



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 334 OF 2013

ALEX M. MWAKALECLAIMANT

VERSUS

NINE ONE ONE GROUP LTDRESPONDENT

J U D G M E N T

INTRODUCTION

This is a case about unfair termination of the claimants' employment by the respondent. The claimant seeks to recover employment benefits and compensation for unfair dismissal. The defendant denied liability and accused the claimant for deserting work without notice. The defence seeks to recover one months salary in lieu of notice from the claimant's. The suit was heard on 12/2/2014 when the claimant testified as CW1 and the defence called Wahsington Abala and Caroline Wairimu kariuki as defence witnesses RW1 and RW2 respectively.

CLAIMANTS CASE

CW1 told the court that he was employed as a guard by the respondent on 8/8/2006 and worked in Nairobi, Mombasa and Voi. His service was continuous until end of April 2013 when he was dismissed. During his service he was attacked by robbers while on duty on 22/7/2012 and got injured and went to hospital. He was given 3 weeks bed rest by the hospital but the respondent converted it to leave at half pay for, 13/8/2012 to 13/9/2012.

The employer told him to pay the hospital bill and avail receipts for refund but the same was never refunded after availing of the receipts. In addition all the days he took sick off he was not paid salary. After the leave he was transferred to Mombasa. On 2/5/2013, he received a call telling him not to report to work the following day until further notice of which he complied. On 4/5/2013 he went to the office but never found the boss and returned the following day but missed him again. On 9/5/2013 he returned to the office and found the branch manager who referred him to Mr. Morris the controller. The latter told the CW1 that he has been sacked by orders from above and demanded that he returns his uniform. CW1 reported to his union which intervened and Morris promised to reinstate CW1.

CW1 waited for reinstatement in vain until 20/6/2013 when he received summary dismissal letter dated 20/5/2013. The letter was send through his home address. He reported to Kituo cha Sheria who served a demand letter. He prayed for compensation for injuries sustained while on duty and refund of medical expenses. He also prayed for his accrued leave, allowances, overtime disturbance allowance refund of un-remitted NSSF deductions, 12 months salary for unfair dismissal, ksh.550 million for

defamation and negligence, refund of welfare deductions from salary, service pay, 4 off days per months and fine for forging his signature.

On cross examination he explained that his employment contract was kept by the respondent but maintained that his NSSF statements showed that he was employed in August 2006. He however confirmed that he signed another contract on 17/9/2009. He also confirmed that his transfers were verbal.

He denied receiving ksh.1200 from the respondent for medical expenses and averred that the defence exhibit 13 was a forgery and not his signature. He contended that he was only referred to Tudor Health Centre in September 2012. CW1 insisted that he did not know why he was dismissed and denied the incidence reported on OB for the defence marked Appendix A-H as entry No. 6 for 1/5/2013.

He however admitted that RW1 passed at CW1's work station on routine checks but he did not cut short his shift. He also admitted that he never went to work on 2/5/2013 and 3/5/2013 although he was not on leave. He however maintained that he reported to the office on 4/5/2013 to enquire why he had been told not to report to work. He denied ever being served with the show cause letter dated 11/5/2013 but he admitted receiving the dismissal letter through the same address.

He also denied ever seeing the respondent's letter to the labour office reporting his injury and further denied ever seeking the forms for workman's compensation done by the respondent on his behalf.

DEFENCE CASE

RW1 is the Guard Supervisor for the respondent in Mombasa. On 1/5/2013 he went on routine check and found the CW1 asleep and while in sport shoes. When RW1 enquired why CW1 was asleep and not in complete uniform, CW1 rudely responded that only the branch manager had the mandate to ask him such a question. RW1 reported the matter to the control room then ordered CW1 to go home and report to the office the following day for disciplinary action. The control room also called him and told him to comply with the orders.

According to RW1 the CW1 never, reported to the office the following day and refused to receive all telephone calls. Apart from the said incident the claimant had exhibited rudeness towards RW1 since he reported to Mombasa. On cross examination, RW1 confirmed that the reason why he reported to the control room was because CW1 was not in his complete uniform. He further confirmed that during the incidence that led to suspension there was another guard present who gave a statement.

RW2 is the HR manager for the respondent. She contended that CW1 worked for the respondent from 2009 to 20/5/2013 when he was dismissed for absconding duty from 2/5/2013. He had no pending leave as at the time of dismissal. RW2 received an email from Mombasa branch manager saying that CW1 was indisciplined and setting bad example to the junior staff by attending duty without full uniform and was found asleep at work. RW2 denied that CW1 was entitled to refund to welfare contributions because it was not refundable. She also contended that CW1 was not entitled to any gratuity because he was a member of NSSF. She maintained that CW1 was given opportunity to be heard but declined. She denied receiving any communication from the claimants union at Mombasa. She also confirmed that CW1 refused to return his uniform after dismissal and also never paid one month salary in lieu of notice.

On cross examination, RW2 confirmed that the respondent changed name from first Force Security Services ltd to the current name. She also confirmed that there were payslips for claimants salary dating back to November 2008. She also confirmed that the show cause letter was never returned unclaimed. She further confirmed that she never reported to the union before dismissing the claimant.

