



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE 570 OF 2014

ELVIS MRAMBA KARUMECLAIMANT

VERSUS

PETER I VAZ.....RESPONDENT

J U D G M E M N T

Introduction

1. This is claim for terminal dues and compensation for unfair and wrongful termination of the claimant's employment by the Respondent on 1.7.2014. It is the claimant's case that his termination was not based on a valid and fair reason and it was not according to the fair procedure stipulated by the law. It is his further contention that during his entire tenure of office, he was under paid and worked over time.
2. The respondent admits the employment relationship with the claimant but denies the claim for under payment of salary and overtime. In addition he denies that the claimant was unfairly and wrongfully dismissed and avers that he summarily dismissed him fairly for gross misconduct and paid all his terminal dues being Ksh 30,500.
3. The suit was heard on 31.3.2015 and 7.7.2015 when the claimant testified as Cw1 and called Mr Justin Chai Chivatsi as Cw2. On the other hand, the respondent testified as Rw1 and called Mr Arnold Jamuhuri Kazungu as RW2. Thereafter both parties filed written submission.

Analysis and Determination

4. There is no dispute from the material placed before the court that the claimant was employed by the respondent as a House hold servant based at Watamu Malindi from 1.4.2008 until 1.7.2014 when he was summarily dismissed for gross misconduct. The issues for determination are whether the said termination was unfair and wrongful and whether the reliefs sought should be granted.

Unfair and Wrongful termination.

5. Under section 47 (5) of the Employment Act (E A) the burden of proving unfair termination lies with the employer. The burden is discharged and shifted to the employer if the employee demonstrates that there was no valid and fair reason for dismissal and further that the procedure followed was not fair. The employer's burden is not discharged and the termination is deemed unfair under section 45 of the EA if the employer fails to prove that there existed a valid and fair reason to warrant the dismissal of employee and that a fair procedure was followed. Fair procedure mainly relates to according the employee a hearing within the meaning of section 41 of the EA and giving him a certificate of service under section 51 of the Act.
6. In this case the claimant told the court that the respondent went to Malindi on 15.6.2014 and

returned to Mombasa without raising any issue with him. That on 29.6.2014, the respondent returned to Malindi with 2 young persons and asked Cw1 to induct them. That on 1.7.2014, the respondent asked Cw1 to call his colleague Thomas and when the two came, the respondent told Cw1 to calculate his dues. That when Cw1 enquired why, he was threatened that he could lose everything. He was then given a blank paper to sign after which he was given Ksh 24,000 and told that he had been fired. That when he tried to ask for the reason for his dismissal he was threatened and he left after being told to come for a paper on Friday 4.7.2014, but on that day he found that the respondent had already returned to Mombasa. That when reached over his phone he promised to call Cw1 when he returned to Malindi. Cw1 denied any wrong doing and contended that he was terminated without prior notice. That he was not told the reason for his dismissal. Cw2 was not present when Cw1 was demised and as such did not give any evidence on that.

7. Rw1 testified that he dismissed the claimant for gross misconduct namely selling metered water to a neighbour and thereby increasing water bill for the respondent, loss of items from respondent's stores and absenteeism from work for 7 days without permission. That he served warning letters to the claimant in respect of the above misconduct the last being on 16.6.2014 but Cw1 never apologized and was summarily dismissed on 30.6.2014. That after he was paid ksh 24,000 as service pay plus a further ksh 6,500 being salary in lieu of notice. That the claimant received the said Ksh 30,500 as full and final settlement in the same manner he had been receiving his salary. Rw1 maintained that the dismissal was lawful because he followed the law to the letter. He contended that he went to Watamu 3 days before the dismissal and told all the employees including Cw1 that he was going to sack them for misconduct but they never apologized prompting him to sack all of them.
8. Rw2 works for the respondent. He alleged that he served Cw1 with a warning letter on 15.6.2014 and Cw1 verbally denied the accusation in warning letter and refused to write any apology. Rw2 then witnessed the dismissal of the claimant and the payment of Ksh 30,500 to him as terminal dues. Cw2 maintained that Cw1 was told his mistake but refused to apologize.

