



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAIROBI

CAUSE NO. 815 OF 2014

MICHAEL KYALO MAITHYA.....CLAIMANT

VERSUS

VICTORY CONSTRUCTION COMPANY LIMITED.....RESPONDENT

JUDGEMENT

The claimant was on 12th February 2010 employed by the respondent as a Driver at its office in Nairobi under an oral contract of service. His salary was agreed upon at kshs.15, 000.00 per month. It was also an agreed term that the claimant would be paid overtime for every hour outside the normal work hours of 8am to 5pm and to be paid at the rate of 1.5 per hour of the salary due. That the claimant worked day and night without leave or off day and was never paid for overtime or leave.

On 2nd June 2011 the claimant was terminated from his employment by the respondent without notice or hearing. That the termination was unlawful for the reasons that the claimant was not given any reasons or notice, the claimant was not given a hearing and he had not committed any offence to warrant such an action. That the respondent failed to issue him with a certificate of service.

The claimant is seeking for his salary for May 2011; overtime allowance for 1474 hours; payment in lieu of notice; compensation for unfair termination and costs of the suit.

The claimant also testified that upon employment by the respondent he was not issued with a written contract of employment. The claimant worked diligently until 1st June 2011 when the respondent alleged that he had stolen a motor vehicle alternator in one of the vehicles. That he had found the alternator in one of the tool boxes of the vehicle and he voluntarily reported this to the respondent. On 2nd June 2011 the claimant reported to work but was barred at the gate and ordered to report to the police where he recorded a statement. He reported back to work but was denied entry by the security guards. Since, the claimant has not been charged by the police or allowed to resume work.

The claimant also testified that upon filing the claim, the respondent replied and attached a memo dated 6th June 2011 calling him to a meeting but this is a fabrication as he never got such a letter. He has since been barred from entering the respondent premises and therefore cannot have been issued with such a letter or memo.

Defence

In defence, the respondent stated that the claimant worked for them from 8 am to 5pm and not day and

night. All leave days were taken as scheduled. All overtime taken was paid for. That the claimant was entrusted with Motor vehicle No. KAU 264Y, Eicher truck and on 1st June 2011, an alternator and starter for a Mitsubishi truck were found hidden in the tool box of the vehicle. The claimant was responsible for the vehicle at the time and he was unable to account for it. The respondent found that there was a vehicle in their yard missing an alternator and of the same kind as what the claimant was found with. The claimant was not able to give a reasonable explanation for these facts. The claimant was as a result summarily dismissed.

In evidence the respondent witness was Kirpal Singh Suri, a director of the respondent who testified that they had an oral contract with the claimant upon his employment as a driver and was entrusted with Vehicle No. KAU 264&, Eicher truck. On 1st June 2011, an alternator and a starter of a different vehicle, Mitsubishi truck were found hidden in the tool box the claimant had. He was unable to explain himself and therefore this was established to be stolen. On 2nd June 2011 the respondent issued the claimant with a letter requesting him to explain himself in defence but he had nothing plausible. He was dismissed as a result of the theft.

The witness also testified that all leave days were paid for and the claimant did not work overtime. No dues are owing. The claimant was however not paid his May 2011 salary at KShs.15, 000.00

Submissions

The claimant submitted that upon termination of his employment by the respondent he was denied access to the work place. Such action was unfair as he was not given any reasons, he was not issued with notice or given a chance to defend himself. This was unprocedural as held in the case of **Rhoda Kibunja versus Alexander Forbes [2013] eKLR**. The respondent alleged memo to the claimant was never issued to him as he did not sign for it as an acknowledgement and since his dismissal on 2nd June 2011 he was denied entry into the respondent premises by the security guards.

The claimant also submitted that his termination of employment was substantively unfair contrary to section 45(2) and (4) of the Employment Act. There was no investigation undertaken to confirm that he had stolen any property of the respondent to warrant the summary dismissal.

