



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO 417 OF 2015

NIXON BROWN KADOGE ADAGICLAIMANT

VERSUS

GEO-SAT SOLUTIONS LIMITEDRESPONDENT

JUDGEMENT

1. The issue in dispute is the wrongful and unfair termination of the claimant's employment and the failure to pay terminal dues by the respondent.
2. On 18th March 2015 the Claimant filed the Memorandum of Claim; the defence was filed on 10th July 2015; and the Claimant also filed a Reply to the Defence on 14th October 2015. On 22nd October 2015 both parties were in court and a hearing date was allocated for 16th December 2015 but on the due date the Respondent failed to attend. Noting the hearing date had been taken by the consent of both parties, the Claimant was heard in his evidence and judgement reserved for 20th January 2016.
3. The claim is that on 11th October 2012 the Claimant was employed by the Respondent as a Monitor at a monthly salary of Kshs.15, 000.00 that was increased to kshs.18, 000.00 but he was never issued with a letter of appointment. The Claimant served with diligence until 9th September 2014 when he was wrongfully and unlawfully terminated from his employment and the Respondent also failed to pay his terminal dues. The Claimant is seeking notice pay; service pay; leave pay; and salary for 9 days worked in September 2014 that were not paid for. The Claimant is seeking compensation for wrongful termination together with costs and interest.
4. In reply to the defence, the Claimant stated that he was diligent in his duties and attended work at all times and never absconded duty. He was never issued with a warning letter for late reporting at work or disciplined to any misconduct. The Respondent issued the Claimant with a reference letter noting the time he worked with them.
5. In evidence, the Claimant testified that he was employed by the Respondent on 11th October 2012 and was on night duty when he fell sick. He called at the office and the one who took the phone directed him to his boss. This was around 6pm and he indicated that he was sick and could not be able to attend work. The next day he reported to work but was still not feeling well. On 9th September 2014 the Claimant was told not to report to work and when he asked for the reason, these were not given and he was never paid. He got a cheque in August 2014 and later he was told the Respondent had no vacancy for him. He was not issued with a Certificate of Service but a letter of recommendation.
6. The Claimant also testified that he was never issued with a termination letter. In define the Respondent

has set out that in March 2014 he was issued with a warning letter but this is not true as no such letter was served upon him. He was at work each night for 12 hours and when there was a client to be attended he would be forced to work late and would not be able to work for any other employer as alleged in defence.

7. In defence as filed, the Respondent states that they had employed the Claimant as a subordinate but never issued a Certificate of Service as attached to the claim. He was to monitor vehicles that were being tracked by the Respondent on its network, handle calls and give incident reports whenever required. The Claimant was not diligent in his duties and he failed to report for work for two weeks with his whereabouts unknown and his telephone off. On occasions the Claimant reported to work late without reason and this led to the issuance of disciplinary letter on 5th march 2014. When the Claimant disappeared for two weeks, when contacted he said he was sick, one director sent him money to seek medical attention but he never produced medical treatment notes as proof of such illness. From 18th August 2014 to 1st September 2014 the Claimant disappeared for close to two weeks.

8. The defence is also that the Respondent found out that while they had employed the Claimant he was working for another employer and engaged as a web designer. The Claimant subsequently deserted duty and thus compelled the Respondent to consider him as terminated. All his dues were paid and nothing is due. The claim should be dismissed.

There was no call of evidence. The Respondent opted to be absent at the hearing date.

Determination

9. It is trite that every employee should be issued with a letter of employment and where this is not possible immediately due to unavoidable circumstances, the same should be issued within two months of employment. Section 10(1) set this out as follows;

*10. (1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3) be given in instalments and **shall be given not later than two months after the beginning of the employment**— [emphasis added].*

10. Such an employment contract/letter of appointment gives an employee the terms and conditions of employment and creates parameters within which an employer can be able to monitor the employee. The non-issue of the letter of employment only leaves an employer exposed as without such a document, the word of the employee is taken very seriously. It is in the best interests of an employer to issue a letter of employment setting out what an employee is required to do. Such a letter can be revised or amended by the employer in the event there is need for change.

11. Together with or within the letter of employment/contract of employment, an employer is required to set out what disciplinary policy exists so as to apply the same where there is misconduct under the Employment Act thus;

12. (1) a statement under section 10 shall—

(a) Specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;

12. Where then an employee misconducts himself by absconding duty, moonlighting with another employer or fails to perform their duties as required, the set out disciplinary policy must apply. Such a disciplinary policy/rules/directives cannot be formulated on the go and when the employee errs. It must exist with the employment.

Where a suit is filed by an employee or former employee, the employer has the duty to produce all the work records. The employer has the custody of such records and not the employee pursuant to the provisions of section 73 and 74 of the Employment Act.

13. The defence is bare. There is no record attached. Save for the warning letter dated 5th March 2014 that is not signed by the claimant, there is not record of letter of employment, a work attendance schedule to confirm the times the Claimant was at work or absent and the monies sent to him by a director to seek medical assistance. All these records, the duty is vested upon the employer such as the Respondent to keep.

14. Despite there being no call of evidence by the Respondent to challenge the claimant, he is not without blame. His evidence is of the nature that he was not able to attend work as he became sick. The following day when he reported to work he was not able to work as he remained sick. Being sick while at work or outside work is not an offence, the offence is to fail to submit a medical certificate pursuant to the provisions of section 30 of the Employment Act stating where the employee was attended to due to sickness so as to fail to attend work. The duty is vested upon the employee to produce such a record to prove that they were absent from work for a valid reason due to sickness.

15. Where then an employee absents himself from work without due cause, the employer must issue a show cause letter and invite the employee to defend himself before termination. Even where a case warrant summary dismissal, the employee must be given a hearing before the section pursuant to the provisions of section 41 and 44 of the Employment Act. To therefore terminate an employee without taking these measures, such amounts to unfair termination. It is not sufficient to simply pay the due salary, the notification before termination is required or payment in lieu of such notice.

16. In this case, I find the Claimant was not given a hearing before his termination, he was not given notice stating what error or misconduct he had committed and despite the letter dated 5th March 2014, when he failed to attend work in August 2014, he should have been taken through due process for the misconduct that arose then. To terminate him without giving a chance to know the nature of his conduct was unfair.

Remedies

17. The Claimant having been terminated without notice is entitled to notice pay awarded at Kshs.18, 000.00. For the 9 days worked in September 2014, the Claimant is entitled to his due all being Kshs.5, 400.00.

18. On the finding that the Claimant was unfairly terminated, he is awarded compensation at one (1) month/s pay all at Kshs.18, 000.00.

19. The Claimant is seeking leave pay. In evidence, the Claimant never addressed this aspect at all. This is declined.

Judgement is entered for the Claimant for kshs.18, 000.00 compensation; salary for 9 days at kshs.5, 400.00; and notice pay at kshs.18, 000.00. No order for costs.

Orders accordingly.

Delivered in open court at Nairobi and dated this 20th day of January 2016.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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