Reason for Dismissal

9. After carefully considering the evidence by the two sides, the court is satisfied that the respondent has not discharged his burden of proving that there existed a valid and fair reason for dismissing the claimant. Although he has produced water bills and correspondences with the water company, the respondent has not proved that the alleged abnormally high water bills was caused by the misconduct on the part of the claimant. Although he suspected that Cw1 was selling the water to a neighbour, no prove was tendered to show that indeed Cw1 did sell the water to the neighbour.
10. In addition to the foregoing the allegation that Cw1 was to blame for loss of respondent's items was not proved. Indeed, alleged lost items were never substantiated to the court. That Rw1 only made mere allegation that items were lost and the claimant is the one who had the key to the store. Lastly, the respondent never proved that the claimant was absent from work without permission. He was not present when Cw1 allegedly absented himself from work for 7 days. Rw1 never told the court which days, month and year when Cw1 absented himself from work. He also never called any witness to substantiate that allegations after Rw2 told the court that he was not aware of any day when Cw1 absented himself from work. Consequently the court finds and holds that the claimant was not dismissed for valid and fair reason.

Procedure

11. As regards the procedure followed to dismiss the claimant, the court is satisfied that the claimant was not accorded a hearing before his dismissal. He stated in evidence that he was told by Rw1 to call his colleagues Thomas to meet Rw1 and when they met him, he told Cw1 to calculate his dues or risk to losing everything. Rw1 never explained to Cw1 that he was intending to terminate his services and cited never the reasons therefore. He only threatened and prevailed on Cw1 to sign for Ksh 30,500 after which then declared that he had been fired. Rw1 never rebutted that evidence by Cw1 during his testimony. Under section 41 of the EA, an employer is barred from dismissing an employee for misconduct under section 44 before first explaining to the employee in the

company of a fellow employee or shop floor union representative of his choice, the reason for the intended dismissal and thereafter allowing the employees and his companion to air their representations. The said proceedings must be conducted in a language the employees' understanding. That statutory procedure was not followed in this case. Consequently, and in view of the finding above that the reasons from the dismissal was not proved, the court finds on a balance of probability that the termination of the claimant's employment by the respondent on 1.7.2014 was both wrongful and unfair.

Reliefs

12. The court awards damages to the claimant for the unjustified and unfair termination of employment under section 49 (1) of the EA. In so awarding the court has considered the length of service by the claimant, his wish not to be reinstated and the fact that the respondent did not prove that the termination was due to the claimant's misconduct. The award is based on the salary of Ksh 6,500 cited by the respondent. According to Rw1 Watamu is an area outside cities and municipalities according to the classification under the wage order and as such the salary he was paying Cw1 was well above the minimum wage. That contention was not contested or rebutted by the claimant in evidence because he never adduced any evidence to prove that Watamu was within a municipality or city to warrant a higher pay than Ksh 6,500 which was used in assessing his terminal dues of Ksh 30,500 on 1.7.2014.
13. In view of the foregoing, the claim for under payment is dismissed likewise the claim for arrears in house allowance is dismissed because the claimant was resident in the respondents premises. The claim for over time is also dismissed because the claimant only used to work over time when the respondent's family visited the house at Watamu or when there were guests. That was not an everyday routine and as such the claimant had the burden of proving which days he worked overtime subject to limitation period. That burden of proving the overtime worked was not discharged by the claimant. Likewise the claim for off days and public holidays worked is dismissed for want of particulars and evidence. The claim called "Gratefully" is unknown to law and it has also not been proved in evidence and as such it is dismissed. The claimant was paid one month's salary in lieu of notice and he did not demonstrate to the court that he is entitled to 2 months' notice. He will therefore have to be contented with the Ksh 6,500 paid as salary in lieu of notice on 1.7.2014. Lastly the claimant is awarded compensation of Ksh 19,500 being 3 months' salary for unfair and wrongful dismissal. The reason for the said award is because with due diligence the claimant could secure alternative employment of a general labourer in 3 months. The court has also considered the fact that the claimant was paid service pay of Ksh 24,000 for the 6 years served.

Disposition

14. For the reasons stated above judgment is entered for the claimant in the sum of Ksh 19,500 plus costs and interest.

Signed, Dated and Delivered at Mombasa this 13th day of November 2015.

ONESMUS MAKAU

JUDGE

13.11.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:

For the Respondent:

Court

Judgment delivered in their presence/absence in open court.

ONESMUS MAKAU

JUDGE