



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 63 OF 2014

DAVID OWINO ODUOR.....CLAIMANT

v

PANCRAS KURIA NYOIKE

T/A MIJENGO INVESTMENTS..... RESPONDENT

JUDGMENT

1. David Owino Oduor (Claimant) sued Pancras Kuria Nyoike t/a Mijengo Investments on 13 March 2014 and he stated the issues in dispute as

1. One month salary in lieu of notice
2. Salary for 7 days (June 2013)
3. Underpayments
4. Annual leave for 4 years 9 months
5. Unfair termination-section 49(1)(c) of the Employment Act.

2. The Respondent filed a brief Response to Claim on 4 April 2014, and this prompted the Claimant to file a Reply to Defence on 10 April 2014. The Cause was heard on 13 July 2015 and the Claimant filed his submissions on 30 July 2015 while the Respondent's submissions were not on record by time of preparing this judgment.

3. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether dismissal of the Claimant was unfair, whether cause of action was compromised at conciliation, whether the claim is defective, nature of Claimant's employment, whether Claimant was underpaid and appropriate remedies (including contractual/statutory entitlements)*

Whether dismissal was unfair

4. The Claimant's case is that he was unfairly dismissed on 28 June 2013. On the circumstances leading to the dismissal, he stated that he got an order to make a mahogany bed and that after making the bed, the Respondent called him to his office and informed him that the bed had gone missing. The Respondent wanted an explanation.

5. According to the Claimant, he told the Respondent to inquire about the bed from the Manager, Ndungu

and Assistant Manager Robert Ndungu but the Respondent told him to take his tools and leave after which he reported to the Labour office.

6. On why the dismissal was unfair, the Claimant stated that he was not given notice of termination of employment and that he was not heard before the dismissal.

7. The Respondent's Accountant/Administrator testified. He stated that the Claimant and the Assistant Manager, Robert Ndungu had colluded to make a bed using the Respondent's materials without his knowledge and then sneaked the bed out.

8. The Respondent's Director then called the Claimant and the Assistant Manager to his office to explain. The Assistant Manager accepted but the Claimant denied knowledge of the issue.

9. The two were dismissed and later paid dues including pay in lieu of notice.

10. For a dismissal to pass legal muster, it must be both procedurally fair and the employer must have and prove valid and fair reasons.

11. Procedural fairness entails an employer informing the employee of the intended dismissal and the reasons thereof and allowing the employee to make any representations. An employee has a right to be accompanied during such a session.

12. Procedural fairness is now part of the employment relationship because of statutory intervention (see section 41 of the Employment Act, 2007).

13. But in my view, procedural fairness does not require an employer to hold a mini-court. Each case will depend on the circumstances obtaining and therefore the Court ought to evaluate each case depending on the realities of the employment relationship.

14. The statute envisages that the employer will give written notice (section 35 of Employment Act, 2007) but at the same time allows the employer to dismiss without notice on account of fundamental breach of the employment obligations/gross misconduct (section 44 of the Act).

15. The Claimant herein was not given written notice and on that account the dismissal would be unfair unless he was in breach of a fundamental obligation/gross misconduct.

16. It was incumbent upon the Respondent therefore to prove that there was a hearing and breach of a fundamental term necessitating summary dismissal.

17. The Claimant was called by the Respondent and asked to explain about the bed. Apart from admitting that he was called, he stated that he was not given an opportunity to make representations.

18. It is the Claimant who was present. In his examination in chief, he was not very forthcoming with what transpired in the office. He gave very little information.

19. But with the little information revealed, the Court is satisfied that within the employment set up between the disputants herein, the Claimant was made aware of the issue at hand and allowed to make representations.

20. But that finding does not dispose of the dispute. Because this is essentially a summary dismissal, the Respondent had to prove breach of a fundamental obligation or gross misconduct.

21. It is clear to the Court that the Claimant and the Assistant Manager agreed that the Claimant would make a bed for the Assistant Manager. The Claimant did not deny or challenge the Respondent's witnesses testimony to this effect.

22. Again there was no challenge to the testimony that the Claimant used the Respondent's materials to make the mahogany bed.

23. In my view, the use of the Respondent's material for what was a private job was a breach of the universally implied term of trust and confidence and the Respondent was entitled to dismiss the Claimant.

Whether cause of action was compromised

24. The parties submitted to conciliation before the Labour Officer and a Payment Agreement/Settlement was signed on 15 October 2013. The Claimant was paid some Kshs 7,965/-.

25. The demand from the Labour Officer was in respect of *unlawful dismissal, pay in lieu of notice, earned wages, outstanding leave, public holidays and any other legal dues.*

26. When the agreement of 15 October 2013 was signed it was in respect of these items and in so far as the same was settled, in my view the Claimant is stopped from coming to Court to agitate over the same.

Whether claim is defective

27. This line was not advanced nor the particulars of the defects disclosed and the Court leaves it at that.

Appropriate remedies/contractual and statutory entitlements

28. In the employment relationship, there are entitlements accruing to the employee as a matter of contract or statute. They would not accrue because of unfairness of termination of employment. The Court will now examine some of these entitlements.

Salary for 7 days in June 2013

29. Under this head, the Claimant sought Kshs 3,491/-. The Respondent's witness admitted the Claimant was owed Kshs 2,600/- at time of separation and this was part of the Kshs 7,965/- paid through Labour office. Nothing therefore turns on it.

Underpayments

30. The Claimant sought Kshs 68,084/85 on account of underpayments from September 2008 to November 2011. Reference was made in the pleadings to Legal Notices Nos 38 of 2006, 70 of 2009, 98 of 2010 and 64 of 2011.

31. Underpayments was not one of the items set out in the demand arising from the complaint laid by the Claimant before the Labour Officer.

32. The Notices provided for daily rates of pay where applicable. Both parties agreed on the rates of pay at the material times and the Court finds that the Claimant was underpaid.

33. Because the Respondent did not challenge the figures/computations, the Court finds for the Claimant as prayed.

Annual leave

34. The Respondent's witness testimony was that the payment through the Labour office included accrued leave for 5 months. The Claimant however sought Kshs 29,295/- under this head.

35. The Court is unable to make a determination on this question based on the material placed before it.

Gratuity

36. The Claimant did not demonstrate a contractual or statutory basis for this relief and is declined.

Conclusion and Orders

37. The upshot of the foregoing is that the Memorandum of Claim filed on 13 March 2014 is dismissed on account that the cause of action was compromised save for an award of Kshs 68,084/- on account of underpayments.

38. Each party bear own costs.

Delivered, dated and signed in Nakuru on this 6th day of November 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Magatta instructed by Magatta & Associates

For Respondent Mr. Maina instructed by Ikua, Mwangi & Co. Advocates

Court Assistant Nixon