



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NUMBER 768 OF 2014

OSCAR ONGAYA.....CLAIMANT

VERSUS

SHREE SAI INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. The claimant pleaded that he was employed by the respondent in February 2008 as an accountant at a monthly salary of Kshs.12,000/= which was later increased to Kshs.13,000/=. The appointment was verbal.
2. According to him, his duties included printing monthly statement of debtors, printing yearly statements of debtors, auditors, reconciliation of bank statements and other duties as may be assigned from time to time. He worked for the respondent for 5 years without going on leave. He further averred that he worked overtime but was never paid.
3. The claimant further averred that he got bereaved and travelled up country for the funeral and while still there he received a call from the respondent informing him that his services had been terminated with immediate effect. He further averred that the respondent filed a criminal complaint against him, which was on going by the time the matter came to trial.
4. According to the claimant, his dismissal was contrary to the principles of natural justice and section 41 of the Employment Act.
5. The respondent refuted the claimant's claim averring that he deserted duty for three months until he was arrested and charged in court with the offence of stealing. According to the respondent, the claimant brought the claimant brought the present suit to circumvent the criminal case against him.
6. According to the respondent, the claimant was entrusted with the responsibility of managing the respondent's books of account, compute work and was always instructed to send and receive information of accounts and banking of the respondent. The claimant however breached and violated the labour laws, specifically the Employment Act by being a dishonest person and stealing from the respondent.
7. In his oral evidence, the claimant testified that he was employed in February 2008 as a clerk. His salary was Kshs.12,000/= per month. He further stated that he used to check and respond to email and at the end of the year he would print statements and forward to auditors.
8. It was the claimant's testimony that in April 2012 he received a call from up country on the death of his

cousin. He asked for permission from his loss boss Bina Patel and was granted. He extended his leave by one day and communicated the same to the office. He later received a call from Bina that he should not report to duty anymore.

9. When he returned from the burial he reported to the office to find out why but was told by Bina to wait at home he would be called. According to him, he waited from April to September 2012 and when he went again to ask, he was told to report to Gigiri Police Station. He was not given the reason why. When he went to Gigiri he was arrested and later charged with theft.

10. According to claimant, by the time he was terminated, he had worked for 5 years and during the period he worked, he never went on leave. Upon termination, he was not issued with termination notice. He further stated that he was not given a reason for the termination of the contract.

11. In cross-examination, he stated that he and Ms Bina used to transfer money together. He would prepare the documentation and Bina would send the money.

12. He denied knowledge of any letter written to him on account of desertion. In re-examination he stated that he never had a password for money transfer.

13. The respondent called two witnesses. The 1st witness Mr. Onchari informed the court that he used to maintain the respondent's computers and that he knew the claimant. According to him, the claimant used to operate respondent's computers. He used to send email, do online banking and purchase.

14. The respondent's second witness Ms Bina Patel informed the court that the claimant took a few days off but never came back to work thereafter. She tried calling the claimant and one George but both their phones were off. She tried contacting the claimant through other members of staff but without success. She thereafter reported the claimant's absence to the Ministry of Labour.

15. On 28th April, 2012, she noticed some suspicious accounting payments. The names were unfamiliar. According to her on 28 April 2012, the claimant picked her call around 5.00 p.m. and told her that he had four to five funerals to attend.

16. Concerning online banking, it was her evidence that in online banking, the claimant would prepare payment schedule and she would authorize. It was her evidence that when she noticed the irregular payments, she then knew why the claimant was not coming to work. According to her, the police traced the accounts where the money had been paid and she noted that the respondent had not done any business with them.

17. In cross-examination, she stated that the claimant was never issued with an appointment letter and that the respondent paid house allowance. The respondent never issued pay slips. Ms Bina further stated that she never sent the claimant a show cause letter but wrote to the Labour office about the claimant's absence from work. It was further her evidence that she did not issue the termination notice and further that there was no disciplinary hearing prior to dismissal.

18. In order to lawfully dismiss or terminate an employee's contract an employer must have a valid reason for doing so. The claimant herein was dismissed on suspicion that he was involved in acts of theft against the respondent. Although it was not exhibited at the trial, a written letter or memorandum of charges against the claimant, the respondents escalated their suspicion by making a formal complaint to the police leading to the arrest and prosecution of the claimant.

19. Suspicion of involvement in theft is a valid and justifiable reason for dismissal. The employee does not have to be convicted for the reason to be valid or justifiable. Mere suspicion on reasonable evidence is enough. The respondent in its list of documents filed in court reasonably demonstrated that it lost money and the claimant whose duties included preparation of payment schedules for action by his boss could have been involved. To this extent, the court finds and holds that the respondent had valid and justifiable reason to terminate the claimant's services.

20. The next issue is did the respondent follow due process in terminating the claimant's services? According to the respondent, the claimant failed to resume duties after expiry of the days off he took to attend funeral upcountry. According to Ms Bina who gave evidence on behalf of the respondent, attempts were made to reach the claimant through telephone and colleagues without success. The respondent subsequently notified the Labour office about the claimant's absence. The respondent further stated that they did not issue the claimant with a termination letter and further that no notice to show cause was ever given.

21. In termination on account of desertion, the employer must show that reasonable attempts were made to contact the employee without success. Whilst the respondent claims to have notified the Labour office about the claimant's absence, no show cause letter sent to the claimant through his last known address was exhibited. Further, despite the fact that the respondent claimed to have tried to reach the claimant through fellow members of staff, none was called to vouch for this.

22. To this extent, the court holds and finds that in spite of the fact that there existed valid and justifiable reason to terminate the claimant's services, the respondent failed to follow due process as required by the Employment Act therefore leading to the conclusion that the termination was unfair in terms of procedure.

23. The claimant made a claim for house allowance. The respondent as required by law and rules of evidence failed to show the claimant was paid house allowance at any time during his five years of service.

24. In conclusion the court will enter judgment against the respondent as follows: -

(a) Three months' salary on account of unfair termination of services – Kshs.39,000/=

(b) House allowance for five years – Kshs.117,000/=

Total – Kshs.156,000/=

(c) Costs of the suit

25. Other heads of claim are hereby disallowed as no sufficient evidence was presented in proof thereof.

26. It is so ordered.

Dated at Nairobi this 16th day of June 2017

Abuodha J. N.

Judge

Delivered this this 16th day of June 2017

In the presence of:-

Khalwale for the Claimant

No appearance for the Respondent

Abuodha J. N.

Judge