



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NUMBER 1212 OF 2011

DAVID MURIITHI NGONDI.....CLAIMANT

VERSUS

MR. HERBERT KARIITHI1ST RESPONDENT

MRS. PELAGIAH KARIITHI.....2ND RESPONDENT

JUDGMENT

1. The claimant by a statement of claim dated 15th July, 2011 sued the respondent seeking his terminal dues and compensation for wrongful dismissal which he quantified at Kshs.615,498/=.
2. The claimant was employed in June 2004 and worked until 4th December, 2010 when his services were terminated for gross misconduct. According to his testimony in Court, he used to work for respondent as a general worker looking after livestock, tilling land and watching over the respondent's building materials.
3. He denied being involved in the loss of building materials at the respondent's site and that he brought his family to live with him at his workplace because he was never allowed to go on leave.
4. The 1st respondent testified that the claimant was housed by the respondent and that his utilities bills were paid for by the respondent. She further stated that the claimant was allowed to consume some of the farm produce like vegetables, chicken and eggs.
5. It was her evidence that in December, 2010 while in Rwanda for duties, she received a call from her son that the claimant was not performing his duties properly and that the claimant was bringing strangers to the farm. When she returned she found some building materials and equipment missing. When she asked the claimant, he could not explain their whereabouts and he became rude telling her he was not a guard over her properties. She consequently discussed the issue with her husband, the second respondent and they decided to terminate the claimant's services.
6. The 2nd respondent testified that the claimant was introduced to them by a friend. It was his evidence that since the claimant lived alone in the farm, he was free to take up other work. He used to cultivate and sell farm produce. He stated that over time, they had a close relationship with the claimant.
7. At the point of termination the claimant was earning Kshs.9,000/= per month. He was not enrolled to NSSF. The respondents paid him Kshs.26,000/= which they described as a token of appreciation.

8. In his closing submissions, Mr. Nyabena for the claimant submitted that section 74(1) of the employment Act obligates an employer to keep employment records and the onus of proving or disproving what is alleged in a statement of claim is on the employer.
9. Counsel further submitted that the accusations against the claimant were fumbled and were not clear on which event he was to give an explanation. Counsel therefore contended that the respondent did not have a valid reason for terminating the claimant's services. Further that the respondents before terminating the claimant's services never called upon him to show cause why his services should not be terminated.
10. Mr. Kabaiku for the respondent on the other hand submitted that there was a valid reason for the claimant's dismissal. Theft was a serious offence for which he could have been prosecuted but for which the respondent decided not to pursue to save the claimant the embarrassment of a criminal trial.
11. Domestic relationships such as the case here usually present difficulties when subjected to the rigours of an ordinary contract of employment. Since they are not profit driven but more of hospitality than a commercial venture, the actors more often than not become so intertwined to the point that there is not much difference with a family set up. The formalities of an ordinary contract of service may therefore be found to be missing.
12. It is not in dispute that the claimant was working for the respondent as a general worker. It is also not disputed that he was dismissed following the loss of respondent's property. The claimant denied responsibility but the fact of such loss is common between the disputants.
13. Employment relationship and more so of a domestic nature as the case here, thrives on trust and confidence. Where such has been eroded or lost, the relationship cannot be sustained. The respondents lost property and whether wrongfully or not, suspected the claimant. They opted to terminate his services instead of having him prosecuted. To this extent they had a justifiable reason to end the relationship. Section 44(1) permits an employer to summarily dismiss an employee if an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or employers' property.
14. The claimant was placed in a position of trust by the respondent. In his own evidence he stated that he even moved in with his family to stay in the respondent's premises. The respondents never lived at the premises. They relied solely on the watchful eye of the claimant. The respondents' therefore had reasonable and sufficient grounds to implicate the claimant in the loss. He needed not have to be prosecuted.
15. There is the issue of the process of terminating the claimant. Counsel for the claimant stated that the claimant was neither given notice to show cause or subjected to a disciplinary hearing.
16. Section 44(2) of the Employment Act requires that prior to dismissal, the employer shall hear and consider any representation which the employee may make on the misconduct in question which is being considered as a ground for summary dismissal.
17. The Act does not prescribe the format or nature of this representation. There is no requirement that there must be a formal hearing with minutes taken. Each case will be decided on its own circumstances. As stated earlier the parties herein were in a rather very personal and domestic relationship hence it would be unreasonable to expect them to conduct their affairs in the manner expected in a formal employment set up.
18. The Court therefore finds that the respondents had justifiable reasons to terminate the claimant's services however upon termination the respondent's did not pay him his terminal dues as required by the law. The Court therefore awards him as follows:-

Kshs.

(a) One months' salary in lieu of notice.....9,000.00

(b) Service pay at the rate of 15 days' pay for
each complete year of service.....28,928.00

37,928.00

(c) Costs of the suit

Dated at Nairobi this 10th day of July 2015

Abuodha J. N.

Judge

Delivered this 10th day of July 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge