



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1490 OF 2013

STEPHEN MUSYOKA KATIKUCLAIMANT

VERSUS

ORBIT ENTERPRISES LIMITED.....RESPONDENT

JUDGEMENT

The issue in dispute is the wrongful dismissal of employment.

Claim

The claimant was employed by the respondent in 2006 to June 2013 as a Carpenter. He got registered with the NSSF and NHIF and his statutory deductions were made and remitted thereto. On 15th June 2013, the respondent's manager, Pevin verbally dismissed the claimant without notice or due cause. At the time of dismissal the claimant was earning Kshs.12, 000.00 per month.

The claimant is seeking that the dismissal be vacated; and alternatively he be compensated at Kshs.144,000.00; notice pay; and payment for the unexpired term of his contract to 60 years retirement age and costs of the suit.

The claimant also testified in court that upon employment by the respondent he worked diligently until 15th May 2013 when he was terminated. While at work he would log in using a card to access the workshop. While inside the workshop, his supervisor told him to pick his tools as he was required to go for work outside for a client. His supervisor was Harish at the wood workshop. They left together from the office at Arthi River and did doors fitting until 4pm. When he went back to the office, he found his long in card at the workshop and was not signed which meant he had not worked on this day. The next day the 16th May 2013 he asked to know what had caused his card not to be signed. Macharia told him that he had not been at work the previous day but the claimant had a good explanation to his whereabouts. When Harish was called, they could not resolve the matter and the claimant was directed to the head office.

The claimant was then forced to write a letter so that he could be paid his dues. That the claimant's intention was not to resign but have his dues paid. His advance was already due on 15th May 2013 and he required such advance to support himself. On 26th June 2013, the claimant met the respondent manager who insisted that he never was at work on 15th May 2013 but this was not correct as all clients being served by the respondent employee were with the full knowledge of the respondent.

The claimant was unionised but did not report to the union on his tribulations as he wanted the matter resolved so as to get his job back. He was never issued with reasons for termination save that the

respondent insisted that he was not at work on 1st May 2013 which was not correct.

The claimant admitted that on 21st May 2013 he wrote a letter and submitted it at the head office. The claimant was demanding for his service pay due to miscommunication with his boss. He never resigned but was forced out of work by the respondent.

Defence

The defence is that on 1st March 2010 the claimant was employed as a Labourer at a monthly consolidated wage of Kshs.10,430.00 which was increased to Kshs.10,595.00 per months and a house allowance of Kshs.3,400.00 per month. On 17th May 2013 the claimant was asked to explain why he left work on 15th May 2013 without informing his supervisor or management. The claimant was asked to explain on 18th May 2013 which he refused to do or even attend work. On 21st May 2013 the claimant resigned and demanded his service pay.

On 13th June 2013 the respondent wrote to the claimant's union, Kenya Quarry & Mines Workers Union regarding the claimant's case. The union was aware that the parties had held a meeting on the resignation of the claimant. The union also wrote to the claimant's advocate that he had resigned and not dismissed as alleged.

The claimant had a work history of misconduct. On 30th September 2011 the claimant was given a warning for absenteeism on several occasions. The claimant resigned from his employment and before that the claimant had been directed to respondent to his misconduct which he refused thus in breach of his employment contract. The option to resign was voluntary. The claims should therefore be dismissed.

In evidence the respondent called Samuel Kuria Mburu, a clerk. That on 15th May 2013 he was at work and the claimant alleged that he was allocated work elsewhere by an officer of the respondent but this was not true. On 21st May 2013 the claimant submitted his letter demanding payment of his dues. The claimant was never dismissed he resigned on his own volition. He was paid his dues.

Submissions

In submissions, the claimant case is that the employment of the claimant with the respondent is not in dispute. However, the letter dated 21st May 2013 is not a resignation letter as alleged. The claimant had no reason to resign and the letter does not address termination of employment save that the claimant was requesting for his pay. The respondent's conduct was that they wanted to lay off the claimant as he was only informed of his termination verbally. There was pressure on the claimant to resign as held in **Paul Chitechi Mwaro versus Sasini Limited and Another, Cause No.364 of 2013 (Nakuru)**.

The claimant was never given a hearing before his termination. There were no written reasons for termination or a chance to be heard and the eventual dismissal was unlawful. The process leading to termination is critical for the court consideration as held in **Pelecium Olum versus EPZ Authority [2014] eKLR**. The allegation that the claimant absconded duty on 15th May 2013 has no report by the respondent. The respondent did not call the immediate supervisor to testify as this was the person who assigned the claimant duties. The claimant ought to have been given notice of any allegations of misconduct to enable him to respond and he heard on his defence as held in **Fredrick Saindi Amolo versus Principal, Namanga Mixed Secondary School & Others [2014] eKLR**.

The respondent submits that the claimant was never dismissed as he opted to resign on 21st May 2013 after being directed to respond on his absence from work on 15th May 2013. The claimant can therefore not seek terminal dues set out of the grounds of dismissal as these do not arise in a resignation. That even where the claimant did not resign, when he was directed to give an explanation on his whereabouts on 15th May 2013 he should have obliged as required by his employment with the respondent. To thus

remain adamant and refuse to give such reasons of absence from work was in breach of his employment contract that warranted a dismissal but he opted to resign.

