



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 393 OF 2014

THOMAS KHAMISI NZAI.....CLAIMANT

VERSUS

MOTA SERVICE STATION.....RESPONDENT

JUDGMENT

INTRODUCTION

1. This is a Claim for Kshs.914175 being employment benefits plus compensation for unfair termination of the claimant's employment by the Respondent on 25.2.2014. It is the Claimant's case that he was dismissed on invalid reason and without following a fair procedure.
2. The respondent however denies liability and avers that the claimant was dismissed for gross misconduct and after giving him a chance to defend himself. In addition the respondent avers that she paid the Claimant all his dues and wrote to him a Certificate of service.
3. The then Suit was heard on 9.12.2014 and 25.2.2015 when the claimant testified as CW1 while the defence called Mr. Fahmy Abdalla, Raphael Olala and Daniel Katana Kenga as RW1, RW2 and RW3 respectively. Thereafter both parties filed written submissions.

CLAIMANT'S CASE

4. CW1 was employed by the respondent in February 2009 as cashier. The contract was verbal. In February 2010 he became permanent employee and his pay was now paid using payslip. He worked continuously until 25.2.2014 when he was unfairly dismissed. On the said day CW1 reported back from his annual leave and demanded for his 2010 leave which was still outstanding. The RW1 however told him that he was already dismissed and handed him a summary dismissal letter dated 25.2.2014. RW1 even told CW1 that copies of the letter had been served on his Union and Labour Officer. CW1 contends that the dismissal was unfair because he was not given hearing. He also denied causing any sales shorts and or issuing any fraudulent receipts or denying customer an ETR receipts for Battery Water.
5. CW1, went to the Union's office and met RW2 who denied receipt of the dismissal letter and called RW1 by phone who brought the letters to RW2 in the Union's office. RW2 then told CW1 to pay CW1 one month salary in lieu of notice plus accrued leave of 21 days. RW1 complied by paying CW1 a total of Kshs. 25500. CW1 however prays for his leave earned for 2010, overtime of 10 hours from day worked between 2009 and 2014, 12 months salary being compensation for unfair termination.

6. On cross examination by the defence counsel, CW1 maintained that he was employed as a cashier but whenever necessary, he sold fuel. He admitted that he never agreed with the respondent that he would work for 8 hours per day or go for annual leave of 26days. He further admitted that his agreed salary was Kshs. 12750 per month. He denied ever being served with any warning letter before his dismissal and further denied ever meeting RW1 at RW2's office before the dismissal. He however maintained that he met RW1 and RW2 after his dismissal. He confirmed that he used to work every day either day or night shifts which alternated weekly. He contended that RW1 ordered him to issue a receipt for Kshs. 2000 when a customer had bought Kshs.500 fuel. He denied that there was any short in fuel sales.

DEFENCE CASE

7. RW1 is the Manager of the Respondent. He confirmed that CW1 was his employee but contended that his contract started in October 2010 and his job title was Pump Attendant. RW1 confirmed that he found CW1 still working at the respondent when he joined. He confirmed further that CW1 Was permanently employed and his salary was Kshs.12750 per month. According to him, CW1 was a good employee and whenever any issue arose, they resolved it with the union. RW1 cited example of CW1's misconduct as shorts in daily sales and falsification of ETR receipts which was discussed by the Union and the RW1 and resolved by a warning letter to the CW1. Thereafter however RW1 received letters from other pump attendants complaining that shorts on sales were still continuing. RW1 reported the matter to the Union and CW1 was called for discussion whereby he said he wished to leave the employment. RW1 then paid him his dues after his request by CW1.
8. RW1 denied that CW1 had any leave outstanding. He stated that CW1 went for leave in December 2013 and returned in February 2014. He further denied the claim for overtime. He denied that there was 24 hour operation and maintained that the last shift ended at 10 pm. He denied the claim for certificate of service and stated that the certificate of service was given to RW2. Lastly he denied the claim for compensation by contending that the termination was fair because there was valid reason, namely complaint from CW1's colleagues and that CW1 was heard by RW2 before dismissal.
9. On Cross examination by the claimant's counsel, RW1 maintained that after receiving the complaint letter by other pump attendants refusing to work with CW1, he forwarded the letters to the union. He admitted that by the time CW1 returned from leave, he had already written the dismissal letter and waited for him to report back. RW1 further explained that when he served the letter to CW1, he refused to receive and he forwarded it to his Union. He contained that later in the day, they held a meeting at the Union's office and CW1 received the dismissal letter.
10. RW1 admitted that he did not have any Audited report to prove the alleged shorts on sales caused by the CW1. He also admitted that he did not have the alleged falsified receipts made by the CW1. He admitted that after the end of night shift at 10pm, the pump attendants voluntarily remains in the station until morning for their own security.
11. RW 2 is the branch security for Kenya Petroleum Oil workers Union Mombasa branch. He confirmed the CW1 was a member of the Union at the time of his dismissal. He stated that CW1 was employed as a pump attendant. He confirmed that the Union has no recognition agreement with the respondent. He explained that RW1 reported a complaint against CW1 on 24.2.2014 and he called CW1 from leave to meet with RW1 at the Union's office. After listening to the RW1's argument, CW1 said he wished to resign and demanded for his dues. RW1 promised to make a decision on the request by CW1 and the meeting ended.
12. On 25.2.2014, CW1 went back to the Union office and reported that RW1 had dismissed him. RW2 then called RW1 who brought the dismissal letter and paid CW1 his terminal dues as advised by RW2 being one month in lieu of notice plus the salary due less arrears of union dues. RW2 denied that CW1 had leave days outstanding or any overtime worked.
13. On cross examination by the claimant's counsel, RW2 maintained that there was disciplinary hearing accorded to CW1 at the Unions office. RW1 contended that he took the minutes for the hearing but did not have them in court. He explained that the changes against CW1 were shorts

