



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 427 OF 2015

NICODEMUS CHABANI OGENDI CLAIMANT

VERSUS

RADAR LIMITEDRESPONDENT

JUDGEMENT

1. The issues in dispute are the unlawful termination of the claimant; failure to be paid terminal benefits; and the non-issue of a Certificate of Service.
2. The respondent was served with summons but failed to enter appearance of file any statement of response. The claimant filed Affidavit of Service sworn by Christopher Githui that confirm the respondents were served on 13th April 2015. The court having been certified that the respondent is aware of these proceedings and opted not to defend the same heard the claimant in his evidence.
3. The claim is that in January 2009 to March 2014 the claimant was employee by the respondent as a Security Guard. On 26th March 2014 he claimant was terminated without any justifiable cause. The respondent therefore breached the contract of employment as there was no notice before termination; it was arbitrary without any reason; terminal benefits were not paid; and the respondent failed to comply with the law.
4. In evidence, the claimant testified that upon his employment by the respondent he worked diligently until his termination. On 13th March 2014 he reported to work as usual for night shift at Woodvale – James Gichuru and Ukwala road. Upon handover by the day shift guard he proceeded to work until 9 to 9.10pm when he developed stomach upset and went to ease himself and upon return he found the director on site. The director was hooting and the claimant opened the door for him and found he was with his supervisor who complained that they had been at the gate and there was no body to open the gate. The claimant pleaded his case and noting his condition. The next day, the claimant was given a transfer to a different station as another client on site complained that the claimant had been absent when he came to the gate. The claimant went to replace another employee who was on leave until end of March 2014. The supervisor decided that the claimant was to serve as a reliever for those on leave.
5. On 5th April 2014 the claimant went for his salary but there was nothing at the bank. He went to the office to ask but he was told that his salary had not been processed as he had a disciplinary case while at Woodvale site. The next day he went to see the4 accountant who directed him to the controller where he learnt that he had been dismissed and it had been noted that he had refused to collect his letter. The claimant learnt that despite being at work and his supervisor sending him to different sites, he had been dismissed without his knowledge.

Determination

6. A claimant aggrieved by termination or dismissal from employment has a right to file a complaint with the court under section 47 of the Employment Act. Under Rule 11 of the Court Procedure Rules, once summons have been served upon a respondent, the Process Server must file an Affidavit of Service confirming that the respondent received summons.

7. Upon being served with summons a respondent wishing to reply in defence must respond to the claim within fourteen (14) days from the date of service and serve a response to the claim. However, where a respondent does not wish to enter appearance or file any defence, this is a choice allowed of any respondent. The court must proceed and hear the claimant in his case and on the merits of the case, award as appropriate. In this case, the respondent was served but opted not to defend the claim.

8. Section 41(2) of the Employment Act provides;

(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. [Emphasis added].

9. Summary dismissal must be preceded by a hearing. The provisions of section 41 are mandatory in the sense that an employer must give an employee a hearing, even in the worst case scenarios that warrant summary dismissal. Such is unless it is practically impossible to hear the employee based on the nature of misconduct but that must be demonstrated by the employer that at the time to summary dismissal, it was not possible to hear the employee in their defence. In the case of **Henry Ondari versus Top Security Systems limited, Cause No.572 of 2011** held that;

...even in cases of gross misconduct which render an employee liable to summary dismissal, the procedural fairness requirements set out under section 41 of the Employment Act must be followed as they are mandatory. The requirement is to call the employee to attend hearing in the presence of a fellow employee of his choice where his defence is submitted for consideration by the employer. Without such defence being heard and discussed, the employee is left exposed to the whims of the employer to terminate at will. The right to terminate an employee is no longer unrestricted as section 41 of the Employment Act has created a safeguard to ensure natural justice is achieved at the shop floor where the facts are best established.

10. In this case, without any defence being filed, there being no appearance or the respondent as the employer to controvert the claimant's evidence, I take it the claimant was summarily dismissed on 26th March 2014 but he was not made aware and hence continued to report to work until 5th April 2014 when he went to check why his salary had not been paid only to learn that he had since been dismissed.

11. Where the claimant had misconducted himself, the law allowed the respondent as the employer to summarily dismiss him but upon giving the claimant a hearing so as to state his defence. The letter dated 26th March 2014 indicate that the summary dismissal was on the grounds that the claimant was found sleeping while on duty while he had been assigned duties at World Relief Offices along Kunde Road. Where the respondent may have had a plausible defence herein, no appearance or defence was filed. Where the respondent may have had a good ground to dismiss the claimant, the claimant states that he had an upset stomach at the material date under reference, such should have been put into account in a hearing, and without any evidence of hearing, and the procedure thus leading to summary dismissal was flawed. This amounts to unfair termination procedure contrary to section 45 of the Employment Act.

Remedies

12. Notice pay is due in a case of unprocedural termination of employment in accordance with section 35 of the Employment Act. The claimant was earning kshs.12, 868.00 per month. The claimant is

awarded notice pay at kshs.12, 868.00.

13. The claimant was issued with his notice of summary dismissal on 5th April 2014. The claimant testified that he was not aware of his dismissal until he went to check for his wages. For days worked and up and until the letter of dismissal was issued, wages are due. The claimant is awarded kshs.2, 145.00.

14. Where salary for March 2014 was not paid, the claimant having worked for the full month and the respondent having not challenged the claimant, the due salary is payable. The claimant is awarded kshs.12, 868.00.

15. On the claim for unpaid leave for 5 years, this is not challenged, the claimant is awarded kshs.64, 340.00.

16. Service charge for 15 days for each year worked though claimed and not challenged, the claimant attached his pay slip for February 2014 where the statutory deductions made include NSSF dues. Section 35(5) and (6) read together, service pay is not due. Such is declined.

17. The claimant is seeking 3 months' pay in compensation. It is not clear why the claimant restricted his claim to 3 months' pay for wrongful dismissal. Such will therefore not be enhanced and is awarded as claimed at 3 months' salary all being kshs.38, 608.00.

18. Costs are also due herein.

Judgement is hereby entered for the claimant against the respondent for;

- a. **Compensation awarded at kshs.38,608.00;**
- b. **Notice pay at kshs.12,868.00;**
- c. **Salary for March 2014 at Kshs.12,868.00;**
- d. **5 days Salary in April 2014 at kshs.2,145.00;**
- e. **Unpaid leave kshs.64,340.00; and**
- f. **Costs of the suit.**

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF APRIL 2016.

M. MBARU

JUDGE

Present

.....
.....