



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 950 OF 2012

JAMES MUIRURI NJENGA CLAIMANT

VERSUS

NAKUMATT HOLDINGS LIMITEDRESPONDENT

JUDGEMENT

1. On 5th June 2012 the Claimant filed his claim noting that he was employed by the Respondent on 15th May 1995 as the Shop Assistant and then promoted to Assistant Chief Cashier which position he held until termination on 12th June 2008 when there was theft of over 7 million shillings (Kshs.7, 614,018.00). The Respondent being a large chain of supermarkets singled out the Claimant who was arrested on 13th June 2008 and charged with the offence of stealing by servant. On 12th July 2008 the Claimant was terminated from his employment which termination was to take effect from 1st July 2008 as he was now a suspect in the loss of Respondent property.

2. The Claimant also states in his claim that he was later acquitted of the criminal charges. He had by then been terminated from his employment without being heard or being given a chance to defend himself. He was shocked that his case was published in the newspapers on 18th June 2008. The Claimant fought the criminal charges against him in order to restore his dignity, respect and professionalism until 1st August 2011 when he was declared innocent.

3. The Claimant is seeking reinstatement or compensation for wrongful dismissal based on his last salary at Kshs.55, 300.00. There was no notice before the termination and claim notice pay. He is also seeking severance pay for the years worked all being 13 and all the due salary from the date of termination to the date when he was acquitted that is 1st June 2008 to 1st August 2011. Despite demand and notice to sue in default, the Respondent has refused to oblige.

4. In evidence, the Claimant stated that upon his employment by the Respondent he served diligently and was promoted until 12th June 2008 when there was theft and he was arrested on 13th June 20108. When he reported to work on 13th June 2008 he noted the theft and reported to the manager and chief cashier and the auditor was also called. They found 7 million to have been stolen. This took place on the night of 12th June 2008. Before close of day on 12th June 2008, the Claimant had counted and locked the safe and there was an alarm set using the key which key remained with the manager or assistant manager. On the material day the assistant manager was present. Upon report, the police came and 2 security guards, assistant manager, and cashier were arrested. The Claimant was arrested and charged with theft by servant but was acquitted. The Claimant was however terminated effective 1st July 2008 for misconduct due to negligence which is not true as he had been diligent in his work and had done as required on the material day. There were security guards at night and he had left the safe key with the assistant manager. An alarm

had been set up and this should have alerted anybody about any theft or an investigation done as to what happened. The key code was known to him, the manager and assistant manager.

5. The Claimant called his witness John Maina Muchiri who testified that he was the respondent's Chief Cashier and on 13th June 2008 he was off duty and while at his residence he was called and informed that there had been a robbery at respondent's premises. The manager wanted him to report back at work. He was informed that the Respondent had conducted investigations and he was not to leave the premises. An auditor was called and it was confirmed 7,600,000.00 was missing and stolen as there was not account for it. The police were called and he was arrested together with the Claimant and other staff. He was later terminated and he is giving evidence in support of the claimant's case.

6. The witness also confirmed that the theft took place at the respondent's Downtown Branch along Kenyatta Avenue, Nairobi. Theft took place at night and when the Claimant reported back on 13th he reported the missing cash. On 12th June 2008 the witness was off duty and remained with the Claimant the previous day and the theft was only known to him the following day. He has also filed a claim against the Respondent not as a grudge but to secure his rights as an employee. He was unfairly terminated as these were never investigated, there were security guards at the premises the night of the robbery and the safe had a panic button to set off the alarm which did not work.

Defence

7. In defence, the Respondent filed the response to the claim on 3rd July 2012 and stated that the Claimant only served the Respondent diligently for a period of time and then changed to become negligent occasioning the loss of Kshs.7, 600,000.00. He failed to exercise caution in taking care of money placed under his responsibility; he failed to appreciate the sensitivity and the amount of care needed when handling such huge amounts; and caused the loss of such monies for lack of caution. Due to laxity on the part of the claimant, money left in his care was not safe and went missing. Following investigations, the Claimant and other staff were found culpable and were arrested by the police who caused them to be charged in Court where the Respondent officers were only called as witnesses. Termination followed the gross misconduct of the Claimant following the loss of Kshs.7, 600,000.00 that was in his care. The newspaper reported the fact and the Respondent had no role in the same as the reporting emanated from Court proceedings that are public.

8. The Respondent also states that the Claimant cannot be reinstated back to work as to compel a party to take a reckless employee would not be lawful. The termination in any case was lawful and should be confirmed with a dismissal of the entire suit. The Claimant was paid all his dues and he signed a clearance form for his notice pay and due salaries. Retirement benefits were paid and nothing is unpaid.