The claims made are not due in this case and the suit should be dismissed.

Determination

The claimant's testimony is that on 15th May 2013 he reported to work and the process upon reporting is to log his card and while at the workshop, his supervisor told him to pick his tools as he was required to go and work elsewhere. That he left with Harish and he carried his tool box. He worked until 4pm and when he went back to his workplace, he found his card had not been signed. The next day he asked to know why his card was not signed but was told to explain where he was the previous day.

Absence from work is one ground set out under section 44(4) of the Employment Act as constituting good reason for summary dismissal. An employee who wilfully fails to attend work is also in gross misconduct and in breach of his employment Contract pursuant to the provisions of section 44(3) of the Employment Act. Therefore when an employee is required to explain himself with regard to an allegation of being absent from work without approval and authorisation by the employer, such should be taken seriously.

The claimant testified that;

... my card was signed by Harish. The officer Hajit was to first sign then Harish was to sign. On 15th May the card is cancelled.

Where indeed the claimant was supervised by Harish and was allocated work by the supervisor, from the claimant's evidence it is apparent that his job card, once lodged in was to be signed by two officers. Such was to confirm work attendance. In the claimant's case and based on his evidence, Harish and Hajit were to sign his job card. The claimant confirmed that only Harish signed. Who then had the duty to ensure that upon reporting to work such attendance was procedurally approved?

The claimant by his own words was at all material times aware that his card should and ought to have been signed by Hajit. Work attendance is the duty of an employee. The employer should only facilitate the provision of work and for the performance of the same by the employee. Therefore when an employee is allocated work but fails to attend due to non-attendance of duty as directed, such attendance being confirmed by the logging of the job card, where such job card is not signed as required, I take then the employee is absent from work. It cannot be visited upon the employer that the failure to ensure the job card is signed is upon the employer. This is the duty of the employee at all material times as where an employee is present at work, such can only be confirmed from the job card logging and approval.

Mention and evidence was gone into the letter submitted by the claimant and dated 21st May 2013. This letter was produced by the respondent and not the claimant.

I take it then the claimant before writing this letter had knowledge of letter dated 17th May 2013 where he was required to give an explanation to his whereabouts on 15th May 2013 and the notice therein that;

Mr Katiku,

You have to explain in writing what is happened with you. Without informing the in charge and [you] left job early.

Further, on 18th May 2013 the respondent wrote to the claimant;

... and today 18/5/13 you were not at on duty if you do not send your explanation written [written] to the h/office you will be summary dismissal from the job.

The claimant explained that indeed he was not allowed at work before the issue of his whereabouts on 15th May 2013 was resolved. What he confirmed doing was letter dated 21st May 2013 setting out as follows;

I Stephen Musyoka on this day, I request to pay me my service. This is because of miscommunication between my in-charge at work. So can you do this without delay as we agreed with you at this date 21/5/2013.

The claimant was required to give an explanation on his whereabouts on 15th May 2013 and further on 18th May 2013 and his response was to demand for his service. As set out above, the offence of absence from duty without authorisation by the employer warrant summary dismissal. Instead of the claimant giving his explanation, he demanded for his service. Service pay is no similar to an advance pay, such speak to terminal dues.

In any event the claimant was unionised and had the option to inform his union that indeed he required responding to his absence from duty but he took the option of not following such route. The respondent also, once the claimant refused to give a due explanation as to his whereabouts and they received the letter dated 21st May 2013, the same not directly taking into a resignation, the claimant should have been called to either explain himself and or the issue of his absence from duty on 15th May addressed procedurally. To leave things as they, ambiguous and hazy and take the same to be a resignation I find not appropriate. In any event the supposed resignation is not accepted by the respondent! such are the hazy and ambiguity circumstances of the same.

The duty is upon an employer to explain to an employee all process and procedures required at work in a language such an employee can understand. Such is set out under section 41 of the Employment Act. To seat back and take it that the employee has resigned and thus fail to play its part, the respondent encouraged the filing of this suit.

Remedies

The claimant is seeking a reinstatement. Such should only be in exceptional cases and this does not stand out as one such case. In any event the claimant's work history is poor. Section 45(5) of the Employment Act requires the court to put into account such circumstances and past disciplinary history of an employee and such being submitted by the respondent does not give the claimant a good standing. There shall be no reinstatement and similarly, for failing to give explanations as to his whereabouts on 15th May 2013 in writing as directed, such being a serious offence under section 44(4) of the Employment Act to pay a compensation would be to reward gross misconduct.

The respondent witness testified that the claimant was paid his terminal dues. Such paid dues were not set out. In the circumstances, noting there is no acceptance of the alleged resignation by the claimant, notice pay is due from the respondent. Such should be paid at the rate of one (1) month salary and in accordance with section 35 of the Employment Act as against what is set out under clause 4 of the employment contract which set a notice period below the legal minimum.

With the notice pay, and noting clause 4 of the employment contract between the parties, the claim for future and unexpired term contract to 60 years lacks merit. Such is declined.

In conclusion, judgement is entered for the claimant for the payment of Kshs.13,995.00 being basic pay inclusive of house allowance due.

Delivered in open court at Nairobi this 3rd November, 2016.

M. MBARU

JUDGE

In the presence of:

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