



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1146 OF 2013

TIMOTHY ASUDI MALWA.....CLAIMANT

VS

E-GAP SOLUTIONS LIMITED.....RESPONDENT

AWARD

Introduction

1. This action arises from the termination of the Claimant's employment. It is brought by way of a Statement of Claim dated 19th July 2013 and filed in Court on even date. The Respondent filed a Response and Counterclaim on 2nd September 2013. At the hearing, the Claimant testified on his own behalf and the Respondent called its Managing Director, Eric Okuku Odundo, the Administration & Finance Manager, Julius Otieno Ogola and former driver, Daniel Omondi Aoro. Both parties also filed written submissions.

The Claimant's Case

2. The Claimant states that he was employed by the Respondent as a foreman at a monthly salary of Kshs. 25,000 effective 1st June 2004. His salary was progressively increased to Kshs. 45,000 as at 30th May 2010. The Claimant further states that he was not issued with an employment contract.

3. The Claimant worked in various sites until 30th May 2010 when he was suspended and charged in Criminal Case No 2687 of 2010, at Kibera Law Courts. He was discharged on 2nd July 2013 after which he sought to resume duty but the Respondent declined.

4. The Claimant's claim is as follows:

- a. A declaration that his dismissal was wrongful and unfair
- b. One month's salary in lieu of notice.....Kshs. 45,000
- c. Salary arrears from May 2010.....45,000
- d. House allowance from April 2004 to May 2010.....465,000
- e. Gratuity.....135,000
- f. Leave allowance.....270,000
- g. 12 months' salary in compensation.....540,000
- h. Certificate of service
- i. Costs plus interest

The Respondent's Case

5. In its Response and Counterclaim, the Respondent admits having employed the Claimant as a foreman. The Respondent states that the Claimant was guilty of deducting and misappropriating masons' wages entrusted to him. He was therefore charged in Criminal Case No 2687 of 2010 at Kibera Law Courts.

6. It is the Respondent's case that the Claimant was properly dismissed after having stolen from his employer. The Respondent maintains that the Claimant was afforded adequate opportunity to be heard as required by law. The Respondent further states that the Claimant's discharge from the criminal case was on a technicality and did not prove his innocence. At any rate, the Respondent was under no obligation to re-employ the Claimant.

7. By way of counterclaim the Respondent claims from the Claimant the sum of Kshs. 36,000 made up of 16 wall mirrors valued at Kshs. 32,000 and 5 plastic chairs valued at Kshs. 4,000.

Findings and Determination

8. The following are the issues for determination before the Court:

- a. Whether the Claimant's dismissal was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought;
- c. Whether the Respondent has proved a counterclaim against the Claimant.

The Dismissal

9. From the evidence on record, the Claimant's dismissal was precipitated by allegations of theft of company property. Specifically, the Claimant was accused of underpaying masons and stealing some mirrors and plastic chairs. The Claimant denied all these allegations.

10. Theft by an employee is a serious offence that renders the employee liable to summary dismissal. Following the dictates of Section 43 of the Employment Act, 2007 an employer who fronts such an allegation as the basis for dismissal of an employee must prove, it on a balance of probability.

11. In the instant case it appears that the Respondent was banking on the criminal case to support the Claimant's dismissal. In *Milka Khakayi Kulati v Sandstorm (Africa) Limited [2014] eKLR* this Court held that an employer who chooses to take disciplinary action against an employee cannot be allowed to abdicate its obligation to an external investigative body such as the police. Disciplinary action taken at the work place must be supported by a valid reason, internally established.

12. Apart from lamenting that the police did a bad job in the criminal case facing the Claimant, the Respondent made no attempt to discharge its mandate under Section 43 of the Employment Act and I therefore find that the Claimant's dismissal was substantively unfair.

