



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 72 OF 2015

KENNEDY KITSAO KALEWA..... CLAIMANT

VERSUS

SANDRA VERSINI.....RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for compensation for unfair and unlawful termination of the claimant's employment by the respondent on 5.2.2015 by which the claimant seeks to recover kshs.2, 380,000. The facts of the case are that the claimant was employed by the respondent as the Caretaker and Supervisor of her Villa Sandra House at Malindi from 1.7.2005. His starting salary was kshs.25,000 per month but it was later reviewed to kshs.30,000 and kshs.60,000 respectively. He worked without any problems with the employer until 5.2.2015 when he was dismissed summarily on allegation that he had failed to pay electricity and water bills. He was however never invited for disciplinary hearing by respondent before the summary dismissal.

2. The respondent admits that she employed the claimant as a Caretaker from 2005 for a monthly salary of kshs20,500 which was later increased to kshs25,000 and kshs30,000 respectively. She however denied that she increased the claimant's salary to kshs60,000. She averred that the dismissal of the claimant was lawful, fair and justified because he was guilty of misconduct namely dishonest and poor performance of his duties. She has also counterclaimant from the claimant the sum of kshs.3, 270,804 allegedly paid or transferred to his account by her between 4.3.2010 and 15.8.2014.

3. The case was disposed of by way of written submissions based on the pleadings and witness statements filed.

Analysis and Determination

4. After carefully considering the pleadings, evidence and the submissions, it is clear that the claimant was employed by the Respondent as a Caretaker of her house from 1.8.2005 to 5.2.2015 when he was summarily dismissed for misconduct and poor performance of duty. The issues for determination are:

- a. Whether the termination of the employment was unfair and unlawful.
- b. Whether the reliefs sought in the suit and the counterclaim should be granted.

Unfair and unlawful termination

5. Under section 45 of the Employment Act (EA), termination of employment is unfair if the employer fails to prove that there existed a valid and fair reason to justify the termination and that a fair procedure was followed before terminating the employment of an employee. In this case the claimant contends that he was unlawfully and unfairly dismissed because the reasons cited for the dismissal were not valid and that he was never given a chance to defend himself before the dismissal. According to him he was diligent performer, without any disciplinary cases and that is why the respondent kept on increasing his salary.

6. The respondent never adduced any evidence to prove that there was any electricity and water bills outstanding in respect of her premises. She also did not adduce any evidence to prove that it was the duty of the claimant to pay for the said bills. In addition she did not adduce any evidence to show that she had agreed with the claimant on certain performance targets and appraised his performance as a basis upon which to dismiss him for poor performance. Consequently, the court finds on a balance of probability that the respondent did not prove that there was a valid and fair reason to justify the summary dismissal of the claimant.

7. Likewise the respondent did not prove that she followed fair procedure prescribed under section 45 (5) (c) of the EA which basically involves an oral hearing and giving of a Certificate of Service under section 41 and 51 of the Act respectively. The said section 41 provides in mandatory words that before an employer dismisses an employee for misconduct or poor performance, he shall explain to him the reason upon which a dismissal is contemplated and there after invite him in the company of another employee or union representative to air their defence. The said proceedings must be conducted in a language that the employees understand. The court therefore agrees with the claimant that his summary dismissal was unfair and unlawful within the meaning of section 45 of the EA.

Reliefs –vs- counterclaim

8. In view of the finding above, the court makes declaration that the termination of the claimant's employment by the respondent on 5.2.2015 was unfair and unlawful. Under section 49 (4) of EA the court is required to take into account several matters, including the wishes of the employee, in deciding which relief to award. After considering the reliefs sought in this case, it is clear the claimant wishes to be awarded damages and not to be reinstated.

9. Consequently he is awarded damages under section 49 (1) of EA being 6 months' gross salary compensation for unfair and unlawful termination totaling to kshs.360,000. In the courts view, the claimant could, with due diligence, secure alternative job of equal pay within 6 months. The award is also justified considering that he has also served the respondent for 10 years. The court has used the sum of kshs.60,000 as the correct salary for the claimant despite the respondent's denial because the claimant produced supporting evidence in the form of letters, bank statements and Loan application documents all signed by the respondent as the employer.

10. The claimant is also awarded kshs.60,000 being one months' salary in lieu of notice and kshs.240000 being salary arrears at the rate of kshs.20000 per month from January to November 2014 as per the bank statement dated 12.2.2015 produced by the claimant. The claim for severance is however dismissed because the termination was not through redundancy. Likewise the claim for leave is dismissed for lack of particulars and evidence.

11. As regards the counterclaim, no clear particulars and evidence was adduced by the respondent to support the same. The court takes note of the pleadings by the respondent and admission by the claimant that over and above the employment relationship, the two were involved in an intimate relationship. Consequently, if any money was advanced to the claimant in that context, which has not been proved herein, the respondent has not adduced any evidence to prove that the money was intended for refund if not accounted for. For the foregoing reason the counterclaim is dismissed.

Disposition

12. For the reasons stated above, judgment is entered for the Claimant against Respondent declaring the

termination of the Claimant's employment unfair and unlawful, and awarding him Kshs.660,000 plus costs and interest.

It is so ordered.

Signed, dated and delivered at Mombasa this 14th day of September 2015

O.N. MAKAU

JUDGE