



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO. 1422 OF 2010

(Before Hon. Lady Justice Hellen S. Wasilwa on 29th June, 2017)

NICHOLAS GITAU MBURU.....CLAIMANT

VERSUS

KIAMBU CLUB TRUSTEES REGISTERED.....RESPONDENT

JUDGMENT

1. Before the Court is a Memorandum of Claim dated 12th November 2012 where the Claimant prays for judgment against the Respondent for:

a. Terminal benefits/severance pay, outstanding leave and allowances for the period of 9 years worked and damages as follows:

i. Outstanding Salary Kshs.8,750.00

ii. Outstanding House Allowance 15% of 8,750 x 12 x 9 Kshs. 141,750.00

iii. Outstanding leave 8,750 x 9 years shs. 78,750.00

iv. Terminal Benefits 8,750 x 9 years Kshs 78,750.00

v. Leave Allowance 8,750 x 9 years KShs 78,750.00

vi. Three months salary in lieu of notice Kshs 26,250.00

vii. Work done and not paid 8,750 x 9 years Kshs 78,750.00

viii. Compensation for unlawful termination 8750 x 12 Kshs 105,000.00

b. Damages for unfair dismissal

c. Costs of this suit

d. Interest on a & b

e. Any other remedy that this Honourable Court may deem just and expedient to grant.

2. The Claimant's evidence is that he was employed as a Head Cook at a consolidated salary of Kshs 7,750.00 per month without house allowance and was not being issued with a pay slip. His employment was confirmed on 7th of December 2001. His salary was increased to Kshs. 8,750 with effect from the 1.10.2001. He worked for 9 years until his dismissal on the 17th October 2009.
3. He was not served with any letter for disciplinary action and was issued with a dismissal letter dated the same day where it was alleged that he was involved in activities of fraud contrary to his terms of reference which had led to loss of members' funds. The letter also stated that he had been warned several times but he ignored the committee decisions.
4. He was not paid his terminal benefits nor was he given his letter of service.
5. The Respondents have filed a Memorandum of Defense dated 22nd December 2010 where they admit that the Claimant was their employee but deny that he suffered illegal and unfair termination.
6. They state that the Claimant had been warned of the numerous complaints that were brought against him, and that this led to his summary dismissal.
7. They state that he had taken all his leave days and that his terminal dues had been calculated but he declined to collect the same. They state that the Claimant is only entitled to dues as calculated vide letter dated 25th January 2009 which is Kshs 9,179.00.
8. They state that they have always been willing and able to settle the said sum but the Claimant has declined to collect the same.
9. Claimant filed written submissions on 27th January 2017. In it he submits that he was not taken through a fair disciplinary process as envisaged under Section 41 of the Employment Act 2007. He submits that he went to labour officers who invited the Respondent's Chairman to a meeting at the Kiambu Labour Office which was set for 27th May 2010 at 2.30 pm but the Respondents did not attend the meeting and he was advised to move to Court.
10. He also submits that under Section 41 of the Employment Act 2007, the Respondent ought to explain to the Claimant in the presence of a fellow employee or union official in a language that he understands the reason for his dismissal but this was not done. Further Section 43 (1) of the same Act gives a duty to the employer to prove the reason for termination.
11. He also submits that the reasons for termination were not proved by the employer and for those reasons he prayed that the claim be allowed as prayed.
12. The Respondents have filed written submissions dated 2nd February 2017, where they submit that terminal dues were calculated and a cheque issued but it was the Claimant who declined to collect the same.
13. They reiterate that the Claimant had taken all his leave days and days off and provide a copy of the appropriate forms; they submit that at trial the Claimant himself confirmed to the Court that all leave days were taken.
14. They submit that he is only entitled to leave as earlier calculated, and that they do not dispute outstanding salary for the month of October. They further submit that housing allowance was not provided for as his salary was consolidated and he is not entitled to salary in lieu of notice on account of gross misconduct.
15. Respondent submits that the claim for overtime and work not paid for is not justifiable as the

Claimant did not prove or provide requisitions for such payments.

16. They submit that summary dismissal under Section 44(1) of the Employment Act 2007 waives the right to an employee to be issued with notice should they engage in gross misconduct. They submit that the Claimant engaged in activities of fraud contrary to the terms of his employment leading to loss of members' funds and was warned but ignored warnings.

17. They submit that they felt legally obligated to terminate the Claimant without notice and pray to the Court to dismiss with costs to the Respondent.

18. I have considered the evidence and submissions presented to Court by both parties. The issues to determine are:

1. Whether there were valid reasons to warrant dismissal of the Claimant.

2. Whether Claimant was accorded due process.

3. Whether the Claimant is entitled to prayers he has sought.

19. I take note that the Claimant was an employee of the Respondent as evidenced from the payslips submitted herein. The Claimant was given an employment letter on 1.6.2001 which set out the terms of the employment contract.

20. After confirmation, the contract could be terminated after giving 3 months' notice or salary in lieu. In case of gross misconduct, the contract could be terminated without any compensation.

21. The summary dismissal letter of 17th October 2009 to the Claimant stated that he had been involved in misconduct and warned about it but ignored the warning. It was also stated that he was engaged in fraud which led to loss of members' funds. Details of this fraud were not given nor the losses incurred.

22. The Respondents were invited by the Labour Officer Kiambu to come with records to support their case on 27.5.2010 following the dismissal of the Claimant and they failed to attend.

23. The upshot therefore is that the reasons why the Respondent dismissed the Claimant remains only but a statement and an allegation not backed up with any evidence. Under Section 43 of Employment Act:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

24. Thus, the Respondents are expected to prove the reasons for this dismissal which reasons did exist at the time of the dismissal. This, the Respondent failed to do and it is therefore my finding that there were no valid reason to dismiss the Claimant.

25. On issue of due process, Section 41 of Employment Act 2007 is clear that before termination, an employee is entitled to a disciplinary hearing in the process of his witness or a union representative. This process was omitted. Even in case of summary dismissal as envisaged under Section 44 of Employment Act, a minimum hearing process where the employee is explained to reasons for the dismissal is envisaged and in this case, the Claimant was condemned unheard.

26. It is therefore my finding that there were no valid reasons to warrant dismissal of the Claimant nor was he accorded any hearing.

27. I therefore find the dismissal unfair and unjustified and I declare it so.

28. In terms of remedies sought, the Claimant has sought a number of prayers as stated above. It is true that he was not paid any house allowance but the appointment letter had indicated that the salary was consolidated and “housing is your responsibility”.

29. The letter did not indicate that the salary was inclusive of house allowance. The statement that “housing is your responsibility” does not mean that the salary included house allowance. Section 31(1) of Employment Act 2007 states as follows:

“(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation”.

30. Provision of house allowance or a reasonable house is mandatory and this Section is couched in mandatory terms.

31. I therefore find that failure of the Respondent to pay to the Claimant house allowance was in breach of the law and I find for Claimant on this prayer and award him house allowance equivalent to:

15% of salary x months worked = 15% of 8,750 x 101 months = 132,562.5.

I also award the Claimant 3 months salary as notice as per Paragraph 4 of the Appointment letter = 3 x 8750 = 26,250/=.

Outstanding October 2009 salary = 4598.33.

The Claimant is also entitled to 12 months salary as damages for unlawful termination = 12 x 8750 = 105,000/=.

Total due = 268,410.5/=

The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

Read in open Court this 29th day of June 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odhiambo holding brief for Nyaga for Respondent – Present

Nyabena holding brief for Rakoro for Claimant – Present