on sales and falsification of receipts. He confirmed that by then CW1 was on leave but he did not know when the leave started and when it was ending. He admitted that workers can differ at the work place. He admitted that the particulars of the shorts on sales were not availed to him. He admitted that he was not representing CW1 during the hearing on 24.2.2014 and contended that he was an impartial observer and only let nature to take its course. RW2 admitted that the issue of overtime arose in 2009 but it was resolved by the respondent agreeing to stop operating 24 hours and instead the last shift to end at 10pm. RW2 however did not know whether the workers were provided with transport to go home after 10pm or whether they continued with work till morning.

14. RW3 was CW1's co-workers at the respondent and confirmed that CW1 worked for about 5 years. He also confirmed that CW1 was good employee. He confirmed that he wrote the letter dated 7.2.2014 to his boss complaining about shorts on sales and requesting for investigations and change in shifts.

15. On cross examination by the Claimant's counsel, RW3 confirmed that there are 2 shifts running from 8.00am to 3pm and then from 3pm to 10pm when the station is closed down and then re-opens from 6.00am till 8.00am when the first shift takes over.

ANALYSIS AND DETERMINATION

16. There is no dispute from the pleadings, evidence or submissions that CW1 was employed by the respondent. There is also no dispute that CW1 was dismissed from employment by the respondent on 25.2.2014. The issues for determination are whether the dismissal was unfair and whether the reliefs sought should be granted.

UNFAIR TERMINATION

17. Under section 45 of the Employment Act, termination is unfair unless the employer proves that it was founded on valid and fair reasons and that it was reached after following fair procedure. A valid reason is one which is true and one which existed at the time the dismissal was done. The burden of proofing the reason for dismissal is upon the employer under section 43 and 45 of the Act. In this case the reason for dismissal was not proved. RW1 who made the decision to dismiss acted on complaints from pump attendants that they did not wish to be in the same shift with CW1 because he was misconducting himself and causing shorts on sales. The complaints were received when CW1 was away on leave. RW1 never did any audit on the sales and never interviewed either the complaining pump attendants or customers. The decision was therefore made without any valid and fair reason. Even in this case, RW1 never produced any audited report on the sales or any receipts falsified by the CW1. RW1 and RW3 confirmed in their evidence that CW1 was a good employee. Consequently the court finds that the respondent has not discharged his burden of proving a valid and fair reason for dismissing the claimant as provided for under section 43 and 45 of the Act.

18. As regards fair procedure, the standard is provided for under section 41 of the Act. The said provision requires in mandatory terms that before the employer dismisses an employee on ground of misconduct, poor performance and incapacity, the employer must first explain to the employee the reasons for the intended dismissal after which he must invite him to defend himself. The employee must also be given the right of being accompanied by a fellow employee or shop floor union representation of his choice during the said proceedings who must also be heard. The said proceedings must be conducted in a language which the employees understand.

19. In the present Suit, the said procedure was never followed before the dismissal of the CW1. RW1 stated on oath that after receiving complaint letters from the other employees, he forwarded them to the union and wrote the dismissal letter and kept it waiting for the CW1 to report back from leave. That when CW1 reported back on 25.2.2014, he served him with the letter but he refused to receive it prompting RW1 to forward it to the union. That testimony corroborated CW1's

contention that he was never heard before the dismissal and that the only time he met RW1 at the Union office was after the dismissal. That hearing after the dismissal was only attempt to sanitize an unfair process. However the cart had already been placed in before the horse. Consequently the court finds that the procedure followed in dismissing the claimant was not in consonance with the procedure set under section 41 of the Act. Having found that no valid and fair reason was proved and that fair procedure was not followed in dismissing CW1, the court finds that the termination of the claimant's employment by the respondent on 25.2.2014 was unfair within the meaning of section 45 of the Employment Act.

RELIEFS

20. Under section 49 of the Employment Act, an unfairly dismissed employee is entitled to salary in lieu of notice, accrued benefits plus compensation for unfair dismissal. The claimant has admitted that he was paid one month salary in lieu of notice plus salary due as at the time of his dismissal. He has however prayed for the leave for year 2010. No leave records were produced to prove that CW1 utilized his leave for 2010. He is therefore awarded pay for 21 days leave being Kshs.8925. He will also get 6 months gross salary as compensation for unfair dismissal being Kshs. 76500. The court has not awarded the maximum award because the court deems that with due diligence, CW1 could secure alternative employment of equal or higher pay within 6 months. The prayer for overtime is however dismissed for lack of particulars and supporting evidence. Although the evidence of CW1 and defence witness showed that CW1 stayed overnight at the work place, there is also evidence to show that CW1 was not permanently working in the night shift. There are also days when CW1 went for his leave meaning that CW1 did not prove the specif amount of overtime. He also did not challenge the respondent to produce work attendance register to disprove the alleged over time worked.

DISPOSITION

21. For the reasons stated above, judgment is entered is entered for the claimant in the sum of Kshs.85425 plus costs and interest. The claimant will also be issued with a certificate of service under section 51 of the Employment Act. It is so ordered.

Dated, signed and delivered this 15th May, 2015.

O. N. Makau

Judge

