



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 111 OF 2012

DARIUS Z. MNYIKACLAIMANT

VERSUS

COAST MAIL CO. LTDRESPONDENT

J U D G M E N T

BACKGROUND

The claimant brings this suit claiming accrued employment benefits plus compensation amounting to ksh.929,133/ following his wrongful and unlawful dismissal by the respondent. The respondent has denied any employment relationship between herself and the claimant. Consequently she denied the alleged wrongful and unlawful dismissal of the claimant.

She however admits the allegation by the claimant that she made a report to the police to the effect that the claimant stole ksh.200,800 belonging to respondent on 15/5/2009 when he was working as the supervisor of the respondent's booking clerks. She further contends that from 16/5/2009 the claimant absconded duty and never returned and thereby dismissing himself from employment. The case was heard on 29/10/2013 when the claimant testified as CW1 and the respondent called Mr. Bakari Said as RW1.

CLAIMANTS CASE

CW1 stated that he was employed by the respondent in 1986 as a Junior clerk and worked until 2009 when he was dismissed while at the rank of supervisor. His salary was ksh7700 per month inclusive of allowances. He explained that on 16/5/2009 he was on duty with RW1, a colleague supervisor. RW1 left work at 7pm but CW1 remained on duty until 11.00pm.

The following day RW1 called CW1 to report that there was money missing from the safe. CW1 was thereafter arrested on 24/5/2009 after surrendering to the police following a telephone call. He was released on 25/5/2009 on bond but never resumed work because the workshop manager threatened him. He was never charged in court because no statement were recorded with the police.

The key to safe was kept secretly by the CW1, RW 1 and a Mr. Ali. He denied the allegation by RW1 that he was in India on 16/5/2009 and insisted that he was on duty with Rw1 on the that said date. CW1 was never asked to record any statement with the police or the respondent. He was never given any dismissal letter nor has he been receiving his salary since May 2009. He prayed for his accrued salary, compensation for unfair termination and pay for work done during the gazetted holidays.

On cross examination by the defence counsel, CW1 confirmed that NSSF records showed that the date of employment was 1993 and his employer was the respondent. He also confirmed that in 1986 he was working for coastline safaris before the respondent was incorporated in 1993 through change of name. CW1 further confirmed that from 1986 to 1993 coastline safaris paid NSSF for him. He also confirmed that from 1993 all his NSSF contribution was remitted except for a few months. He admitted that all his salary plus house allowance were paid to him upto April 2009.

CW1 contended that on 16/5/2009 he left less than ksh.10,000 in the respondent safe as usual with all the records well kept. He denied the records produced by the defence showing that ksh.200,800 ought to have been in the safe on the 16/5/2009. He confirmed that 17/5/2009 was his official off duty but between 18th and 24th May 2009 he did not go to work after receiving threats from the Workshop Manager if he dared step at the office.

He maintained that there was a perennial deficit in the treasury which the supervisors used to cover by the daily collections. He contended that some collections for 16/5/2009 was banked with the collections for 15/5/2009 to cover the said deficit. He maintained that he was entitled to salary for May 2009, 2 months salary in lieu of notice and 11 holidays per year for 7 years at double rate. He ended by contending that he was dismissed by the respondent without an opportunity to defend himself.

DEFENCE CASE

RW1 was a supervisor for the respondent together with the claimant and Ali. Their duty was to collect money from booking clerks and keep in the safe. There were 2 clerks at night but only the 3 supervisors knew where the key to the safe was kept. He contended that on 16/5/2009 he was at home in Nairobi after returning from India while Ali was off duty.

RW1 resumed duty on 17/5/2009 when CW1 was supposed to be on duty. RW1 opened the safe and found ksh.7126 only and without any summary except expenses vouchers. RW1 then took all the daily returns and expenses from head office and Town Office and after reconciliation, he discovered that ksh.200,800 was missing. The money should have been kept in the safe. He reported the matter to Mombasa office and thereafter to the police. The CW1 absconded work until 24/5/2009 when he was arrested.

On cross examination by the claimant's counsel, he confirmed that he was equal to the CW1 in rank. He could not however prove by that he was away on treatment on 16/5/2009. He confirmed that the CW1 was possibly off duty on 17/5/2009. He also confirmed that the clerks prepared the daily returns produced as exhibit 1A and B on 17/5/2009 while the summary marked 1D was prepared by his lawyer. He confirmed further that there was no formal signing for receiving money collected from the clerks. He also confirmed that there was no formal procedure to indicate how money was removed from the safe to the bank.

