



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO 1317 OF 2014
PETER MWANZIA KASAU.....CLAIMANT
VERSUS
KOBO SAFARIS LIMITED.....RESPONDENT

Mr. Nyamu the Claimant

Mr. Waranda for the Respondent

JUDGMENT

1. The suit was brought vide memorandum of claim dated 2nd August, 2011 and filed on 2nd August, 2011.
2. The Claimant seeks maximum compensation equivalent to 12 months' salary for alleged wrongful and unlawful summary dismissal from employment.
3. The Claimant further seeks payment of terminal benefits set out under paragraph 13 of the memorandum of claim as follows;
 - i. 3 months' salary in lieu of notice in the sum of Ksh.299,610.00;
 - ii. Gratuity at the rate of 15 days salary per every completed year of service in the sum of Ksh.691,408.00.

4. Facts of the Case

The Claimant was employed by the Respondent in the position of driver by a letter dated 11th May, 1998 at a monthly salary of Kshs.6,000.00. The Claimant received confirmation, salary increments and subsequently promoted to the position of operations administrator in the year 2000. In 2001, he was further promoted to senior operations administrator and his salary was reviewed to Kshs.29,000.00.

5. The Claimant received various bonuses in appreciation of his performance. As at the time of separation the Claimant earned monthly salary of Ksh.99,099.00.
6. The Claimant had no warning letters and his performance was good throughout the period of service. The Claimant received an award for the best employee for the past 10 years.

7. On 25th May, 2010, the Claimant received a letter of suspension. The letter did not have specific allegations against the Claimant other than stating that the Respondent was carrying out investigations into various activities in the Claimant's department. He was to proceed on annual leave during the period of suspension.
8. Two days later, on 27th May, 2010, the Claimant received a letter of summary dismissal for gross misconduct. The Claimant was in the letter of summary dismissal accused of;
 - i. failure to safeguard financial interests of the company;
 - ii. failure to prioritize driver and guide usage;
 - iii. contracting services of a competitor; and
 - iv. late allocation of drivers and guides.
9. The Claimant was not asked to answer the allegations in writing or at a disciplinary hearing before he was summarily dismissed. The Claimant did not participate in the alleged investigations by the Respondent and these matters were a shock to him because he had performed very well over the years.
10. Upon dismissal the Claimant was to be paid Kshs.32,658.00 in lieu of 7.25 untaken leave days, less Kshs.15,600.00, imprest leaving a balance of Kshs.12,546.00.
11. The Claimant wrote a letter of demand through his advocates on 4th October, 2010 challenging the wrongful and unlawful dismissal. The matter then came to court. The Claimant seeks the reliefs set out in the memorandum of claim.
12. The Claimant reiterated the particulars of his case in a sworn affidavit before court.

13. Response

The Respondent opposes the reliefs sought by the Claimant vide a memorandum of defence filed on 7th January, 2013 and through sworn testimony of Mr. Wananda (RWI), the Group Human Resource Manager of the Respondent.

14. The Respondent admits that the Claimant was its employee and does not dispute particulars of employment set out by the Claimant in the memorandum of claim and in the sworn testimony save to say that the periodical promotions and salary increments are standard policy for the Respondent to all employee and therefore have no role or effect in determining whether or not an employees is outstanding or disciplined and that the court should limit the interpretation of these letters within that context.
15. The Respondent avers that it only owes the Claimant Kshs.12,546.00 terminal benefits which the Claimant has declined to collect.
16. That the claimant was lawfully and fairly summarily dismissed and he is not entitled to compensation as claimed or at all.
17. That the Claimant was registered with National Social Security Fund (NSSF) and the Respondent contributed to the fund on his behalf and so the Claimant is not entitled to payment of gratuity or severance pay.
18. That the Claimant was summarily dismissed and is not entitled to payment in lieu of notice. In the alternative, the contract of employment only provided for one month notice and not three months as claimed.
19. The Claimant was entitled to 21 days annual leave and had only a balance of 7.25 at the time of summary dismissal. The Respondent prays that the suit be dismissed with costs to the

Respondent.

20. Determination

The issues for determination are as follows;

- i. whether the summary dismissal of the Claimant was for a valid reason and if the same was done in terms of a fair procedure;
- ii. what remedies if any, is the Claimant entitled to.

21. Issue I

The Claimant has shown on preponderance of evidence that he had served the Respondent diligently and was awarded bonuses and promoted various in recognition of the good service he gave the Respondent in various capacities for a period of about 12 years.

22. That the Respondent did not charge the Claimant with any offence or misconduct until the 25th May, 2010, when the Respondent served the claimant with a letter of suspension which did not indicate in a concise manner what was alleged against the Claimant.

23. After two days and without asking the Claimant to answer to any work related offences in writing or at a properly convened disciplinary hearing the Respondent served the claimant with a letter of summary dismissal dated 27th May, 2010.

24. The Claimant has demonstrated on a balance of probability that the Respondent having not charged him with any offence and having not conducted a disciplinary hearing against him, the Respondent had no valid reason to summarily dismiss the Claimant from the employment.

25. The manner in which the summary dismissal was effected clearly offends Section 41 of the Employment Act, 2007 which provides;

“41(1) subject to Section 42(1) an employer shall, before terminating the employment of an employee, on the grounds of misconduct, non-performance or physical incapacity explain to the employee in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation,

(2) notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or nonperformance and the person, if any, chosen by the employee within subsection (1) make.”

26. This procedure set out under Section 4(1) and (2) apply to summary dismissal and termination of employment.

27. The Respondent clearly violated these provisions and lost the opportunity to provide the Claimant a valid reason for summary dismissal in terms of Section 43 of the Employment Act, 2007.

28. Accordingly, the summary dismissal of the Claimant was wrongful, unlawful and unfair in terms of Section 45(1) and (2) of the Employment Act, which mandates the employer to dismiss an employee.

29. The Claimant is therefore entitled to compensation in terms of Section 49 (1)(c) of the Act, as read with Section 49(4) thereof.

30. In this regard, the claimant had served the respondent for a long period and did not contribute to the wrongful dismissal of his employment. The Claimant was denied terminal benefits upon his termination and was not provided with a certificate of service to enable him look for alternative employment.

31. The Claimant had not sought reinstatement given the manner in which he was summarily dismissed and he has lost employment that had offered him very reasonable career growth and income.

32. The claimant having served the Respondent honestly and diligently and offered a large portion of his career life to the Respondent has suffered loss and damage.

33. The court awards the claimant 10 months' salary as compensation for unlawful and unfair summary dismissal in the sum of Kshs.998,700.00

34. The Claimant is also entitled to one month's salary in lieu of notice in the sum of Kshs.99,870.00

35. The claim for service gratuity has no merit, the Claimant having been a member of a pension fund and National Social Security Fund to which the Respondent contributed during his employment.

36. In the final analysis, the claim is awarded as against the Respondent;

i. Kshs.99,870.00 in lieu of notice;

ii. Kshs.998,000.00 compensation;

Total Kshs.1,997,400.00;

iii. The award is payable with interest at court rates from date of filing this suit till payment in full;

iv. The Respondent is to pay costs of the suit.

Dated and Delivered at Nairobi this 15th day of January 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE