



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE NO.493 No. OF 2014

SALIM GULAHUSSEIN DARESHCLAIMANT

VERSUS

ASSOCIATED WAREHOUSE LIMUTED t/a

BAMBURI BEACH RESOURT1st RESPONDENT

MR. NITIN PANDYA2nd RESPONDENT

J U D G M E N T

Introduction

1. The claimant has brought this suit claiming accrued employment benefits plus compensation for unfair termination of his employment by the respondent on 23.9.2014. He avers that the termination was unfair because he was declared redundant without following the procedure provided under section 40 of the Employment Act (EA). In total he claims ksh 6,290,380 under the amended memorandum of claim filed on 8.4.2015.
2. The respondent has denied liability for unfair termination of employment through redundancy on 23.9.2014 and avers that he was fairly and summarily dismissed for misconduct on 30.9.2014 after being accorded a fair hearing in the presence of Mr Ibrahim Bazafir. That the claimant was found to be dishonest and had been making false and fictitious claims for travelling allowance without authority from the respondent.
3. The suit was heard on 14.7.2015 and 29.7.2015 when the claimant testified as Cw1 and called Mr William Mrinzi Mwero as Cw2 on the other hand 2nd respondent testified as Rw1 and called Nicodemus Kimatu Master and Samir Adulaziz Kassim as Rw2 and Rw3 respectively. Thereafter both parties filed written submissions.

Analysis and Determination.

4. The employment relationship between the parties herein and its length is not in dispute. There is also no dispute that claimant was earning a monthly salary of Ksh 150,000. There is also no dispute that the contract was terminated by the respondents in September 2014 without any prior notice to the claimant. Lastly, there is no dispute that the respondent offered to pay terminal dues to the claimant after the termination but the claimant declined to take the amount offered. The issues for determination are whether the termination of the claimant's employment was unfair and whether the reliefs sought should be granted.

Unfair Termination

5. The burden of proving unfair termination lies with the employee as per section 47 (5) of the EA. The burden is basically to prove that the reason for the termination was not valid and fair and that the procedure followed was unfair. In this case, Cw1 testified that he worked for the respondents from 18.11.2011 until 23.9.2014 when he was dismissed by the 2nd respondent. That the reason for the dismissal was that the business was low and the respondents could not afford his salary any more. That when Cw1 suggested his willingness to take a pay cut, Rw1 rejected the offer and maintained that he wanted Cw1 to leave work. That when Cw1 demanded for his dues he was told to go for discussion on the amount on 30.9.2014, when Rw1 gave him a pay slip and a cheque for ksh 209,000 but Cw1 declined the amount because it was not the correct amount payable. He denied any wrong doing and contended that the money allegedly unlawfully paid to him as travelling allowance was agreed upon between him and the 2nd respondent. He maintained that he was laid off without notice because the business of the hotel was low and the respondents could not afford his salary.
6. Rw1 is the owner of the 1st respondent. He admitted that Cw1 was a good employee and that is why he increased his salary from ksh 50,000 to ksh 150,000 per month. However, in May 2014, he discovered, through his accountant an irregular payment to Cw1 and raised a query to the cashier (Rw2). The cashier responded. The issue was that Cw1 was personally authorizing his own expenses and when Cw1 was served with the query, he responded rudely saying that he had the mandate to authorize his own expenses. That Rw1 called Cw1 to the office on 23.9.2014 and showed him the payments made to him without authority and told him that he could not continue working with him for that reason. That Cw1 asked him for one month salary in lieu of notice and he promised to pay him on 30.9.2014. That on 29.9.2014, Cw1 went to see Rw1 accompanied by his girlfriend Nawal and a Mr. Ibrahim. That the latter threatened RW1 with unspecified consequences from the police and a magistrate if he did not reinstate Cw1 to work. That when Rw1 gave Cw1 payment of terminal dues on that 29.9.2014, he refused and went to file this suit on 8.10.2014.
7. Rw2 is the respondent's cashier .He confirmed that he used to pay Cw1 ksh 5000 as transport allowance. That Cw1 was approving the payment and telling him that he had authority from Rw1 to get the said payment. That Cw1 also sold used Air conditioners and surrendered the proceeds to Rw2 and told him that he had authority from the Rw1 to sell. That Rw2 only discovered that Cw1 had no authority to received transport allowance when he received a query from the accountant. On cross examination by the claimant's counsel, Rw2 confirmed that he paid the transport allowance without first seeking approval from the Rw1 by SMS as required.
8. After carefully considering the evidence by the two sides, the court finds on a balance of probability that the claimant was dismissed by the respondent for misconduct. That on divers dates in the year 2014, Cw1 received transport allowance of Ksh 5000 per month without authority from the 2nd respondent. That he approved the said payment and lied to the cashier (Rw2) that he had been authorized by the 2nd respondent to receive the night transport allowance. That Cw1 also sold used Air conditioners from the Hotel without authority from the 2nd respondent. That the 2nd respondent was not aware of such conducts until a query was raised by the accountant. Cw1 did not deny the alleged receipt of the payment of transport allowance and sale of Air conditioners. He maintained that he had authority from the 2nd respondent. However, he never proved that alleged authority either in writing or at all. For that reason, his allegation that he was declared redundancy in breach of the law is dismissed.
9. Instead the court believe the evidence of the Rw1 that he dismissed Cw1 after discovering that he was dishonest and had misappropriated the employers money. That Cw1 was not happy with the dismissal, and brought a Mr. Ibrahim to threaten him with unspecified consequences using the police and a magistrate. The court does not reasonably believe that an employee who is declared redundant for low business and one who is willing to take a pay cut could bring his girlfriend and Mr. Ibrahim to bully the 2nd respondent. It is only an acrimonious summary dismissal after a broken relationship that one would reasonable expect such bullying or threats from the victim of the said broken relationship. Consequently the court finds or holds that the claimant was summarily dismissed by the respondent.
10. The said dismissal was based on a valid and fair reason within the meaning of section 45 of the EA, namely misappropriation or stealing of his employer's money. Such an offence justifies

summary dismissal under section 44(4) (g) of the EA. In this case Cw1 admitted that he received the transport allowance. The court however takes issue with the procedure followed before dismissing the claimant. That the claimant was not given a fair hearing within the meaning of section 41 and 45 of the EA. That Rw1 has not proved that he complied with section 41 of the EA before dismissing the claimant.

11. Section 41 of the EA requires in mandatory terms that before an employer dismisses his employee for misconduct under section 44 (3) and (4) of the EA, he shall explain to the employee, the reason for the intended dismissal. That during such proceedings, the accused employee shall have the right to be accompanied by another employee of his choice. That the employee and his companion shall have the right to respond to the employee's allegations before the decision to dismiss is reached. In this cause Rw1 adduced no evidence to prove that he invited the claimant to a disciplinary hearing and notified him of his right to be accompanied by another employee of his choice. He also never explained to the claimant that he was contemplating to dismiss him for receiving the transport allowance without authority. That default on the part of Rw1 rendered the summary dismissal unfair.

Reliefs

12. The claimant has prayed for damage under section 49 (1) of the Act which entitles an unfairly dismissed employee to salary in lieu of notice, benefits accrued from employment contract plus compensation of up to 12 months' salary. In this case, the claimant is awarded ksh 150,000 being one month salary in lieu of notice. He is also awarded salary for 23 days worked in September 2014 being ksh 115,000. He is also awarded 21 days leave for the year 2013/2014 being ksh 105,000.
13. The claim for 10% commission on Ksh 1,043,000 accommodation fee from Mt Kenya University students in dismissed for lack of evidence to support it. Cw1 never adduced any evidence to prove that as the manager of the Hotel, he was also entitled to commission from sales. Similarly the claim for over time, public holidays and off days worked are dismissed for lack of evidence and particulars. Cw1 admitted that he used to have off days but was always called back by the boss and his juniors. That was not substantiated and the court will only treat that contention as an admission that Cw1 was allowed off days on the week days after working over the weekends or public holidays.
14. The court has however awarded the claimant 2 months' salary for unfair termination being Ksh 300,000. In awarding that sum, the court has considered the fact that the claimant contributed to his dismissal through misconduct. That save for breach of the statutory procedural safe guards, dismissal was justified.

Disposition

15. For the reasons stated above, judgment is entered for the claimant in the sum of **Ksh 670,000**. The claimant filed suit before serving the respondent with a demand notice and as such each party will bear his own costs.

Signed, Dated and Delivered at Mombasa this 27th day of November 2015.

ONESMUS MAKAU

JUDGE