 1/1/2015 but he declined to receive it.

7. Mr. Kigo contended that the termination of the claimant's employment was lawful because he had misconducted himself. He produced a letter by the claimant dated 3/2/2015 by which the claimant apologized for the said misconduct and promised not repeat if reinstated to his employment.

ANALYSIS AND DETERMINATION

8. There is no dispute that the claimant was employed by the respondent as a security guard from 5/6/2011. There is also no dispute that the claimant's employment contract was terminated by the respondent following an attempted theft of coconut oil from the respondent's premises by another guard Mr. Juhudi and a machine operator Mr. Twalib on 6/12/2014. The issues for determination are:

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

(b) Whether the reliefs sought by the claimant should issue.

UNFAIR TERMINATION

9. Under Section 45(2) of the Employment Act, termination of employment by the respondent 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.

Reasons for termination

10. The reason for termination according to the defence witness is that the claimant was negligent in that he failed to inform him immediately he saw the coconut oil being stolen and being loaded on the motorcycle. The claimant denied knowledge of the events inside the factory because he was only guarding the front gate where the manager found him. The respondent had relied on the alleged confession by the thieves that implicated the claimant. The said persons have not been called as witnesses herein and for that reason the alleged confession is hereby dismissed as hearsay.

11. In view of the admission by the defence witness that the claimant was guarding the front gate while the siphoning of oil was happening in another corner of the respondents premises, I find on a balance of probability that the claimant was not privy to the attempted theft. The distance from the front gate to the oil reserves had not been indicated and as such it is not possible to accuse the claimant of any involvement in the alleged offence on negligence. In this case therefore it is my finding that the respondent has failed to prove and justify the reason for summarily dismissing the claimants.

Procedure followed

12. Section 41 of the Act requires in mandatory terms that before the employer terminates the contract of his employee on ground of misconduct, poor performance and physical incapacity, he shall first explain in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice the reason for the contemplated termination, and thereafter accord the employee and his chosen companion a chance to air their defence for consideration before the termination is decided. In this case the said procedure was not followed and as such it is my finding that the respondent has failed to prove that she followed a fair procedure before terminating the employment contract for the claimant.

13. Having found that the respondent has herein failed to prove that the dismissal of the claimant was grounded on a valid and fair reason and that a fair procedure was followed before the dismissal as required by Section 45 of the Act, I find and hold that the dismissal was unfair and unlawful.

RELIEFS

14. Under Section 49 of the Act I award the claimant Ksh.12548 being one month salary in lieu of notice plus ksh.37644 being three months gross salary as compensation for the unfair termination of his employment. In awarding the said compensation, I have considered the fact that the claimant had not worked for the respondent for a long period of time and also the fact that no misconduct was proved against him. The claim for service/gratuity pay is dismissed because, the payslips produced by both parties show that the claimant was a contributing member of the NSSF and as such he is disqualified from that claim by Section 35(6) of the Act. The claim for 6 days worked in December 2014 is also dismissed because the evidence by the defence witness that the salary was paid has not been controverted. The defence have also produced a payslip for December 2014 showing that salary was paid. The said payslip has not been denied. Finally the claim for accrued leave is also dismissed for lack of particulars and evidence.

DISPOSITION

15. For the reason that the termination of the claimant's employment contract was unfair, I enter judgment for him in the sum of ksh.50192 plus costs and interest. The claimant will also have certificate of service.

Dated, signed and delivered this 19th May 2017

O.N. Makau

Judge