He however denied telling CW1 that he would report to the police nor did he report to him that there was deficit. He also denied reporting the matter to the workshop manager. He confirmed that he never recorded any statement with the police and that no disciplinary hearing was accorded to the claimant. He also confirmed that he worked with the claimant all the years he was at the responded.

After close of the hearing both parties filed written submissions which I have carefully considered while making this judgment.

ANALYSIS AND DETERMINATION

This issues for determination arising from the pleadings, evidence and submissions revolve around the procedure of terminating the contract of employment between the parties herein and the remedy available to the infringed party. The issues can therefore be summarized as follows:

- 1. whether the termination of the claimants employment was wrongful and unfair.**

2. Whether the claimant is entitled to the relief sought.

Wrongful and unfair termination

Termination of employment is wrongful when done through breach of contractual obligation requiring service of notice. On the other hand termination is unfair when done in breach of a statutory obligation regarding the procedure of termination. The claimant's uncontested evidence is that on 17/5/2009 he was off duty. On that day, RW1 called him to report a deficit on the collection for 16/5/2009. On 18/5/2009, when he was supposed to resume, duty he received threats from the workshop manager who told him not to step into the office.

It is also uncontested evidence that on 22/4/2009 he surrendered to the police after receiving a call and no one recorded statement there nor was he asked to record one. Since 25/5/2009 when he was released on bond he was never charged in court and he was never called for any disciplinary case by the respondent a fact which was confirmed by RW1.

This court finds that the claimant was dismissed by the workshop manager when he told him never to step in the office of the respondent. The court also finds that the reason for the dismissal was the alleged theft of ksh.200,800 which was never proved to have been true or to have been committed by the claimant. The said allegation could only have been proved in a disciplinary hearing or a court of law before the dismissal was done.

Even before this court, the defence has not proved that the claimant stole the alleged ksh.200,800. The documents produced as exhibit 1A & 1B were prepared on 17/5/2009 after the alleged theft and were prepared by the same people who ought to have handed over the money to the claimant. There was no evidence to prove that the alleged ksh.200,800 was handed over to the claimant because he never signed for the receipt of the same.

Going by the above observations, the court finds that there was no valid or justifiable reason for workshop manager to dismiss the claimant summarily. Consequently the summary dismissal amounted to breach of contract because the claimant was not served with a prior notice. No contract of employment was produced to ascertain the agreed notice period and as such the court resorted to Section 35(1) which provided for a notice of one month if the interval for payment of wages to the employee is one month or more.

On the other hand it has been admitted on oath that the claimant was never accorded disciplinary hearing before the termination. The failure to accord a hearing to the claimant on the allegation of theft rendered the dismissal unlawful and unfair within the meaning of Section 41 and 45 of the Employment Act. Section 41 of the Act bars an employer from dismissing an employee before explaining to him the reason for the intended dismissal and inviting him and another employee of his choice to tender a defence. That is the equitable procedure which is contemplated by Section 45 of the Act.

In conclusion of this issue therefore, the court holds that the dismissal of the claimant from his employment without prior notice and a disciplinary hearing on the reason for the dismissal amounted to wrongful and unfair termination within the meaning of Section 45 of the Employment Act.

Remedy to the claimant

In his opening remarks, the learned counsel for the defence admitted that the claimant was entitled to salary for the 16 days worked in may 2009. In view of the finding by the court that the dismissal was wrongful, the claimant is awarded ksh.7700 being one month's salary in lieu of notice. He is also entitled to ksh.92,400 being 12 months gross salary for unfair termination as held by the court above.

The claim for salary from may 2009 to date is dismissed for lack of merit. The claim for house allowance is dismissed, the claimant admitted in evidence that he was paid all his house allowance upto April 2009.

The claim for gazetted public holidays is also dismissed for want of particulars and evidence.

DISPOSITION

For the reasons above stated judgment is entered for the claimant against the respondent for:

- a. **The payment of ksh. 104, 206.66 plus interest at courts rates from 17/5/2009 till payment in full.**
- b. **Costs and interest**

Signed dated and delivered this 28th day of February 2014

O. N. Makau

Judge