



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 245 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JOSEPH MORARA OMOKE.....CLAIMANT

VRS

INVESCO ASSURANCE CO. LTD.....RESPONDENT

JUDGMENT

The Claimant **Joseph Morara Omoke** was employed by Invesco Assurance Company Limited, the Respondent, as Branch Manager of its Kisii Branch by letter dated 17th June, 2010. His starting salary was Shs. 72,000/= with a mobile phone allowance of Shs. 5,000/= and a fuel allowance of Shs. 10,000/= per month. The Claimant was also a member of the Respondent's Medical and Pension Schemes.

The Claimant was arrested on 15th June, 2011 and charged in Kisii CMCC. No. 502 of 2011 with the offence of Stealing by Servant contrary to Section 281 of the Penal Code. He was acquitted of the charges on 29th February, 2012 under Section 210 of the Criminal Procedure Code without being put on his defence.

While the Criminal case was going on, the Claimant was interdicted by letter dated 16th June, 2011 and dismissed summarily by letter dated 1st August, 2011.

In the Statement of Claim filed on 28th August, 2013 the Claimant avers that besides the Kisii Branch he was also running the respondent's satellite office at Migori from 17th June, 2010 up to 1st August, 2011 when he was dismissed.

The Claimant seeks the following remedies;

a) *Declaration that the summary dismissal of the Claimant by the Respondent was irregular, illegal and unlawful without a three months notice for Kshs. 304,287.*

b) *Payment of withheld salaries and allowances Kshs. 373,885/= for 5 months plus leave 27 days, further six months pay up to the date the interdiction and dismissal letter was served Kshs. 608,574/=.*

c) *General damages for breach of employment contract for 12 months salary totalling to Kshs. 1,217,148/=.*

d) Costs of the suit be borne by the Respondent .

e) Any such other relief as the honourable court may deem fit and expedient so to grant.

The Respondent filed a Response to the statement of claim on 24th September, 2013 denying the allegations in the statement of claim and alleging that there were proper grounds for dismissal of the Claimant and due process was followed.

The Respondent also filed a counter claim alleging that the Claimant misappropriated Shs. 233,334 being property of the Respondent which he converted to his own use and for which he was charged.

The Respondent prays for dismissal of the Claimant's suit and entry of judgment against the Claimant in terms of the counter claim.

The case was originally heard by my sister **Wasilwa J**, who took the testimony of the Claimant and two of the Respondent's witnesses. I then took over the case and with consent of both parties proceeded from where the case had reached and took the testimony of another two witnesses of the Respondent. The parties thereafter filed and exchanged written submissions.

The Claimant was originally represented by Momanyi Aunga & Co. Advocates who filed the Statement of Claim. He however filed a Notice to Act in Person on 3rd November, 2014 and thereafter acted in person.

The Respondent was represented by Mr. Ogeto instructed by Onwong'a & Co. Advocates.

Claimant's case

It is the Claimant's case that the summary dismissal was unlawful and illegal. It is his contention that he was never given an opportunity to defend himself as both the letter of interdiction and summary dismissal were handed over to him on 29th January, 2012, long after the date of dismissal.

Respondents Case

The Respondent's position is that the Claimant was served with a letter of interdiction on 16th June, 2011. The letter of interdiction required him to give an explanation in writing and show cause why disciplinary measures should not be taken against him but the Claimant failed to respond to the letter. The Respondent contends that it initiated the disciplinary process through the letter of interdiction but the Claimant waived the same by his failure to respond, thus he elected not to be subjected to disciplinary process. The Respondent further contends that it only dismissed the Claimant after he failed to subject himself to the disciplinary process. The Respondent further avers that the Claimant elected not to appeal against the dismissal.

Determination

I have considered the claim and the evidence of the Claimant together with his written submissions. The Claimant relied on the following authorities: Kipchumba Koskei V Baringo Teachers Sacco, Nakuru Cause NO. 37 of 2013, Galaxy Paints Co. Ltd V Falcon Guards Ltd (2000) 2 E.A 285. The Claimant filed a list of authorities containing the above 2 cases and two others which are not mentioned in his submissions and which I find not relevant to his case.

The issues for determination are the following

1. Whether the summary dismissal of the Claimant was unfair
2. Whether the Claimant is entitled to the reliefs claimed.

On the first issue, the law relating to the procedure for termination is contained in Section 41 of the Employment Act which states as follows.

"(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor 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 this 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 poor performance, and the person, if any, chosen by the employee within subsection (1), make."

The Respondent avers that it complied with the procedure therein by issuing a letter of interdiction to the Claimant which the Claimant failed to respond to, an act that the Respondent took to mean that he waived the right to a hearing. The Claimant on the other hand states that he received the interdiction letter together with the letter of dismissal on 29th January, 2012. RW3 Josephine Mbikuka, the Respondent's acting Human Resource Manager admitted in her testimony in court under cross examination that the Claimant was served with both the letter of interdiction and summary dismissal on 29th January, 2012. This negates the Respondent's contention that the Claimant waived his right to be heard and is proof that the Claimant was not given a hearing in terms of Section 41 of the Act before dismissal.

The other requirement for a fair dismissal provided for in section 43 of the Act is that an employer proves valid reason for the dismissal or termination. Having not given the Claimant a hearing it was not possible to prove the reasons for his dismissal. The Claimant's eventual acquittal in the Criminal Case instituted at the behest of the Respondent is further proof that there was no valid reason for his dismissal. The dismissal was on the same grounds as those for which he was acquitted.

For these reasons I find that the summary dismissal of the Claimant did not meet both the standards for fair procedure and proof of reason for dismissal. The summary dismissal was therefore unfair.

Remedies

The Claimant seeks a declaration that his summary dismissal was unfair. I have already found herein above that the summary dismissal was unfair and do hereby declare so.

The Claimant further seeks payment of withheld salary for 5 months, 27 leave days and a further 6 months salary upto date of receipt of summary dismissal letter. The Respondent submitted absolutely no defence in respect of these prayers. There was not even a denial of the same in the defence filed by the Respondent. There is further no mention of these demands of the Claimant in the testimony of defence witnesses or in the written submissions filed by the Respondent.

Having been notified of his dismissal on 29th January, 2012, that is the effective date of dismissal. The Claimant is therefore entitled to payment of salary up to that date. The Claimant testified that no salary was paid to him after his arrest.

The Claimant's gross salary at the time of dismissal was Shs. 101,429 as per his payslip for the month of May, 2011 which is not contested by the Respondent. Salary for 11 months is therefore **Shs. 1,115,719** which I award him. Pay in lieu of 27 leave days amounts to **Shs. 91,286.10** which I also award the Claimant.

The Claimant also seeks maximum compensation for unfair dismissal. Taking into account the manner in which the Claimant was dismissed, the length of service and all other factors set out under Section 49(4) of the Act it is my opinion that 6 months salary is reasonable compensation. I therefore award him **Shs. 608,574** as compensation.

The Respondent shall also pay the Claimant's costs for the case which I assess at **Shs. 50,000/=** all inclusive. I have assessed the fees taking into account that the Claimant was initially represented by an Advocate but withdrew instructions from the advocate midstream, and also the fact that he is entitled to disbursements incidental to the filing of the case.

The total sum awarded to the Claimant is therefore **Shs. 1,865,579.10**. The said sum will attract interest at court rates unless payment is made within 30 days from date of judgment.

No evidence was led in respect of the counter claims. The same remains unproven and is dismissed.

Orders accordingly.

Judgment dated, signed and delivered this 26th February, 2016.

MAUREEN ONYANGO

JUDGE