



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2017 OF 2012

ISAAC OCHIENG ODUL.....CLAIMANT

VERSUS

PAN AFRICA EXPRESS TRANSPORT LTD.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent vide a Memorandum of Claim filed on 5th October 2012. The Claimant averred that he was employed from March to May 2012 and from 1st June to 29th June 2012 when his services were terminated. He averred that he earned a salary of 21,500/- per month as at the time of terminating his employment. He claimed payment in lieu of notice Kshs. 21,500/-, June 2012 salary Kshs. 20,784.30, 5¼ days accrued leave Kshs. 3,762.60. The Claimant also sought costs of the suit and interest.
2. The Respondent filed a Reply to Statement of Claim on 7th December 2012. In the Reply the Respondent averred that the Claimant was employed from March 2012 till 29th June 2012. The Respondent averred that the Claimant's services were summarily dismissed due to grave misconduct, dishonesty, theft and corrupt dealings contrary to his contract of service. The Respondent averred that the Claimant's contract of service was done procedurally and within the contract and the law. It was averred that the Claimant was given an opportunity to defend himself and failed to account for his presence during the theft as captured by CCTV footage. The Respondent averred all the dues Claimant was owed to were fully paid. The Respondent thus sought the dismissal of the Claim with costs.
3. The Claimant was heard on 13th October 2014. He testified that he was presently an administrator at Wild Agroforestry Centre. He stated that he was employed by the Respondent from January 2012 to June 2012 as a courier. He testified that he had joined on trial basis from February 2012 before the contract of 1st March 2012. The contract was for 3 months. He testified that he received an employment contract from 1st June 2012 and that he was entitled to 21 days leave as well as gratuity. He testified that he was accused of having stolen goods belonging to a client. He stated that he was called from the field and attended a meeting in the Boardroom where he found police officers and the Managing Director. He was accused of stealing together with his colleague. He testified that he was taken by the CID officers from Embakasi to his residence and they ransacked his house and arrested him. He testified that there was nothing recovered from his residence. It was alleged they had stolen software. He denied being called before a panel for hearing contrary to the guidelines to employment of the Respondent. He testified that there was no formal allegation. He wrote email to Human Resources and there was no reply. He sought legal redress and in reply

- to his lawyers letter the employer confirmed termination of employment. He testified that the goods were cleared from the airport and delivered to the client's spouse who signed for the delivery. He testified that he learnt of the theft when he was arrested.
4. In cross examination he testified that when he was arrested on 29th June he had only worked for 29 days on the new contract. He stated he was on probation and that the contract provides for 30 days notice except for summary dismissal. He testified that he had not earned any leave as of the date of the arrest. He used to pick good – parcels, documents including cash handling. He testified that he delivered the goods and denied that the goods disappeared in his custody. He stated that he and his colleague delivered the goods and the client accepted them without coercion. He stated that he was accused of theft and that he understood summary dismissal did not allow for notice.
 5. In re-examination he testified that he did not get accusation from client and the goods delivered note was returned to the Respondent's operations manager. He stated that he was not told his employment had been terminated.
 6. The Respondent called Joy Mildred Mboya an administrator with the Respondent. She testified that she went through the records and was familiar with the case. She stated that she had not met the Claimant in person. She testified that there was CCTV footage that showed the Claimant had tried to remove the goods from the warehouse. She stated the footage was in the custody of the police. She testified the goods did not reach the client and the Respondent had to pay penalties. She testified that the courier team handles many shipments and it could be that the goods he talks of delivering were not the ones he was accuse of. She testified that the Respondent submitted footage and the case is with the police. She testified that 6 months was the probation period as per Clause 3 of the contract. She testified he was on probation. She stated he was not entitled to leave as he had not earned it.
 7. In cross-examination she testified that she had not met the Claimant and had been told and had seen records at the office. She testified that she had gone to the police about 3 months ago and the police had said they were still handling the issue and should not be pushed. They are still investigating. She said that the goods did not reach the client. She testified that she did not have evidence the goods were taken by the Claimant and she did not have the evidence of complaint by the Claimant. She stated the letter speaking of the termination was not addressed to the Claimant but to his advocate. She stated that she would pay the 29 days and then the Claimant pays what the company paid which is over and above the sums he is claiming. She testified that the Claimant absconded duty. She stated that the Claimant was called and she testified that she would call and follow up with an email or letter. She testified she had not seen any email.
 8. In re-examination she testified that there was a report to police and she had no control over the police.
 9. The parties proposed to exchange submissions and the Claimant filed written submissions on 13th November 2014. He submitted that he was told not to report to work and despite the fact that he had communicated vide email on 6th July 2012 enquiring about his status he never received a response. He submitted that he only got official communication of termination of employment from letter sent by the Respondent to his lawyer. He submitted that the dismissal was summary and uncalled for and without notice. It was submitted that the allegations of theft were unsupported.
 10. The Respondent submitted that the Claimant's contract was terminated during probation and that the provisions of Section 41(1) and 42(1) of the Employment Act applied. The Respondent relied on the case of **Danish Jalang'o & Another v Amicabre Travel Services Ltd Cause [2014] eKLR** for the proposition that employers did not need to prove any substantive grounds on misconduct for probationary contracts. It was submitted that the Claimant was not entitled to any of the remedies sought.

