



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NUMBER 2179 OF 2014
GEORGE MUIGAI NJAU.....CLAIMANT
VERSUS
NEW ABERDARE TIMBER & HARDWARE LTD.....RESPONDENT

JUDGEMENT

1. By a memorandum of claim filed on 8th December, 2014 the claimant averred that he was employed by the respondent on 15th April, 2008 as a general worker at Starting salary of Kshs 6,000/= without house allowance. This wage according to the claimant was below the regulation of Wages (General) (Amendment) Order 2006.
2. On 2nd April 2010 the respondent drafted and introduced an employment contract and was signed by both parties which contract placed the basic wage at Kshs 6,130/= and a house allowance of Kshs 920/= per month. According to the claimant he continued working for the respondent faithfully and was promoted to the position of a dispatch clerk at a basic salary of Kshs 14,000/= which salary according to him was below the minimum wage which was Kshs 15,064/65. On 13th September, 2014 the respondent verbally terminated the claimant's services without giving the claimant opportunity to explain himself. The claimant therefore sought judgement against the respondent for wrongful termination of employment and judgement for liquidated sum of 1,359,130.
3. The respondent on its part through a memorandum of response filed on 15th January, 2015 stated that the claimant was employed on contract and on terms and conditions agreed by both parties and the allegations of underpayment did not arise. The respondent further averred that the claimant was terminated for stealing from the respondent given a hearing and consequently lawfully dismissed.
4. The respondent therefore pleaded that the claimant was not entitled to the claims set out in the memorandum of claim and prayed that the same be dismissed with costs.
5. In his oral evidence in court, the claimant stated that on 13th September, 2009 he was called to the office by the respondent and told he should be given off. He asked for how long but was told to just proceed he would be called. After two weeks he called and asked for his monthly pay but was told he should not be seen in the respondent's compound because some items had been stolen and he was a suspect.
6. It was the claimants evidence that he asked for the matter to be reported to the police but no report was made and that he was never prosecuted for any offence. Regarding his education and skills, he stated that

he left school at Form 2 and did not possess any formal training.

7. In cross-examination he stated that his payslips reflected his monthly pay and further that he pleaded that he was employed on 2nd April, 2010 and that his was a second contract. Prior to the second contract his employment was verbal. The claimant further admitted that he did not mention his earlier contract in his pleadings. According to him, he worked for six and a half years and his claim for underpayment was for the period he worked.

8. Regarding his duties he said he was a dispatch clerk in charge of releasing and dispatch. He used to record receipts and the customer would either go with the items bought or send someone later to collect. When shown entries at page 24 of the respondent's bundle of documents he admitted he was the one who recorded them. He denied the entry at page 25 and stated that it did not exist in the system and further that he did not supply paint twice.

9. The claimant further testified that when he was sent on off, he was not told he was under investigation. He further denied he attended the meeting whose minutes were exhibited at page 27 of the respondent's bundle of documents.

10. The respondent on his part called two witnesses. The first witness Carolyn Ireri informed the court that on 12th September, 2014 she was with her colleague Leah and that she (Leah) sold four tins of paints but removed extra four. Carolyn alerted her boss about it but when she returned the extra tins were nowhere. It was her evidence that the receipts for dispatch was written twice. It was her evidence that the receipts for dispatch was written twice. In the evening a meeting was called to discuss the matter but the claimant and Leah did not attend. As stock taking was done it was found that several boxes of paint were missing.

11. In cross-examination she admitted that no CCTV was reviewed to see who took the paint. The respondents second witness Mr Amos Kiragu informed the court that the claimant joined the respondent in March, 2010. It was his evidence that the claimant had no special skills and that his starting pay was Kshs 6,130/= plus house allowance.

12. It was his evidence that on 12th September, 2014 he received reports on lost items especially those handled by the claimant. The issue was discussed and it was agreed that each member of staff should monitor the other. On the material day he was informed that Leah and the claimant were involved in theft of paint. He informed the Director and a meeting was called and all sales staff and stock officers attended and claimant asked to give his own recount of the incident. He was given until the following day but since then the claimant never came back.

13. Concerning payment of wages, it was his evidence that the respondent paid legal minimum wage. According to him the labour officer visited them frequently and confirmed the respondent paid legal minimum wage. Regarding leave, it was his evidence that everyone went on leave and at the end of each year, any leave untaken was reimbursed. According to him the claimant was not terminated but that he absconded after failing to explain the theft.

14. Having reviewed the evidence and testimony by either side, it would seem that contrary to the claimant's allegations that he was sent away without a reason, he was informed of the theft at the respondent's premises. The only point of difference is how the loss or theft was communicated. The claimant denies attending any meeting in that regard while the respondents stated upon detection of the theft a meeting was called at which the claimant and his colleague Leah were given until the following day to explain their position regarding the theft. The meeting was documented by way of minutes. According to the respondent, the claimant never came back to work thereafter. The claimant has denied attending any such meeting.

15. The burden of proof of reasons for dismissal always rests with the employer. In this particular case, the respondent chose to document a meeting the claimant allegedly attended but did not document in writing the show cause letter. Besides, if it be true as alleged by the respondent that the claimant

absconded duties after being confronted with the allegations of theft, to justify dismissal on that ground, the respondent ought to have shown by way of evidence any attempts made to reach the claimant informing him to show cause why his services should not be terminated for absconding duties. To this extent the court comes to the conclusion that the claimants dismissal was unfair in terms of procedure followed.

16. Concerning claims for underpayment and leave not taken the court has reviewed the evidence exhibited by the respondent especially exhibits 4-6 which showed labour inspection certificates, leave analysis and acknowledgement and is persuaded that the respondent has successfully refuted these claims and the same are hereby dismissed.

17. In conclusion the court taking into account reasons and circumstances of the dismissal will award the claimant three months salary as compensation for unfair termination of services. The claimant shall further have costs of the suit.

18. It is so ordered.

Dated at Nairobi this 21st day of July 2017

Abuodha J. N.

Judge

Delivered this 21st day of July 2017

In the presence of:-

..... for Claimant

.....for Respondent

Abuodha J. N.

Judge