



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 128 OF 2016

MANGALE MWADZAME KUTACLAIMANT

VERSUS

RAPID KATE SERVICES LTDRESPONDENT

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 28/3/2014. The respondent has admitted that she terminated the claimant's services but denies that the termination was unfair. It is the defence case that the termination was founded on a valid reason and it was done after giving the claimant an opportunity to defend himself. The parties dispensed with the hearing and instead disposed the suit by written submissions based on their respective record.

CLAIMANT'S CASE

2. The claimant stated in his written statement that he was employed by the respondent on 1/9/2008 as an Operations Coordinator earning ksh.21000 per month. The salary was later increased to ksh.30,800 per month. During his employment he was entitled to 30 day annual leave every year but he only went for the same in only two years.

3. On 28/3/2014, his services were terminated on allegation that empty fertilizer bags were lost under his supervision. He contended that the alleged loss was not proved and as such it was not a valid reason for his dismissal. He further contended that he was never accorded a hearing before the dismissal and prayed for the damages outlined in his claim.

DEFENCE CASE

4. Mr. Salim Abdallah filed a written statement on behalf of the respondent stating that he is the respondent's Senior Operations Coordinator since 2006. He confirmed that the claimant was his assistant based at the Changamwe Warehouse. On 27/3/2014, he went to Changamwe warehouse on a routine check and the clerk there reported to him that some fertilizer bags were missing while other had their weight reduced from 50kgs to 20 or 30kgs.

5. When he called the claimant to explain the said loss, he denied knowledge of the lost fertilizer. Mr. Salim then reported the matter to the management and on 28/3/2014, they came and inspected the station

and directed to the claimant report to the Changamwe police station and record a statement. He stated that the claimant never reported to the police and absconded work and consequently he was dismissed by the letter dated 28/3/2014. He contended that the claimant was given a chance to explain the loss but he declined. He further contended that the claimant was the one responsible for the store and as such the reason for his dismissal was valid.

6. As regards the reliefs sought, he stated that the claimant was requested to collect his terminal dues but declined. In addition he stated that under the contract of employment the claimant had no right to accumulate leave without consent from the respondent and as such all his unutilized leave days were forfeited.

ANALYSIS AND DETERMINATION

7. The issues for determination are:

- a. Whether the termination of the employment contract by the respondent was unfair.
- b. Whether the claimant is entitled to the reliefs sought.

Unfair termination

8. The claimant contends that the termination was unfair because there was no valid reason and that he was not accorded any hearing before the termination. Specifically, he contends that the alleged loss or theft of fertilizer bags was never proved. The respondent on the other hand contends that the termination was fair because the claimant was the one responsible for the Warehouse from where the fertilizer bags were lost, and he failed to explain himself out when directed by the management to report to the police to record a statement.

9. After carefully consideration of the evidence and the submission presented to the court, I find that the respondent has failed to prove that fertilizer bags were lost while under the claimant's supervision. No records of the alleged loss was produced exhibits in this case. In addition, I find that the respondent has failed to prove she followed a fair procedure before terminating the claimant's services for the alleged loss of property. Under Section 41 of the Employment Act, fair procedure involves explaining to the employee in a language he understands and in the presence of another employee or shop floor union representative of his choice the reason for the intended termination and thereafter inviting the employee and his chosen companion to air their defence. In this case the said mandatory procedure was not followed. Directing the claimant to report the unproven loss to the police and record a statement did not amount to a fair hearing.

10. Under Section 45(2) of the Act, termination of employment by the employer 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. Having found herein above that the respondent has failed to prove a valid and fair reason for the termination of the claimant's services, and further having failed to prove that she followed a fair procedure, I hold that the termination was unfair and unjustified.

Reliefs

11. Under Section 49 of the Act the claimant is awarded ksh.30800 being one month salary in lieu of notice. He is also awarded ksh.308,000 being ten months salary as compensation for the unfair termination. In awarding the said compensation, I have considered the six years served as a fairly long period and also the fact that the claimant did not contribute to the termination through any proven misconduct.

12. The claim for 4 years accrued leave is not allowed as prayed but the court awards the claimant leave for last year of service being ksh.30,800. The reason for the foregoing is that under the contract of employment, the claimant could not accumulate lave without prior consent from the respondent.

DISPOSTION

13. For the reason that the termination of the claimant's services was unfair, I enter judgment for him in the sum of ksh.369,600 plus costs and interest.

Dated, signed and delivered this 9th June 2017

O.N. Makau

Judge