



REPUBLIC OF KENYA
IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT NAIROBI

CAUSE 1963 OF 2013

PETER NJUKI MAINA.....CLAIMANT

VERSUS

PCTL AUTOMATION LIMITED.....RESPONDENT

JUDGEMENT

Introduction

1. The Claimant brought this Suit on 6.12.2013 seeking terminal dues plus compensation for his wrongful dismissal by the Respondent on 11.9.2013. According to the Claimant the dismissal was wrongful and unlawful because he was not given a prior Notice, or told any reason for the dismissal and he was not paid his terminal dues.

2. The Respondent has denied liability for the wrongful dismissal as alleged by the Claimant and avers that she lawfully dismissed the Claimant for gross misconduct. She further avers that she suspected that the Claimant had stolen several busbar (copper) pieces from her and absconded work to avoid arrest for the crime. She therefore denies the Claim for compensation but contends that the Claimant is entitled to salary for 11 days worked in October 2013, one month salary in lieu of notice, service pay and 16.67 leave days.

3. The Suit came for hearing on 22.4.2016 when the parties agreed to dispose the Suit by way of Written Submissions.

Claimants Case

4. The Claimant was employed by the Respondent in October 2011 as a General Worker earning Kshs. 19200 per month. That he worked well until 11.9.2013 when he was wrongfully and unlawfully terminated without any prior notice, not being informed the reason for the dismissal and without being paid his separation dues. That the termination was done without following a fair procedure. He contends that he was never served with any warning before the dismissal. He prayed for 12 months gross pay for the wrongful dismissal being Kshs. 230400. He further prays for one month salary in lieu of notice (Kshs.19200), 42 leave days (Kshs. 26880), 2 years' service pay (Kshs. 19200), leave allowance for 2 years (Kshs.69120) and salary for 11 days worked in September 2013 (Kshs.8118).

Defence Case

5. The Respondent admits that she employed the Claimant from 7.10.2011 to 11.9.2013 for a salary of

Kshs. 20600 per month. That on 11.9.2013, the Claimant was caught by the security guards with several busbar (copper) pieces stolen from the Respondent. That the discovery was made by the security guard while frisking the workers on their way home after work. According to the witness statements filed by the defence, the Claimant ran back to the toilet and hid the copper in a locker. The copper was however recovered by the guards but the Claimant denied the offence of stealing and demanded for his terminal dues. He however left quickly and never returned to work in fear of arrest for the offence. Later he served a demanded letter Claiming damages for unlawful dismissal.

6. The Respondent contends the Claimant was caught red handed by security guards with property stolen from her and thereafter he absconded duty from 11.9.2013. That the offence of stealing is a criminal offence under section 281 of the Penal code. That such an offence also constitutes gross misconduct under section 44 (4) (g) of the employment Act (EA). That under section 44(1) of the EA, she was entitled to summarily dismiss the Claimant for theft of her property and for absenting himself without leave or lawful cause. That the Claimant knew the reason for his dismissal and such the termination was not wrongful.

7. The Respondent denied the Claimant for compensation for wrongful dismissal and maintained that the Claimant was only entitled to kshs. 7553 being salary for 11 days, worked in October, Kshs. 20600 salary in lieu of notice, Kshs. 19874 service pay, kshs. 13208 for 16.67 leave days less kshs. 12243 PAYE, Kshs. 320 NHIF and Kshs. 200 NSSF leaving a net pay of Kshs 48472.

Analysis and Determination

8. There is no dispute that the Claimant was employed by the Respondent until 11.9.2013 when he was dismissed summarily. The issues for determination are:-

- a. Whether there was a valid and fair reason for the dismissal?
- b. Whether a fair procedure was followed before the dismissal?
- c. Whether the dismissal was wrongful and unfair?
- d. Whether the remedies sought should be granted?

Valid and Fair Reason

9. There is overwhelming evidence from the defence that the Claimant was caught while carrying away pieces of Busbar (copper) from the Respondent's premises. The pieces of copper belonged to the employer and the Claimant had no authority to carry them away. Although the Claimant filed a Reply to the defence denying the alleged theft of copper and absconding work, no witness statements or any other form of evidence was adduced by him to contest the 3 witnesses' statements filed by the defence.

