



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1083 OF 2012

CYRUS NG'ANGA NJUGUNA.....CLAIMANT

VERSUS

KAHOYA AND KAHOYA LIMITED.....RESPONDENT

JUDGEMENT

Introduction

1. The Claimant brought this Suit on 22.6.2012 seeking declaration that he was unlawfully and untimely dismissed, and payment of separation dues amounting to kshs. 111327. The Respondent has denied liability for alleged unlawful terminating the Claimant and avers that the Claimant was found drunk and sleeping on the job on the night of 9th/10th July 2011 and when he was deployed to do general duties by the Supervisor, he deserted work without any notice. She therefore contends that the damages sought should not be granted.
2. The Suit was heard on 20.4.2016 when the Claimant testified as CW1 and the Respondent called her clerk Robert Njenga Mwangi RW1.

Claimant's Case

3. CW1 testified that he was employed by the Respondent on 17.10.2007 as a night Guard earning kshs. 7106/- per month and worked up to 10.7.2011 when RW1 told him that the Manager had said that there was no more work to do and as such he should go home. That no reason was given to him for the termination and no hearing was given to him prior to termination. He denied that he was drunk and slept on the job on the night of 9th/10th July 2011 as pleaded in the defence. He contended that he worked faithfully for 4 years and at no time was he served with any warning by the employer. He prayed for terminal dues plus compensation for the unlawful termination.
4. On Cross examination CW1 admitted that he started as a General Labourer in the farm but later he was deployed to night guard duties. He admitted that he was on duty on the night of 9th/10th July 2011 guarding the proprietors home and his supervisor Mr. Mutisya Mbithi came there at 4am and chased him away and denied him the right to sign out on the attendance register. He denied that the supervisor found him drunk and asleep on the job. He further denied that the supervisor and the clerk told him that he was deployed from night guard duties to general labour at the farm.

Defence Case

5. RW1 confirmed that CW1 was employed by the Respondent starting as a General Labourer but later made a Night Guard on temporary basis during the coffee peak period. That on 10.7.2011 morning RW1 received a report from the supervisor, Mr. Mbithi that he expelled CW1 from work because he reported to work drunk and was sleeping on the job. That Mr. Mbithi (now deceased) recommended that CW1 be redeployed back to general duties because he was not Suitable to do security duties.
6. RW1 explained that CW1 was on his official off duty on 11.7.2011 but he never reported back to work from 12.7.2011 as required. RW1 believed that CW1 absconded work protesting the redeployment to general duties in the farm. He denied that CW1 was dismissed and maintained that CW1 deserted employment without notice. He denied the Claim for salary in lieu of Notice and compensation because CW1 was not reinstated. He however admitted that CW1 is entitled to service pay.
7. On Cross examination, RW1 maintained that CW1 was found drunk and sleeping by the supervisor while on his patrol duties. RW1 however admitted that he had no evidence to prove that CW1 was found drunk and asleep on the job. He further admitted that he never served any warning letter to the CW1 or a letter deploying him to the field to do general duties. He maintained that after expulsion, CW1 came to the office and proceeded to his off duty but never reported back to work on 12.7.2011. He further maintained that there was no intention of dismissing the Claimant from employment.

Analysis and Determination

8. There is no dispute that CW1 was employed by the Respondent from 17.10.2007 till 10.7.2011 when his employment ended. The issues for determination herein are:-
 - a. Whether the Claimant deserted work or he was unlawfully dismissed?
 - b. Whether the reliefs sought should be granted?

Desertion vs. Dismissal

9. There is no dispute that on the night of 9th/10th July 2011 Mr. Mbithi visited CW1 at his work station at 4am and the supervisor ordered the CW1 to go home. That the supervisor barred CW1 from signing out and proceeded to mark on the attendance register that CW1 was absent. According to CW1, the supervisor chased him away for no reason and he never told him that he was henceforth deployed to the general duties in the farm.
10. On the other hand, there is no dispute that on 10.7.2011 CW1 met RW1 at the office and discussed CW1's future in company. According to CW1, RW1 reported to him that the boss had terminated CW1's employment because there was no work to do. However, RW1 stated that, he deployed him to general duties in the farm but CW1 deserted work protesting the change of duties.
11. After careful considerations of the evidence adduced, the court finds on a balance of probability that the Claimant was never dismissed by the Respondent but had voluntarily deserted work without notice. In the opinion of this court, the Claimant is not a truthful person and had concealed material facts in his Memorandum of Claim. In his pleadings, he concealed the fact that he had met with his supervisor on the night of 9th/10th July 2011 and was ordered to go home before time. He also never pleaded that he went to the office the same morning and met RW1 where his termination was communicated. In that respect the court finds that there is a disconnect between the Claimant's pleadings and the evidence which makes his case inconsistent and unbelievable.
12. On the other hand, the Court finds the defence and the evidence by RW1 very consistent and presenting the probable cause of the events that took place on the night and morning of 9th/10th July 2011. Although RW1 was not present when CW1 was visited by the Supervisor, it is an established fact that CW1 was not dismissed by the Supervisor at that time when he alleges that he was chased

away. The reason for the foregoing observation is that CW1 stated in his testimony under oath that it is CW1 who reported to him that the Manager of the company had terminated his services due to lack of work to do. Consequently, the court believes the testimony of the RW1 that CW1 deserted work protesting his deployment from guarding duties to general duties in the farm. For that reason the testimony of CW1 that he was dismissed from the employment is rejected.

Reliefs

Declaration

13. In view of the foregoing findings, the court declines to make declaration that the termination of the Claimant was unlawful and untimely.

Notice

14. Likewise the court declines to award to the Claimant salary in lieu of notice because it is him who terminated his employment without notice to the employer.

Compensation

15. The Claim for compensation is also dismissed because it is the Claimant who deserted employment.

Service Pay

16. RW1 admitted in evidence that CW1 is entitled to service pay. There is no dispute that CW1 worked from October 2007 to July 2011 which is 4 years 9 months. Under section 35 (5) of the Employment Act, CW1 is entitled to service pay for every completed year of service. Considering that he served for almost 5 years, and the 5th year is not considered in computing the service pay, the court will use the rate of 20 days per year of service. Hence $\text{kshs. } 7106 \times 20 / 30 \times 4 = \text{kshs. } 18949$.

Disposition

17. For the reasons stated above, judgment is entered for the Claimant for the sum of kshs 18949 plus costs and interest from the date of filing the Suit.

Signed and dated at Mombasa this 26th day of May 2016.

ONESMUS MAKAU

JUDGE

Delivered at Nairobi this 10th day of June 2016.

JUDGE