11. In the claim before me a probationary contract was terminated. The Respondent cited the decision of Rika J. in **Jalang'o v Amicabre Travel Services** for the proposition that procedural fairness does not apply in the case of employees on probation. I do not agree. In the case of **Mercy Njoki Karingithi v Emerald Hotels and Resorts Limited [2014] eKLR** where Radido J. held that protections against unfair and unlawful dismissal under Section 43 and 45 of the Employment Act are available in full to employees on probation. This view I hold is affirmed by the decision in **Samuel g. Momanyi v The Attorney General & Another [2012] eKLR** where Lenaola J. while declaring Section 45(3) unconstitutional held that in denying employees who had been in employment for less than 13 months legal redress that “there is obvious discrimination and the Applicant and those in his situation have been denied equal protection and equal benefit of the Law and they have also been denied *the full and equal employment of all rights and fundamental freedoms* to the extent expected by the Constitution. They have also been *denied access to justice.*”
12. As I held in a Ruling in the case of **Onesmus Musyoki Kilonzo v Nation Media Group Cause 2355 of 2012** (unreported) “why should perceived infringement of employment rights that accrue to the employee only be valid if the employee has been in employ for 13 or more months? Would that mean that if contracts were all reduced to 1 year or less there would be no redress in the law for any infringement of employee rights or conversely employer rights? I think that cannot be a proper proposition of law.” I equally am of the firm view that procedural fairness cannot be tossed out of the window merely because an employee is on probation. The least the employer can do is inform the employee that the contract is being terminated and not wait for his lawyer to write a letter in order for the employee to be informed that the matter as far as they are concerned, was closed and shelved.
13. The Claimant has proved his case on a balance of probabilities. It matters not that there was an allegation of theft. The termination should accord with the provisions of the law. He should have been informed that his contract was at an end. For that failure I hold that notice is payable. He was not paid his salary for the days worked in June 2012. In the premises he will be entitled to recover the sums due for the days worked. He had not earned any leave and therefore his claim on leave fails. He claimed the certificate of service and as far as the law is concerned this is a requirement. See Section 50 of the Employment Act. He is thus entitled to a certificate of service issued strictly in terms of the provisions of the law.
14. In the final analysis I enter judgment for the Claimant against the Respondent for:-
- a. Notice pay - Kshs. 21,500/-
 - b. Days worked in June 2012 – Kshs. 20,784.30
 - c. Costs of the suit

Orders accordingly.

Dated and delivered at Nairobi this 22nd day of January 2015

Nzioki wa Makau

Judge