She could not verify whether the leave forms and letters which she received from the branch office were genuine in respect of the signature. She clarified that after receiving email from the branch office on CW1's misconduct, she sent a show cause letter to him.

Upon close of the hearing the defence filed written submissions which have been considered

carefully alongside the pleadings and evidence.

ANALYSIS AND DETERMINATION

The issues for determination arising from the proceedings generally are:

- a. **whether the dismissal of the claimant by the respondent was unfair.**
- b. **Whether the claimant is entitled to the reliefs sought.**
- c. **Whether the respondents counter claim has merits and ought to be allowed.**

Unfair dismissal

The decision to dismiss claimant was done by RW2 following a report of misconduct made to her by the branch manager Mombasa. Before reaching the said decision she served a show cause letter to the claimant through his home address P.O. Box 200–043 Voi. The letter was written on 9/5/2013 and a response was expected by 17/5/2013. The letter was posted on 11/5/2013 at Nairobi. At the time of the said postage the claimant was resident at Mombasa. He severally reported to the branch office even on 9/5/2013 the day when the Notice to show cause was allegedly written. That allegation by the claimant was not rebutted because the defence never called the branch manger and the controller Mr. Morris to testify in this suit.

The court therefore finds that the mode of service of the show cause letter was not fair and proper in the circumstances of this case. Firstly, it was very short and secondly it was not the fastest mode of service to the claimant who was then staying at Mombasa. In addition the court finds that RW2 should have also called the claimant by his telephone to confirm that he was refusing to receive calls before sending the show cause letter through his home address at Voi.

The question that follows is whether a show cause letter alone is enough reason to dismiss an employee without affording him a disciplinary hearing under Section 41 of the employment Act. This court finds in the negative. It is unfair for an employer to dismiss an employee without affording him a hearing even if a show cause letter was served. In the opinion of this court a reply or not to a show cause letter does not disentitle an employee the protection of the law as enshrined under Section 35,41 and 45 of the Employment Act.

In the present case, the Court believes the evidence of the CW1 that he never received the show cause letter at least within time to enable him respond before 17/5/2013. Going by the uncontested evidence by the CW1, he received the dismissal letter on 20/6/2013 which was one month after the dismissal. Such mode of service was therefore unfair. The employer should have called the claimant by phone or delivered the letters physically at his residence at Mombasa. The court therefore finds and holds that the dismissal was unfair within the meaning of Section 35,41 and 45 of the Employment Act. The RW2 dismissed the claimant on the basis of an email sent to her by the branch manager Mombasa without hearing the claimant. No more enquiry was done by her to verify the allegation of desertion from work or other misconduct. She was also not aware that the claimant was attending office from 4/5/2013 until he was told by Morris to surrender his uniform because he had been sacked by orders from above. This court has severally held that employers are barred from dismissing employees on account of misconduct before according a disciplinary hearing to the employee as required by Section 41 of the Employment Act.

Reliefs

The claimant is awarded one month salary in lieu of notice being ksh.9651/-. The only evidence to support that award is the contract of employment dated May 2009 which expired in April 2010. It can only be presumed that the same contract was extended by implication because no party testified of any other contract. Even if the said contract was not extended, Section 35 would apply so as to entitle the claimant a notice of one month or salary in lieu. The notice pay is awarded because the party who terminated the contract was not the claimant but the respondent by the letter dated 20/5/2013. The

uncontested evidence by the CW1 is that he was desirous to continue working but was told to leave and return uniform. Had he been given a hearing before dismissal the notice pay would not be awarded.

The prayer for refund of NSSF contribution for 33 months is awarded being ksh.6600. It is a criminal offence for an employer to deduct the salary of a poor employee and fail to remit it. In connection with this finding the employer is ordered to pay service pay for the 33 months she defaulted to remit NSSF deductions. The period is be rounded off to 3 years calculated at 15 days salary per year totaling to ksh.14,476.50.

As regards the prayer for leave outstanding, the court has been persuaded by the evidence adduced by the CW1. The leave allegedly taken from 13/8/2012 to 13/9/2012 was not his annual leave but sick leave applied on the basis of a recommendation by the doctor. The court therefore awards to the claimant pay in lieu of leave not taken being ksh.9651/. The claim for refund of welfare is dismissed for want of particulars. The claimant may however pursue the refund from the welfare directly. The prayer for refund of medical expenses is granted less ksh.1200 advanced to the claimant by the respondent. The court awards him ksh.4400 only for medical expenses.

Lastly the claimant is awarded 6 months gross salary as compensation for unfair dismissal being ksh.57905. The reason for not granting the maximum compensation is because the unfairness of the dismissal was more on the procedure than the reason.

Counter-Claim

In view of the courts findings that the dismissal was by the respondent and that it was unfair, the counter claim is found to lack merits and it is dismissed.

DISPOSITION0

Judgment is entered for the claimant against the respondent for ksh. 102,684.50 plus costs and interest from date of filing suit.

Signed, Dated and delivered this 25th day of April 2014

O.N. Makau

Judge