



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 483 OF 2015

MOSES WANJIMA MWANGI.....CLAIMANT

VS

VERT LIMITED.....RESPONDENT

AWARD

Introduction

1. The Respondent, having been served with the Claimant's claim and attendant summons filed a Memorandum of Appearance on 30th April 2015 but did not file a defence. As a result, my brother **Abuodha J** by an order issued on 2nd July 2015, directed that the matter proceeds as an undefended claim. I therefore heard the Claimant *ex parte* on 30th March 2016. The Claimant also filed written submissions.

The Claimant's Case

2. The Claimant's claim is contained in a Statement of Claim dated 25th March and filed in Court on 26th March 2016. He states that he was employed by the Respondent as a Farm Manager on 16th February 2009 at a monthly salary of Kshs. 40,000. For some reason he was paid diverse amounts of salary.

3. The Claimant was scheduled to proceed on his annual leave from 13th August 2013 and resume on 10th September 2013. He however did not take his leave until 14th August 2013 as he needed to hand over to his immediate supervisor who was not available on 13th August 2013. There was also a public holiday, (Idd Ul Fitr) falling within the Claimant's leave period.

4. The Claimant therefore decided to extend his leave by two (2) days to cover for the delayed commencement of leave and the public holiday, thus resuming duty on 12th September 2013.

5. The Claimant was accused of deserting duty until 17th September 2013, an allegation he denied. He was issued with a show cause letter to which he duly responded. He was nevertheless summarily dismissed.

6. It is the Claimant's case that his dismissal was unlawful and unfair. He claims the following:

- a. One month's salary in lieu of notice.....Kshs. 96,317.55
- b. Underpaid salaries
- c. Leave and leave traveling allowance
- d. Gratuity

- e. Terminal dues
- f. General damages for unlawful dismissal

Findings and Determination

7. The issues for determination are as follows:

- a. Whether the Claimant's dismissal was justifiable and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

8. The dismissal was triggered by a show cause letter dated 24th September 2013 stating as follows:

“Dear Moses

SHOW CAUSE LETTER AGAINST DISCIPLINARY ACTION

As per your Annual Leave Request Form, you were supposed to resume duty on 10th September.

Without explanation, permission or making arrangements how your duties would be carried out, you extended the duration at will and reported back on 17th September, translating to an entire week of absence. Needless to say, this caused great inconvenience to company operations.

As you are aware, absence from work without reasonable cause and especially to such an extent is classified as gross misconduct under the company policy which attracts severe disciplinary penalty.

In a written submission to be handed in to the undersigned not later than close of business on Wednesday, 25th September 2013 could you provide an explanation for your absence, showing cause why disciplinary action should not be taken against you?

Yours sincerely

(signed)

Nderito Maina

Managing Director”

9. The Claimant responded by his letter dated 28th September 2013 explaining that he had resumed duty on 12th September instead of 10th September because he had delayed the effective date of his leave by one day and there was a public holiday in between his leave period. He denied the allegation that he had resumed on 17th September. He also offered to forfeit the two extra days he had taken from his pending leave days.

10. The Claimant was subsequently dismissed by letter dated 1st October 2013. The dismissal letter states as follows:

“Dear Moses

DISMISSAL

Our letter dated 24th and the correspondence exchanged resting with yours dated 28th September the details of which are well within your knowledge refer.

Unfortunately your letter under reference failed to show satisfactory cause why disciplinary action should not be taken against you as it has well emerged that:

- You made amendments to your leave thereby extending the same without information to or authorization from the immediate higher office.*
- Contrary to procedure, you did not report to your immediate supervisor when you resumed work.*
- Despite having resumed work as alleged, you have not taken up performance of your duties e.g. giving technical updates of what goes on in the farm continue to be discharged by the Farm Accountant.*

Your conduct as above translates to gross misconduct as you have not only failed to obey a proper command which is within the scope of your duty but also negligently/improperly performed your duties.

In view of the circumstances, we regret to inform you that your employment is no longer tenable. As a result the company has reached a decision to relieve you of your duties with immediate effect. Please arrange to report to Nairobi Office for a hand over of all the company property in your possession, as well as a formal discharge.

We wish you all the best in your future endeavours.

Yours sincerely

(signed)

Nderito Maina

Managing Director”

11. Section 43 of the Employment Act, 2007 requires an employer to prove a valid reason for the termination of the employment of an employee. From the record, the Claimant was dismissed for gross misconduct, which constitutes a lawful reason but which must be proved. The correspondence between the Claimant and the Respondent reveal a number of complaints made by the Respondent against the Claimant.

12. It would appear however that the Respondent did not allow the disciplinary process to run full circle as contemplated under Section 41 of the Employment Act. That being the case, the Respondent cannot be said to have proved a valid reason for the Claimant's dismissal. Moreover, in effecting the dismissal, the Respondent did not follow due procedure. The Claimant's dismissal was therefore substantively and procedurally unfair.

Remedies

13. In view of the foregoing findings, I award the Claimant six (6) months' salary in compensation. In making this award I have taken into account the Claimant's length of service as well as the Respondent's conduct in the disciplinary process. I also award the Claimant one (1) month's salary in lieu of notice. For purposes of tabulating the Claimant's claim, the Court adopts the figure of Kshs. 40,000 pleaded by the Claimant as the agreed monthly salary.

14. The claims for underpaid salaries, leave and leave traveling allowance, gratuity and terminal benefits and general damages were not proved and are dismissed.

15. Ultimately I make an award in favour of the Claimant in the following terms:

a) 6 months' salary in compensation.....Kshs. 240,000

b) 1 month's salary in lieu of notice.....40,000

Total.....280,000

16. The Claimant will have the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

17. It is so ordered.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF
MAY 2016**

LINNET NDOLO

JUDGE

Appearance:

Mr. Njuguna for the Claimant

No appearance for the Respondent