10. In view of the foregoing observation, the Court finds on a balance of probability that there existed a valid and fair reason to warrant the summary dismissal of the Claimant. The Claimant had stolen pieces of copper from his employer and he was to take them away were it not for inspection by the security guards at the gate. As rightly submitted by the defence, the offence of theft by the Claimant amounted to gross misconduct under section 44(4)(g) and the Respondent was entitled to summarily dismiss the Claimant as he did. That as a result of the said dismissal, the Claimant demanded his terminal dues in vain and left. On a balance of probability therefore, the Court find that the Claimant never absconded work from 11.9.2013 but was dismissed on that day as pleaded.

Fair Procedure

11. The Claimant contends that the dismissal was wrongful because he was not served with any prior notice or informed the reason of dismissal or accorded a fair procedure. That he was not given any prior warning and after dismissal he was not paid his terminal dues. The Respondent has not proved that she followed a fair procedure before dismissing him. All what she said is that the Claimant was caught with pieces of copper and ran to hide them in a toilet locker and denied the offence of theft.

12. Under section 45(2) of the EA, termination of Employment contract of an employee is unfair if the employer fails to prove that a fair procedure was followed before the termination. The fair procedure is enacted under section 41 of the EA that bars an employer from terminating the services of his employee for misconduct under section 44(3) and (4) of the EA before first explaining the reason for which the dismissal is intended, in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice both of which must air their views for consideration before the dismissal.

13. The said provision of section 41 of the EA is coined in mandatory terms which leaves no options for the employer to dismiss an employee without a hearing in the event an employee is caught red handed stealing. For the foregoing reason, the Court finds that the procedure followed before dismissing the Claimant was unfair because no fair hearing within the meaning of section 41 of the EA was accorded to the Claimant before his dismissal. Even if he fled in fear of an arrest, which is not true because he was heard demanding for his dues after dismissal, the Respondent never invited him to any hearing before dismissing him as requested by the law.

Unfair and Wrongful Dismissal

14. In view of the foregoing finding that the dismissal of the Claimant was done without following the mandatory fair procedure prescribed under section 41 of the EA, the dismissal was rendered unfair and wrongful within the meaning of section 45 of the Act.

Remedies

15. There is no dispute that the Claimant is entitled to one month's salary in lieu of notice. There is also no dispute that his salary per month was kshs. 20600. He however prayed for Kshs. 19600 and he is awarded the same.

Leave Outstanding

16. The Claimant prayed for 2 years leave being 42 days calculated at Kshs. 26880. The Respondent, however, submitted that the Claimant served for only 23 months and 4 days and calculated his leave days outstanding at 16.67 days. No leave records were produced except a computer printout showing the leave days earned and spend between 2011 and 2013. The said evidence has however not been contested by the Claimant in evidence or submissions. The Court will therefore award the amount submitted for by the defence being Kshs. 13208 for the 16.67 leave days outstanding.

Severance Pay

17. The prayer for severance pay is not sustainable in this Case because the said remedy is only available when termination is through redundancy, as opposed to this Case where the termination was by summary dismissal. Graciously, however, the Respondent has persistently through a letter, defence and submissions maintained that the Claimant is entitled to service pay of Kshs. 19874. The Court will allow such gratuitous pay despite the fact the section 35(6) of the EA disqualifies employees who are contributors to NSSF like the Claimant, from Claiming service pay. The pay slips produced by the client clearly indicates that the Claimant was deducted kshs. 200 towards NSSF contribution although no evidence of the remittance of the same to the fund was adduced.

Leave Allowance

18. The particulars of the leave allowance sought were not pleaded and no evidence was adduced to support the Claim. Consequently, the said relief is declined.

Salary for October 2013

19. There is no dispute that the Claimant is entitled to salary for the 11 days worked in October. The

Claimant prays for Kshs. 8118 while the Respondent has pleaded and submitted for Kshs. 7553. Using a salary of kshs. 20600, the salary for 11 days (kshs 20600 x 11/30) is kshs. 7553.35 and is so awarded.

Compensation

20. in consideration of the fact that the Claimant had served the Respondent for less than 2 years and that he contributed to his dismissal through gross misconduct, the Court awards him only kshs. 41,200 being 2 months' salary as compensation for the unfair and wrongful dismissal.

Disposition

21. For the reasons stated above, judgment is entered for the Claimant in the sum of kshs. 101435.35 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.