Dismissal Procedure

13. The accusations made against the Claimant constitute what is generally referred to as gross misconduct. Section 41 of the Employment Act, 2007 establishes the following mandatory procedure for handling such cases:

- (a) The employer must explain to the employee in a language the employee understands the reasons why disciplinary action is being considered;
- b) The employee is entitled to have a representative of their choice, being either a fellow employee or a shop floor representative present during the explanation;
- c) The employer must hear and consider any explanations by the employee or their representative;

14. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its

employment, to document internal disciplinary rules for use in handling disciplinary cases.

15. The Claimant told the Court that he was not summoned to respond to the accusations of theft. Further, the Respondent's Director, Eric Okuku Odundo admitted in cross examination that there was no record of any meeting at which the Claimant was heard. Odundo also told the Court that the Claimant was not issued with a show cause letter and that his suspension was communicated verbally.

16. Overall, the Court finds that the Respondent failed to observe the procedural fairness requirements set out under Section 41 of the Employment Act thus rendering the Claimant's dismissal procedurally unfair.

Remedies

17. Before addressing the issue of the remedies available to the Claimant I need to dispense with two preliminary issues; first, the effective date of the Claimant's employment and second, his salary as at the time of his dismissal.

18. With regard to the employment date, the Respondent produced a certificate showing the date of its incorporation as 3rd July 2007 with the implication that the Claimant could not have been employed by the Respondent before this date. The Claimant's Director, Eric Okuku Odundo was however unable to explain his testimony before the criminal court that when he became a director in 2003 he found the Claimant already working.

19. It seems to me therefore that the certificate of incorporation cannot be used as conclusive evidence of the Claimant's effective date of employment. The law requires the employer to issue the employment contract and in its absence, the Court adopts the employee's testimony on the effective date of employment.

20. The same fate befalls the issue of salary payable to the Claimant. The Respondent produced some payroll summaries showing the Claimant's salary as at May 2010 as Kshs. 25,410. These summaries were however unsigned and could have been generated for purposes of this case. More significantly, Odundo gave a different figure of Kshs. 35,000 to the criminal court.

21. The way to settle the issue of salary payable to an employee is to issue an itemised pay statement as prescribed by Section 20 of the Employment Act. The Respondent failed to do so and the Court adopts the figure of Kshs. 45,000 given by the Claimant as his monthly salary.

22. That brings me to the claim for house allowance. Section 31(1)and(2) of the Employment Act provides that:

1. ***An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.***

2. ***This section shall not apply to an employee whose contract of service-***

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

23. The employment relationship between the Claimant and the Respondent was not documented and as held by **Mbaru J** in ***Robai Musinzi Vs Safdar Mohamed Khan [2012] eKLR*** where an employer fails to document the terms and conditions of employment, it is left to the Court to interpret these terms. I have

looked at the issue of the Claimant's salary in this light and have formed the opinion that the figure of Kshs. 45,000 was adequate as both basic salary and house allowance. The claim for salary allowance is therefore disallowed.

24. Back to the dismissal. I have already found that the Claimant's dismissal was unjustifiable and unfair and I therefore award him eight (8) 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 dismissal transaction. I also award the Claimant one (1) month's salary in lieu of notice as well as salary for May 2010.

25. By its own admission, the Respondent did not make National Social Security Fund (NSSF) remittances in favour of the Claimant and the claimant is therefore entitled to service pay. Similarly in the absence of leave records to counter the Claimant's assertion that he never went on leave, the claim for leave pay succeeds and is allowed.

Counter claim

26. The Respondent's counter claim was not proved and is dismissed.

Final Orders

27. Finally I make an award in favour of the Claimant in the following terms:

a. 8 months' salary in compensation.....	Kshs. 360,000
b. 1 month's salary in lieu of notice.....	45,000
c. Salary for May 2010.....	45,000
d. Service pay for 6 years (45,000/30x15x6).....	135,000
e. Leave pay for 6 years (45,000/30x21x6).....	<u>189,000</u>
Total.....	774,000

28. I further direct the Respondent to issue the Claimant with a certificate of service and to pay the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

29. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF MAY 2016

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JUDGE

Appearance:

Mr. Khalwale for the Claimant

Mr. Magambo for the Respondent