



REPUBLIC OF KENYA
IN THE EMPLOYMENT LABOUR AND RELATIONS COURT
AT NAIROBI
CAUSE 1017 OF 2011

MWENDWA SANARE.....CLAIMANT

VERSUS

THAMES ELECTRICAL LIMITED.....RESPONDENT

JUDGEMENT

Introduction

1. The Claimant brought this Suit on 24.6.2011 seeking kshs. 122112 from the Respondent on ground that the Respondent had unfairly terminated his services on 25.10.2010. On 18.4.2016, the sum claimed was amended with the leave of the Court to read kshs. 316512.
2. The Respondent has denied any employment relationship with the claimant and challenges the claimant's right to sue her. In the alternative the Respondent avers that the Claimant was suspected of theft while on duty and consequently arrested and thereafter absconded duty. She therefore prayed for the Suit to be dismissed with costs.
3. The Suit was heard on 21.4.2016 when the claimant testified as CW1 but the Respondent never attended the hearing despite being served with a Hearing Notice. After the hearing the claimant filed Written Submissions.

Claimants Case

4. CW1 was employed by the Respondent as a night Guard on 6.4.1998. He worked as such until 2009 when he was deployed to be Day Time Guard working daily without any off day. His salary was kshs. 16200 per month.
5. On Sunday 24.10.2010 he was on duty and at 9.00am, his colleague guard went to collect dog's food. In the meanwhile Kenya Power and Lighting Corporation Staff came to repair the transformer at the gate. At the same time some young men of Indian origin who resided within the compound CW1 was guarding passed by and went to the side of the Godowns. Shortly thereafter the alarm at the Godown went off. In response, CW1 told the Power men not to let anyone in except the other guard who went for the dog's food, and ran to check on what was happening at the godown. On arrival he found the Godown door open and that the Indians had removed copper metal bars. The Indians asked him where he was when people went to steal the metals. In the meanwhile G4S Guards arrived in response to the alarm and upon enquiry, the Indians admitted that they were the ones who opened the godown. When the G4S Guards reported the matter to the Respondent's boss Mr. Nilesh Junior the latter called police. The boss then instructed CW1 and the others to return the metals to the Godown and CW1 continued with his work.
6. On Monday 25.10.2010, the boss told CW1 to remain in the compound but do not work because he was going to dismiss him and deny him his benefits. That at about 5pm the boss told G4S Guards to arrest CW1 and take him to Industrial Area Police which they did. That on arrival at police station, CW1 found the Manager of the Respondent. CW1 was then locked up for 4 days and was later released without any charges. CW1 reported to his Union and the Labour Officer but the Respondent refused to settle the matter amicably prompting him to bring this Suit. He prayed for salary for October 2010, one month salary in lieu of notice, leave for 2010 which was due in November 2010, service pay and compensation totaling to kshs. 316520.

Analysis and Determination

7. The issues for determination arising from the pleadings, evidence and submissions are:
 - a. Whether the Claimant was employed by the Respondent.

b. Whether the employment contract was unfairly terminated by the Respondent?

c. . Whether reliefs sought should issue.

Employment Relationship

8. The evidence by CW1 that he was employed by the Respondent has not been rebutted by the Respondent because she called no witnesses to testify. In addition the witness statements filed by the Respondent confirmed that the Claimant was employed by the Respondent as a guard. Likewise, the Court has noted the letter by the Respondent to the Labour Officer dated 1.11.2010, filed among the Respondent's documents confirming that the Claimant was her employee. The said letter stated as follows:-

“This is to inform your office that the above mentioned Mr. Sanare Ole Mwenda of ID No. [particulars withheld] was in our employment and was picked up as one of the suspects for a theft in our office Godown on 24th October 2010 when he was serving as a day time Guard.”

Consequently the answer to the first question is in the affirmative.

Unfair Termination

9. The Claimant stated that on 25.10.2010 he was going to be dismissed without any benefits. He was then told to remain at his work station but do not work which he complied. That at about 5 pm he was arrested and escorted to the police station where at he was locked up for 4 days and then released without any charges. Thereafter he reported the matter to his Union and the Labour office but the Respondent refused to settle the matter amicably. CW1 contends that he was unfairly dismissed.

10. Termination of employment is unfair if the employer fails to prove that it was founded on valid and fair reason and that the termination was done after following a fair procedure. In this case, the reason for dismissal was theft of the employer's property from a Godown. However, the evidence by CW1 that he did not commit the offence was not rebutted. That on 25.10.2010 the CW1 was arrested and locked up for 4 days but he was released after the Respondent failed to avail witnesses to record statements in support of the alleged theft. That even in this case the respondent never called any witnesses to prove that in deed the claimant stole metals from the Respondent's Godown. Consequently, the Court believes the uncontested evidence by the CW1 that the Godown was opened by young Indians who also removed metal bars but then the alarm went off and prompted his response and that of G4S Guards. For that reason the Court finds that the Respondent has failed to prove that there existed a valid and fair reason to warrant the dismissal of the Claimant.

11. In addition, the Claimant's evidence that he was dismissed verbally and threatened with loss of all his service benefits was not rebutted. According to him after dismissal he was directed to remain in the office but do no work until 5pm when he was escorted to the police station and locked up for 4 days. The foregoing was not the procedure provided by the law to terminate the employment of an employee. Under section 41 of the Employment Act, an employee must be given a personal hearing in the presence of a fellow employee or Shop Floor Union Representative of his choice, both of whom must be allowed to air their view to the charges preferred against the employee for consideration before the decision to terminate is reached. In this case the Claimant was never given a personal hearing in the presence of his chosen companion before the dismissal. Consequently, the lack of a valid and fair reason for dismissal and the failure to follow fair procedure rendered the termination of the claimant's services unfair.

Reliefs

12. In view of the foregoing, the Claimant is awarded kshs. 16200 being one month salary as prayed. He is also awarded kshs. 13500 as his salary for the 25 days worked in October 2010. The Claim for 21 leave days earned in 2010 is allowed. No evidence was adduced in the form of leave records to disapprove the Claim for leave. Hence $21/30 \times \text{kshs. } 18200 = \text{kshs. } 11340$. The Claim for kshs. 89712.20 was not pleaded and it is dismissed. Finally, the claim for compensation for unfair termination is allowed. The Court awards the maximum compensation of 12 months gross salary being kshs. 194400 because the claimant had served for a long time from 1998 to 2010. Additionally, the claimant did not contribute to the termination through misconduct.

Disposition

13. For the reasons stated above, judgment is entered for the sum of kshs. 235434 plus costs and interest.

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

ONESMUS MAKAU

JUDGE

Delivered at Nairobi this 10th day of June, 2016.

JUDGE