



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI
CAUSE NO.771 OF 2014

JOHN MUTSUMI DAVID.....CLAIMANT

VERSUS

DELTA GUARDS LIMITED.....RESPONDENT

JUDGEMENT

The issue in dispute is the wrongful dismissal of the claimant and the non-payment of his terminal dues.

On the 10th July 2009 the claimant was employed by the respondent as Branch Manager at a monthly salary of Kshs.15, 000.00 which was reviewed to Kshs.21, 000.00. The respondent, a security company had its offices at Thika. The claimant had the duties of selling and marketing the respondent around Nairobi; manage clients; coordinate employment; report on security matters; undertake investigations in cases of theft; and organise the staff under him. The claimant would report to work at 8am to 6pm all being 40 hours per week.

The claimant was terminated from his employment on 14th March 2014. At the time he was not housed by the respondent and was not given a house allowance. He had not taken his annual leave for 4 years. The claimant was not informed of his termination in writing.

The claimant is seeking notice pay; one year leave; severance pay; compensation; house allowance; and certificate of service.

In evidence the claimant testified that upon his employment by the respondent on 10th July 2009 he was made assistant branch manager at Ndunyu Njeru at Ol Kalou/Ndunduri road project. He was however not given a contract. His main duties were to oversee operations. He would start his day early and end late as he had to organise the day and night guards and in total worked for 14 hours. He would be called at night when there were emergencies. He was not paid overtime.

The claimant was later deployed to Thika, then Ruiru. The claimant was then promoted to branch manager. He realised that his NSSF dues were deducted but never remitted. On 14th March 2014 his salaries had been delayed over time and he therefore approached the respondent's managing director Mr Mungai who told him if he was not patient he could leave. By this time the February and March salaries had not been paid. On 23rd March 2014, when the claimant went to the Thika office, Mr Mungai told him that he had been terminated.

In cross-examination the claimant confirmed that in October 2011 the respondent wrote to him and he

admitted having been working overtime for a rival company. He was paid kshs.800.00 for working for the other company on Saturday. This was in breach of his contract. That when he was summoned back to work he did not do so immediately.

Defence

In defence the respondent state that they employed the claimant as a supervisor and had 21 days of annual leave. In May 2010 the claimant took 44 days of his annual leave meant for 2 years. When the respondent from the Ndunyu Njeru project, the claimant applied for leave but went to work for a rival company which was in conflict of interest. The claimant admitted to moonlighting. In 2013, the respondent reengaged the claimant but he proceeded to ask for 8 days leave on the reasons that his father was sick. The claimant never reported back on duty. In March 2014, the claimant having absconded duty and deserted work, the respondent wrote to him and warned that unless he reported back, he would be removed from the pay register. The claim is therefore without basis and meant to extort the respondent and should be dismissed.

In evidence, the respondent called Mr Mungai Mwaura the managing director of the respondent. He testified that the claimant worked for the respondent on and off and his last contract was 7th June 2012. The claimant was paid kshs.15, 000.00 and a house subsidy of Kshs.6, 000.00. The claimant was in charge of Nairobi area, he was able to take his annual leave or was paid for it with a deposit in the bank account. That the respondent learnt that the claimant was working for a rival company, Sunrise Security and he did this while still engaged by the respondent. The claimant then abscond duty and his last salary was in February 2014. When the claimant's advocate served a letter of demand, the claimant was still employed by the respondent.

Submissions

Both parties filed their brief submissions, a one (1) pager from the respondent.

Determination

An employee who absconds duty commits an act of gross misconduct. Such is prohibited under section 44(4) of the Employment Act. There can be no doubt that during the currency of his contract of employment the claimant owed a fiduciary duty to his employer, the respondent which involved an obligation not to work against his employer's interests. The claimant therefore committed a breach of the duty by moonlighting for a competitor, and did so when he left to undertake similar duties for business with another employer elsewhere.

The claimant testified that while in the employment of the respondent he would go back to his former employers Sunlight Security, work over Saturdays in similar work as that of the respondent and was paid kshs.800.00. The claimant's defence is that this was not an admission of moonlighting, rather this was his old employer and the director asked him to help train guards at Kikuyu PCEA hospital when off duty. He did such work when not on respondent duty. Every week he would train at Sunlight Securities. He had no contract that was forbidding him from doing other work. However, the claimant had an employment contract with the respondent as their employee. To serve other competitors or employers in a similar capacity and justify the same to be work during off work periods is not acceptable.

What is also clear is that on diver's dates, the claimant was granted time off to attend to his sick father but failed to return to work. The letter dated 28th march 2014 from the respondent recalling the claimant back to work was contested. The claimant testified that this letter was sent by an officer who has since left the employment of the respondent. That the letter is signed by an officer other than his employer. However, the contents of the letter is clear. The respondent absconded duty since 14th March 2014 and he does not explain his whereabouts.

Very few employers will bother with an employee who absconds duty. However the respondent did not seat back and wait for the claimant to attend work as and when he chose to. They wrote to him to resume

duty failure to which he would be terminated. Such is the context of the letter dated 28th March 2014.

Ultimately, where the claimant absconded duty and was recalled by the employer and failed to abide, he cannot claim notice pay. I find evidence that the claimant had taken all his leave days or was paid for the same. The period he remained absent was not compensated for and was without due cause. No notice of leave should arise. The claim for severance pay does not arise in this case as the facts and issue in dispute does not relate to redundancy. The salary paid put into account all factors as the terms and conditions of employment were mutually agreed and the claimant cannot seek house allowance outside his contract terms. Compensation is due where the claimant was in breach of his contract.

In conclusion, noting the above matters set out, the claim must therefore fail and is hereby dismissed. Save the claimant should be issued with a Certificate of Service for the last contract served with the respondent. Each party shall bear their own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF MAY 2016.

M. MBARU

JUDGE

In the presence of

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