



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 417 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilla on 16th December, 2015)

DAUDI MOHAMMED.....CLAIMANT

VERSUS

RAFIKI BUSINESS PARK LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant Daudi Mohammed filed his Memorandum of Claim on 14.3.2012 claiming unlawful termination of employment. The Claimant's case is that he was employed on 3.4.2007 by the Respondent as a General Manager in charge of security at a basic pay of 20,000/=. This contract was in writing as per Appendix `1 and the claimant was to be on trial for one month and thereafter there was to be an agreement on salary review.
2. The Claimant avers that he served the Respondent as agreed until 15.2.2011 when the Respondent terminated his services claiming that he had given the keys to the office to a shamba boy causing a security risk. The Claimant avers that he had performed his duties well and had to perform other tasks including getting money and paying workers in other companies working for Respondent and it was impossible not to give the keys to the Secretary who was not a security risk.
3. The Claimant contends that he served the Respondent well and never received any warning letter. He avers that the Respondent also failed to let him go on leave for the time he served and that he was dismissed without a hearing and so he terms his dismissal unfair.
4. In cross examination, the Claimant states that he was to work upto 5 pm and was to leave only after all workers had left the office. The Claimant avers that he was dismissed verbally and never resisted taking a termination letter.
5. He admits he was paid for leave in 2009 and also went to Mecca in 2007 when he took leave for 2010 he was paid for his leave Kshs.21,833/=. He states that in 2009, he only took 6 days leave.
6. The Respondents filed their Memorandum of Defence on 27.6.2012 through the firm of Kiogora Mutai & Company Advocates. They admit that the Respondent was their employee till 15.2.2011 from 3.4.2007.
7. It is however their position that the Claimant was rightfully terminated on 15.2.2011 when he failed to perform his work satisfactorily causing a security lapse by leaving the keys to an unauthorized person.

That the Claimant was the custodian of all office keys. They aver that the Claimant had been warned about passing sensitive information to tenants/customers but he persuaded and that they learned that the Claimant was absconding duty and this is why they decided to summarily dismiss him.

8. The Respondents aver that they accorded the Claimant a hearing before dismissal as per their Appendix AV 4 and that the Claimant is not entitled to the prayers sought.

9. I have considered the evidence and submissions of both parties and issues for consideration are as follows:

1. ***Whether there were valid reasons to warrant summary dismissal of the Claimant.***
2. ***Whether the Claimant was accorded due process before he was dismissed.***
3. ***What remedies if any, the Claimant is entitled to.***

10. On the 1st issue, the reason given by Respondent for dismissing the Claimant is failing in his work which posed a security risk to Respondent's property.

11. The Claimant has explained that he had to leave the key with the Secretary as he attended to other matters. The question then is whether this omission or commission was so grievous that it could lead to a summary dismissal. the factors that can lead to summary dismissal have been set out in Section 44(4) of Employment Act 1007 and it provides as follows:

“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

- (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;***
- (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;***
- (c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;***
- (d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;***
- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;***
- (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or***
- (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.***

12. The Claimant did not commit any of the above mentioned misconduct and it is therefore this Court's

finding that the decision to summary dismiss him was very harsh. There were no valid reasons to do so.

13. Assuming he had committed any other misconduct, then he was still entitled to be given a hearing. This is envisaged under Section 41 of Employment Act 2007 and it states as follows:

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

14. Therefore the finding of this Court is that the termination of the Claimant was unfair and unjustified as envisaged under Section 45 of Employment Act 2007 which states as follows:

1. *“No employer shall terminate the employment of an employee unfairly.*
2. *A termination of employment by an employer is unfair if the employer fails to prove:*
 - a. *that the reason for the termination is valid;*
 - b. *that the reason for the termination is a fair reason:-*
 - i. *related to the employee’s conduct, capacity or compatibility; or*
 - ii. *based on the operational requirements of the employer; and*
 - c. *that the employment was terminated in accordance with fair procedure.*

15. In the circumstances I find for Claimant and I award him as follows:

1. *1 months salary in lieu of notice = 25,000/=*
2. *Service pay for 5 years = ½ pay x 5 = 25,000 x ½ x 5 = 35,000/=*
3. *12 months salary as compensation for wrongful termination = 12 x 25,000 = 300,000/=*

TOTAL = 360,000=plus costs

The Claimant shall also be issued with a Certificate of Service.

The Respondent will meet costs of this suit.

The amount awarded will attract interest at Court rates with effect from the date of this Judgment.

Read in open Court this 16th day of December, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mwaura for the Claimant - Present

No appearance for the Respondent