



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE NO. 1591 OF 2012

ALIO OMAR HUSSEIN.....CLAIMANT

VERSUS

COLOUR PRINT LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking resolution of the dispute he framed as unfair termination of employment, salary for days worked, payment in lieu of notice and certificate of service. He sought payment of service as well as costs of the suit.

The Respondent defended the claim and the Respondent averred that the Claimant's dismissal was lawful. The Respondent annexed statements of colleagues of the Claimant and office memos relating to the service of the Claimant.

2. The Claimant testified and called Mr. Peter Kibe as his witness. The Claimant testified that he worked for the Respondent at the residence of one of the Directors Mr. Bhulan. He testified that he worked diligently and was sacked unprocedurally by one of the Directors. The Claimant testified that he did not get a house allowance and sought the payment of all his dues as well as the service for his years at the Respondent.
3. Mr. Kibe testified that the Claimant worked for the Respondent but was posted to serve at the residence of one of the Directors of the company. He confirmed the Claimant was employed by the Respondent. He was the HR Manager of the Respondent at the material time. He denied being involved in the dismissal of the Claimant from his employment. The Respondent has been advised by Mr. Kibe to issue a warning letter but instead the Claimant was fired without the knowledge of the HR Manager.
4. The Respondent denied the Claimant was unprocedurally dismissed. The 1st witness confirmed that the Claimant was employed in 1996. Mr. Vidyarthi testified that the Claimant was instructed not let any employee leave the premises without being checked. He testified the Claimant was negligent as he failed to check everyone leaving always. He stated the Claimant was given a warning letter and later a letter of termination. He testified that he saw the Claimant let the cook Solomon leave with a rucksack. Alio was sitting outside the gate. He testified the Claimant

would lose his temper when the issue was raised. It was stated the Claimant would often disappear and bring strangers in his place. He denied the dismissal was unlawful and stated the basic pay for the Claimant was 12,846/= per month.

5. In cross exam he testified that the Claimant was expected to check all staff going out and the Claimant just watched as Solomon the cook walked away. He stated the Claimant was shifted from day to night duty and this was because the Claimant was sleeping while on duty. He confronted the Claimant face to face and consequently summarily dismissed the Claimant. The Claimant was taken to the office and in presence of HR Manager and Shopsteward told that he was being dismissed. He testified that he had made up his mind that the Claimant should be dismissed and informed HR of the reasons. He did not let HR discipline the Claimant.
6. The Respondent called Adan Mohamed a watchman who worked with the Claimant and he testified the Claimant was caught napping at work and he was given warning. He complained to the boss about Alio but the Claimant wanted to beat him and called him a fool. He testified the Claimant did not do his work diligently.
7. The cook Solomon Kisanye was called and he testified on the incident where he left with a rucksack and was not checked at all by the Claimant. He stated the watchman was meant to be at the sentry box but was not. The witness testified that though he had not carried anything other than his clothes he should have been checked. The testimony was closed and parties opted to file written submission.
8. The submissions filed by the parties reiterated their positions. The dispute is one on unlawful termination of work and non-payment of dues. The Claimant testified how he was terminated and the Respondent confirmed employment and the termination. The Respondent brought evidence of warnings given and the sequence of the termination. The Respondent did not deny it did not pay the termination dues.
9. The law on termination of employees for negligence is clear. Section 44 provides that summary dismissal can ensure where 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 was his duty to have performed carefully and properly. It was contended the Claimant was careless in permitting staff to depart without checking them as required.
10. In deciding whether it was just or equitable for the employer to terminate the employment of an employee the court should consider the procedure adopted by the employer in reaching the decision to dismiss the employee, the extent to which the employer has complied with statutory requirements connected with the termination including the issuance of a certificate under section 51 of the Employment Act and following of the procedural requirements under section 41 of the Employment Act. Section 41 of the Employment Act provides that the employer shall before terminating the employee on grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understands the reasons 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. The employer shall before terminating or summarily dismissing employee on the grounds of misconduct or poor performance hear the employee and any representation the employee or his chosen representative would make.
11. The Respondent's witnesses being Mr. Vidyarthi and Mr. Munge concurred that the termination took place. Mr. Vidyarthi stated he had made up his mind and did not let Mr. Kibe of HR do anything. Mr. Munge stated it was difficult to defend the Claimant as he was not co-operative. It is clear from the narrative of the 2 witnesses that the provisions of section 41 were not followed. The Respondent's Director made up his mind and did not allow for the law to be followed. The Claimant was not given a certificate of service. Clearly the Respondent blatantly refused to follow the dictates of the law and the termination was unfair. It is true there may have been cause to

dismiss but the manner of dismissal was improper.

12. The Claimant is thus entitled to 6 months compensation for the unfair termination. The Respondent dutifully deducted NSSF dues and the Claimant did not prove non-remittance of the sums. There is also proof house allowance was paid. No evidence was led to prove payment of notice or the terminal dues. The Claimant was not properly terminated and notice is due. He is also entitled to payment of dues up to the last day of work which was 16th May.

The Claimant will therefore have in addition to the 6 months compensation the pay for 1 month in lieu of notice, the 16 days worked and the certificate of service.

- a. Ksh. 215,313 being 6 months compensation at 35,885.55 per month.
- b. Ksh. 35,885.55/= being 1 month salary in lieu of notice.
- c. Ksh. 17,942/= being for the 16 days worked.
- d. Certificate of Service
- e. Costs of the suit

Orders accordingly.

Dated and Delivered at Nairobi this 14th day of May 2014.

Nzioki wa Makau

JUDGE