



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

AT MOMBASA

ELRC CAUSE NO. 418 OF 2013

MOSES HINZANO.....CLAIMANT

VERSUS

MOMBASA SLAUGHTER HOUSE..... RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for damages for unfair termination of employment of the Claimant by the Respondent on 5/2/2008. It is the Claimants case that he was dismissed for alleged loss of money which was not a true allegation. He also contends that he was dismissed without being accorded a hearing to defend himself.
2. The Respondent has denied liability and averred that the Claimant was guilty of gross misconduct and she was entitled to summarily dismiss him.
3. The suit was heard on 3rd July, 2015 when the Claimant testified as Cw1 but the Respondent called no witness. There after counsel for the two parties filed written submissions.

CLAIMANT'S CASE.

4. Cw1 was employed by the Respondent on 23/2/2003 as a Painter in the maintenance Department. His salary was kshs.7500 per month even after being promoted to be a store keeper in 2006 to become a cashier and his salary was increased to kshs.8,000. The contract was not written.
5. In October 2007, Cw1 was suspended in connection with an alleged loss of money. He remained in suspension for 4 months without receiving any pay or any word from the employer. No report was made to the police either to investigate or charge Cw1 with any offence.
6. Cw1 decided to visit the office on 5/2/2008 were he met Mr. Muhamed Sheikh the Managing Director who told him that he was no longer needed at work. Cw1 demanded for his terminal dues but he was told there was none. Cw1 then reported the matter to the union but the Respondent refused to pay any dues. The Cw1 then reported to the Labour Office who referred him back to the union. The union officially lodged a complaint to the Labour Office and the matter went for conciliation but the Respondent never attended the same. There after the Cw1 filed this suit.
7. He prays for salary for October 2007 being Kshs.8,000, one month salary in lieu of notice being

kshs.8000 and leave for 5 years being kshs.28,035. He also prayed for overtime of kshs.53,2169 for 5 years worked maintaining that he used to work everyday without rest due to the nature of work in the slaughter house. He further prayed for kshs.130,700 being off days worked for 5 years. Lastly he prayed for gratuity of kshs.20,000 for the 5 years worked.

8. On cross examination by the defence counsel, Cw1 confirmed that in October 2007 he was called to the Head Office by the Managing Director Mr. Sheikh and General Manager Mr. Haji and was then verbally suspended on ground that he had lost some money. He was instructed to stay at home to wait for the outcome of investigations after which he would be called back. He admitted that he used to receive money from customers and bank it and file the banking slips. He confirmed that he used to report to work at 9.00 pm and leave at 12 pm daily. He contended that whenever he requested for leave, he was told that there was no one to stand in for him while on leave.

ANALYSIS AND DETERMINATION

9. After considering the pleadings, evidence and submissions, there is no dispute that Cw1 was employed by the Respondent from February 2003 to February 2008. There is also no dispute that Cw1 was suspended for misconduct and thereafter dismissed summarily for the same before being heard on the said offence. The cause of action being governed by the repealed Employment Act, the issues for determination are whether the dismissal was wrongful and unlawful, and whether the relieves sought ought to issue.

WRONGFUL AND UNLAWFUL DISMISSAL

10. The dismissal occurred on 5/2/2008 under Section 16 of the Employment Act (repealed). The contract of Employment was governed by collective Bargaining Agreement (CBA) which was never produced as an exhibit. The court was therefore not shown the procedure for dismissal under the CBA. The question that arises is that whether the Claimant had committed any misconduct that warranted summary dismissal. Cw1 disputed the alleged misconduct and maintained that his suspension and dismissal were wrongful and unlawful. He maintained that no investigations were done either by the employer or police and no arrest was made to him despite visiting the office alone on 5/2/2008 and thereafter with the union official. That evidence was never rebutted by defence as no witnesses were called to testify. Consequently the court finds and holds that the Claimant has proved on a balance of probability that his summary dismissal by the Respondent was wrongful and unlawful. The reason for that finding is that the alleged reason for the dismissal was not proved and as such the summary dismissal for no justifiable cause amounted to breach of contract.

RELIEF

11. The cause of action being governed by the repealed law, the Claimant was only entitled to salary in lieu of notice, accrued leave, salary arrears, and any other common law benefit proved in evidence. Cw1 was therefore not entitled to damages for unfair termination as provided for under the 2007 Employment Act. The Claimant is therefore awarded kshs.8000 being salary in lieu of notice, kshs.8000 being salary for October 2007, and kshs.28,000 for leave earned for the 5 years served. No leave records were produced to prove that Cw1 went for any leave. His evidence that he was denied leave whenever he requested on ground that there was no one to hold his brief, was never disputed in evidence by the defence. The prayer for off duty was not disputed and it is allowed as prayed being 4 days x 60 months x 8000/30 x 2=64,000. However the prayer for overtime, public holidays worked and gratuity are dismissed for lack of particulars and supporting evidence. The said awards of kshs.108,000/= herein above will attract interest from 5/2/2008.

DISPOSITION

12. For the reason stated above Judgment is entered for the Claimant against the Respondent for Kshs.

108,000 plus costs and interest.

Dated signed and delivered this 10th day of July 2015.

O. N Makau

JUDGE