9. The Respondent opted not to call any evidence in support of the defence.

Submissions

10. In submissions the Claimant stated that in the termination of the Claimant the provisions of section 41 of the Employment Act were never followed. There was no hearing or due process followed and therefore the Respondent did not have a valid reason to terminate the Claimant as under section 43 of the Employment Act. The Respondent has also failed to prove that there existed good ground for the termination of the Claimant and the same should be declared unfair under the provisions of section 45 of the Employment Act.

11. The claimant is seeking for his notice pay; service pay; unpaid salary from the date of termination to the date he was acquitted; and compensation with costs and interest. The Claimant was until his termination the sole bread winner in his family, this was cut short by his arrest and termination and he should be paid compensation at 12 months. He was earning Kshs.55, 300.00 per month at the time.

12. The Claimant also submitted that he should also be paid his severance pay at 15 days per year worked.

The Claimant is also seeking the payment of his salaries from the date of termination to the date he was acquitted. A claim for reinstatement or payment of maximum of compensation.

13. In response, the Respondent upon the termination of the claimant, the duty to prove the same was wrongful is on the Claimant and not the respondent. There was a *prima facie* case against the Claimant that led to his termination that the Respondent found to be justified. At the time, the Respondent genuinely believed that there was a valid reason to effect termination. The acquittal of the Claimant is not sufficient to remove the legal requirement under section 43 of the Employment Act where the employer can terminate where *genuine reasons* exist at the time of termination.

14. The Respondent also submitted that in the termination letter it gave the Claimant sufficient reasons for his dismissal due to the loss of huge cash, where the Claimant was the custodian which fact has been admitted by the claimant. The Claimant has admitted material facts in that he was the one, who received over Kshs.10 million from G4S group, counted it and left it in the safe after locking the code and giving the key to the assistant manager. The Claimant was therefore the sole person responsible for the loss as he is the one who also noted the missing cash. He reported this to his manager. Upon report and police investigations, those arrested followed such investigations and not upon the Respondent to direct the police in such matters. The police were independent in their work. The call of the claimant's witness John Michiri is of no value as he was arrested as an accomplice.

15. The Respondent also submitted that section 44 of the Employment Act contemplate summary dismissal on grounds of gross misconduct and especially in a case where one is charged with a criminal offence and in the loss of property belonging to the employer in a manner found to be negligent. This was such a case where the Respondent lost property and the Claimant was arrested and charged in a criminal Court hence the case warranted summary dismissal.

16. The Claimant was issued with a certificate of service upon payment of his dues. Notice pay is not due in summary dismissal and where it is paid, it is *ex gratia*. In the clearance forms signed by the claimant, he has confirmed receiving payment of his notice.

17. Severance and service pay are not due in this case as the Respondent has complied with the applicable law. Reinstatement should not be granted noting the provisions so section 49 of the Employment Act and the conditions precedent for the award of such an order. Such condition no longer exist in this case.

18. The Respondent submitted that the case should be dismissed with costs.

Determination

19. Section 41(2) of the Employment Act has created a fundamental change to labour relations. There is no longer any summary action allowed for an employer to take before following due process and particularly hearing an employee in defence even in a case of gross misconduct. Such a hearing is supposed to establish the circumstances leading to the allegations such an employee is said to have committed and giving the same employee a chance to defend himself. This is what principally the common law calls natural justice is. Section 41(2) is therefore mandatory as follows;

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

20. Before effecting a termination or a summary dismissal that is contemplated under section 44 of the Employment Act, an employer *shall* hear and consider any representations which the employee may have. Such representations may involve matters of misconduct or poor performance. Simply stated, each employee whatever the case, has a right to be heard before an advance action is to be taken. These are the conditions that entail due process being followed.

21. In this case, the Claimant was issued with a termination letter dated 12th July 2008 noting the following;

...

Termination of employment

It is with sincere regret that we wish to inform you that your services as Nakumatt Holdings limited have been terminated with effect from 1st July 2008 due to loss of cash in the company premises under your jurisdiction.

22. The Respondent submitted that they did not give the Claimant a hearing as his case was serious, the Respondent had lost huge sums of money that the Claimant had acknowledged and when he was charged in Court with a criminal offence, it was an affirmation that indeed he had committed gross acts of misconduct that warranted the summary termination under the provisions of section 44 of the Employment Act. However, this is not a case of summary dismissal; the notice issued to the Claimant was that of *termination of employment*. Such a termination required due process of a notice of any allegations against the claimant, a hearing and such hearing be done in the presence of his representative as under section 41(1) of the Employment Act. This is not said to have been done as the Respondent seek to justify the summary action taken. Even in a case where the notice had been stated as a *summary dismissal* which is not the case here, section 41(2) still apply with regard to the Claimant being given a chance to be heard before his dismissal. The criminal case notwithstanding, there was an employment relationship between the parties herein that are secured and guarded in law. Criminal proceedings do not negate such a relationship. To terminate the relationship, the applicable law must be adhered to.

23. I find no justification in the manner the Claimant was terminated; nothing prevented the Respondent from following due process. Where the Respondent had valid grounds to rise with the Claimant with regard to the loss of huge sums of money in his care and custody, such are matters that were within the knowledge of the Respondent and should have formed the basis of the hearing. To act as the Respondent did in terminating the Claimant through a summary process, find not rationale of reasonable explanation. The resulting action of termination was wrong and unfair as under section 45 of the Employment Act. To rely on the provisions of section 44 to justify the action taken by the Respondent is a misapplication of the law. I find the termination of the Claimant was procedurally unfair.

Remedies

24. The Claimant is seeking a reinstatement. Such a prayer is pegged on the provisions of section 49 of the Employment Act but such provisions must be read together with section 12(3) of the Industrial Court Act. I find no merit is seeking a reinstatement at this stage noting the circumstances within which a party should be directed towards specific performance. The Claimant in his pleading and evidence is Court was not categorical with regard to this claim. It will not be granted. The Court will consider the alternative prayers.

25. The Respondent submitted that upon the termination of the Claimant he was paid his terminal dues. Annexure NHS3 is the Clearance Form that note payments of;

Ex gratia pay at Kshs.55, 300.00;

Accrued leave pay at Kshs.23, 397.00;

Less pay for days when Claimant absent at kshs.31, 337.00

Barclays loan at Kshs.7, 619.00

Total due Kshs.31, 141.00.

26. The Respondent also submitted that the *ex gratia* pay made to the Claimant was for notice pay. That this became *ex gratia* since his case was that of summary dismissal and since the Respondent wished to be fair to him, thus made the pay. However, in a case of unfair termination, notice pay where not given becomes a legal requirement that the same is due. It is not to be equated to any *ex gratia* payment that an employer feels morally responsible to pay due to good service of an employee. Section 35 of the Employment Act require notice to be issued before termination and or payment in lieu of such notice. I therefore find the *ex gratia* payment aside, the Claimant is legally entitled to notice pay. I ward the Claimant such pay at Kshs.55, 300.00.

27. The Claimant was issued with notice of termination on 12th July 2008. Such notice was to take effect on 1st July 2008. Termination takes effect of the date the notice is issued. The salaries due for the time the Claimant remained the employee of the Respondent is up and until the 12th July 2008 when that relationship was severed. The Claimant is also seeking for salaries due from the date of termination to the date his criminal case was concluded. The same principle applies. The Claimant did not offer any labour and was no longer the employee of the Respondent after the 12th of July 2008. This is the essence of the claim herein. That he was unfairly terminated from his employment by the Respondent on 12th July 2008. To award for pay due based on the criminal case is to defeat the very principle that termination was unfair. The Claimant is therefore awarded his salaries due for the period 13th June 2008 to 12th July 2008 from the date of arrest to the date of termination. These are 30 days and an award of Kshs.55, 300.00 is appropriate in the circumstances.

28. The Claimant has claimed for severance pay and service pay interchangeably. The two refer and relate to different employment situations, one under section 40 of the Employment Act and the other under section 35(6) of the Employment Act. Severance pay relate to situations where an employer has declared redundancy while service pay is due in cases where an employer has failed to pay statutory dues or failed to registered an employee as required under the Retirement Benefits Act. In this case, the facts and evidence on record does not make reference to a situation of redundancy as the Claimant is based on unfair termination and equally from the pay slip of the Claimant attached to the memorandum of claim, I note the Respondent as the employer had complied with section 35(6) of the Employment Act. Despite the confusion in the nature the two issues have been articulated, none is due in this case. These are declined.

29. Compensation is due in a case of unfair termination. The Claimant had served the Respondent for over 13 years. He was terminated while he was young. The Claimant has not stated how his has tried to mitigate his circumstances since 2008. Such efforts are worth putting into consideration in a matter such as this one especially where reinstatement has been declined. The Claimant is awarded compensation at 6 months based on his gross salary at the time of termination all at Kshs.331, 800.00.

30. The Claimant shall also be awarded costs of the suit.

Conclusion

Judgement is entered for the Claimant in the following terms;

- a) The termination of the Claimant was procedurally unfair;**
- b) Compensation awarded at Kshs.331, 800.00;**
- c) Notice pay at kshs.55, 300.00;**
- d) Unpaid salaries at kshs.55, 300.00; and 'costs of the suit.**

Delivered in open Court dated and signed at Nairobi on this 30th day of June 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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