



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 538 OF 2014

JAPHET OBIRA OMWANGE.....CLAIMANT

VS

RAISONS DISTRIBUTORS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by Ransons Trading Company Limited as messenger on 2.6.2004. He later rose to become an Invoicing Clerk earning a gross monthly salary of kshs. 15,500/=. The said company was later bought by the respondent herein and the claimant was absorbed as her employee. On 30.11.2013, the claimant was terminated from his employment on ground of poor performance and frequent late reporting to work. He was aggrieved and brought this suit claiming separation dues plus compensation for the unfair termination.

2. The respondent has admitted that she employed the claimant until 30.11.2013 when she terminated him for gross misconduct. She averred that the termination of the claimant's services was fair because there was a valid reason for the dismissal. She further averred that the dispute herein was resolved through conciliation before the Labour officer and the claimant accepted the compensation awarded by the conciliator for unfair termination as full settlement.

3. The suit was heard on 9.3.2015 and 7.12.2015 when the claimant testified as Cw1 and the respondent called Michael Owego Otiato, Mita Naresh Malubahi Adatia, Khahl Ahmed Malik and Deepan Raichand Shah as Rw1, Rw2, Rw3 and Rw4. Thereafter both the parties filed written submissions.

Analysis and Determination

4. After considering the pleadings, evidence and submissions, there is no dispute that the parties herein related as employer and employee until the respondent terminated contract on ground of gross misconduct. The issues for determination are whether the termination of the employment contract was unfair and whether the claimant is entitled to the dues sought.

Unfair termination

5. Cw1 told the court he reported back to work from leave on 30.11.2013 and was shocked to be served with a letter terminating his services with immediate effect. The reason cited for the dismissal was poor performance, frequent late reporting and absenteeism. He denied the alleged misconduct and contended

that the accusation came the same year he was promoted and he had not been served with any warning. He further contended that his dismissal was unfair because it was not preceded by any notice or fair hearing.

6. On the other hand all the defence witnesses contended that the claimant was habitually absenting himself from work for one reason or another and that he frequently reported to work late and also left earlier than required. As a result of the said conduct the performance by the claimant was poor and was negatively affecting the operations of the respondent. Surprisingly however, Rw3 admitted that although he signed the claimant's dismissal letter he was neither an employee nor Director of the respondent. Additionally Rw4 admitted that the termination of the claimant's services was unfair because no fair hearing was accorded to him before the termination.

7. In view of the above admissions by the Rw3 and the Rw4 the court finds and hold that the termination of the claimant's service was unfair. The termination of the services by a stranger to the employing company, and the failure to follow fair procedure before termination, rendered the termination unfair within the meaning of section 45 of the Employment Act (EA).

Reliefs

8. The claimant has prayed for one month in lieu of notice, 12 months salary as compensation, unpaid overtime, certificate plus costs. The respondent case is that she paid all the separation dues plus compensation for the unfair termination to the claimant and that nothing was owed to him.

9. Cw1 admitted that he was paid kshs.19,972.00 in November 2013 after termination and later received kshs.53,991.00 through the Labour office after conciliation. After considering the documents filed, the court finds on a balance of probability that the claimant was paid all the separation dues plus compensation for the unfair termination. The document titled "FINAL DUES WORKINGS" includes one month salary in lieu of notice being kshs.15,500.00, salary for 13 days worked in November 2013 and 13.5 leave days which total to kshs. 37,958.00. After subtracting the statutory deductions the claimant received kshs.19,972.00 as the net pay as admitted in his testimony. Consequently the claim for one month pay in lieu of notice must fail.

Compensation

10. Cw1 contended that during the conciliation the Labour office directed the respondent to pay 10 months salary as compensation for unfair termination. That the respondent delayed the payment and due to financial stress the claimant accepted the payment of kshs.53,991.00 through cheque number 014914 dated 22.5.2014. He however, declined to sign a Discharge voucher because the payment was not in full settlement.

11. The Rw4 has on the other hand maintained that the payment of the kshs.53,991.00 was the net pay after deducting tax from kshs.77,500.00 being the 5 months salary compensation accepted by the claimant at the conciliation proceedings as full settlement. The court has considered the settlement agreement signed by the parties herein and witnessed by the Labour officer. It says that the claimant had accepted the payment of kshs.53,991.00 as settlement of the dispute he had lodged in the Labour office on 17.1.2014 against the respondent. The claimant has not pleaded and adduced any evidence to deny the authenticity or validity of the said settlement agreement signed before the Labour office. He executed the agreement voluntarily. Consequently the court finds that the claim for compensation for unfair termination was settled before the Labour officer on 23.5.2014 vide the settlement agreement produced in court as exhibit D.8.

Overtime

12. The claimant contended that he was working 23 ½ hours as over time every month. He prayed for the payment for the entire period of his service from 2004 to 2014. The said allegation has however not been proved in evidence. Some of the attendance records showed that the claimant never worked overtime

every month or worked for less than 23 ½ hours while some payslips show that he was paid his overtime. The court finds on a balance of probability that the claim is exaggerated and not substantiated.

Certificate of service

13. Cw1 admitted in his testimony that he was given his certificate of service at the Labour office when he went to sign the settlement agreement. He cannot therefore demand for another certificate.

Disposition

14. For the reasons stated above the claimant's suit is dismissed. Each party will bear his own costs.

Dated, signed and delivered this 27th day of May 2016

ONESMUS MAKAU

JUDGE