The respondent on their part submitted that the claimant grossly misconducted himself to warrant summary dismissal as under section 44 of the Employment Act as held in **Erick Karanja Gakonyo & Another versus Samson Gathimba [2011] eKLR**. That the respondent was justified to dismiss the claimant and the claims made do not arise.

The respondent also submitted that leave due to the claimant was granted in accordance with section 28 of the Employment Act. However the records submitted by the claimant on NSSF payments show that the claimant did not work in April, June and July 2010 and in May 2011 and thus there time period of work was not on a full year. That no leave pay is due and the overtime claimed does not arise.

Determination

The respondent admitted owing the claimant his May 2011 salary. Such is awarded.

It is trite that where an employee grossly misconducts himself, commits acts suspected to be of criminal nature such as theft, such an employee is subject to summary dismissal in accordance with section 44(4) of the Employment Act. However, before such summary dismissal, an employer is procedurally required to abide with the provisions of section 41(2) of the Employment Act as a mandatory requirement. Such a provisions requires that the employee who has grossly misconducted himself or is suspected to have committed criminal acts be given a hearing so as to defend himself before the summary dismissal. Such is to allow the employee explain himself. Such a hearing does not necessary require that it be conducted like a judicial trial as held in the case of **George Musamali versus G4S Security Service [2016] eKLR**. The requirement is to have an internal process where the employee who is alleged to have misconducted

himself is called in the presence of a fellow employee of his choice so as to state his case in defence. Such is a minimum requirement.

In this case, Mr Kirpal Singh Suri the witness for the respondent testified that upon discovery of stolen good in the vehicle that the claimant was entrusted with, he was summoned to his office and since he could not explain himself properly, he was summarily dismissed. There was no evidence that there was effort to call any other employee to be present when the claimant was summoned. The ignorance of the required procedures before summary dismissal is not a good defence at all. The fact that the respondent has also taken the option not to issue the claimant with a written contract of employment spelling out his terms and conditions of employments does not place the respondent as an employer with good practices. Such an employment contract is a requirement in law under section 8, 9 and 10 of the Employment Act. Such an employment contract should be issued spelling out the details of employment and what is to happen when an employee misconducts himself. Such an employment contract is not only for the benefit of the employee, but it serves the employer well as upon it, where there is a conflict, parties can make reference to the written contract. It is also a requirement in law that the respondent should abide.

Failure to follow the set procedure make the resulting action in sanction unfair. The claimant shall be awarded compensation equivalent to one (1) month salary as kshs.15, 000.00.

The claimant for overtime is on the basis that the claimant was at work night and day. However impossible this evidence sounds, the claimant did not set out how he was able to undertake his work within such time of day and night. He simply did not explain how the number of 1474 hours in overtime arose. Such is declined.

Where the termination of employment was procedurally irregular, notice pay is due. Such is awarded at Kshs.15, 000.00 being one (1) month salary.

Leave is claimed on the grounds that the claimant did not take his annual leave. The claimant testified that she was employed on 12th February 2010 and was dismissed on 2nd June 2011. He served for only 15 months. The respondent testified that they allowed staff to go on leave but such record with regard to the claimant were never submitted to confirm leave taken or payment of taking such leave. The respondent in submitted made a case that the claimant NSSF record show that he did not work for some months and therefore the claimant did not serve for a full year. However, such evidence only works against the respondent as employment was admitted, the employment record is supposed to be kept by the respondent and where the claimant remained at work and his NSSF dues were never remitted, such is a matter for investigations by the labour Officer. For purposes of this case, for the time worked, the claimant on his oral contract had earned leave for complete year at 21 days which is compensated at Kshs.15, 000.00.

Judgement is hereby entered for the claimant against the respondent in the following terms;

- (a) Compensation awarded at Kshs.15,000.00;
- (b) May 2011 salary at 15,000.00;
- (c) Notice pay at kshs.15,000.00;
- (d) Leave due at kshs.15,000.00;
- (e) Each party shall bear their own costs

Orders accordingly.

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

M. MBARU

JUDGE

In the presence of

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