



IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 397 OF 2013

JOSEPH KINOTI MARETE CLAIMANT

=VERSUS=

MAWINGO CONSTRUCTION 2010 LIMITED RESPONDENT

J U D G M E N T

I N T R O D U C T I O N

The claim herein is about wrongful and unlawful dismissal and it seeks to recover accrued employment benefits. The genesis of the dispute is the claimant's summary dismissal by the respondent on 13th September 2013.

The respondent has denied that the claimant was dismissed summarily and contended that no dues were payable to the claimant in case of dismissal on grounds of gross misconduct.

The suit was heard on 19.5.2014 and 26.5.2014 when the claimant testified as CW1 and called Thoya Katana as CW2 while Mr.Clive Patrick Erskine testified on behalf of the respondent as RW1.

CLAIMANT'S CASE

CW1 told the court that he was employed by the respondent on 19.4.2013 as the General Manager for a monthly salary of Kshs.100,000/-. He produced letter of appointment as exhibit 1. He worked until 12.9.2013 when he was dismissed verbally followed by an email.

On the fateful date workers had downed tools because of delayed salaries and the CW1 and the RW1 met them in an assembly. That during the said assembly, RW1 directed CW1 to write a dismissal letter to one of the workers but when CW1 enquired from RW1 which reason was to be cited for the dismissal, RW1 dismissed CW1 verbally in front of the other workers and took away the car keys from CW1.

The email that followed the verbal dismissal accused CW1 of poor performance of duty and lack of diligence. The email also accused CW1 of inciting workers to go on strike and also for misappropriation of company funds that led to increased expenses for the company.

CW1 prayed for refund of Kshs.20,226/- spent from his pocket as petty cash for mobilizing machinery to Kwale. He also prayed for Kshs.20,000/- refund he spent as petty cash on 11.9.2013 for mobilizing a grader from Mshomoroni to Miritini.

He prayed for Kshs.100,000/- being one month's salary in lieu of notice, Kshs.100,000/- being salary for August 2013 and Kshs40,000/- being salary for 12 days worked in September 2013. He further prayed for Kshs.30,000/- being pay in lieu of 9 days accrued leave. He also prayed for costs of the suit. He produced demand letter dated 30.9.2013 as exhibit 3.

According to him he found a weak institution but turned it around into a vibrant profit making entity with competent staff and on-going contracts.

On cross examination by the defence counsel, CW1 maintained that his salary was Kshs.100,000/- which was being paid through cheques, cash or Mpesa but there was no payslip. He further maintained that he spent his own money as petty cash to mobilize machinery and the records were with the RW1. According to CW1, the procedure was that, once he spent his money on petty cash, he used to prepare vouchers and present them to the RW1 for refund. CW1 denied that he incited workers to go on strike. He denied ever misusing company funds contending that RW1 was the only signatory to the bank account and he only gave very little amounts. He denied that he left the respondent in financial crisis and contended that RW1 was the one in charge of the Respondent's finances.

He concluded by saying that the workers went on strike claiming their delayed salary for August and he blamed the RW1 for the strike because RW1 was the one responsible for paying salaries.

CW2 worked as a welder for the respondent since October 2011 and left in February 2014. He praised CW1 for turning round the respondent by increasing staff and sourcing for business from clients. CW2 was not present when CW1 was dismissed with another colleague called Victor. He however contended that since the departure of CW1, respondent started performing poorly including delaying delivery of materials.

DEFENCE CASE

RW1 is the Managing Director for the respondent. He confirmed that CW1 was his employee as the Administrative Manager. His basic salary was Kshs.40,000/- per month plus bonuses not exceeding Kshs.60,000/-. RW1 contended that CW1 breached the contract of employment which stipulated his duties. RW1 accused CW1 of stealing company money and giving credit to clients on machines against RW1's written instructions. He also accused CW1 of hiring out machines without a written agreement for hire against the RW1's instructions and thereby caused loss to the company when clients failed to pay.

He further accused CW1 of spending Kshs.42,000/- on machinery against written instructions not to incur any expenses or spend money without express authority from RW1.

As a result of continued disobedience and misuse of company money, RW1 wrote a warning letter via email to the CW1 but he did not take heed. As a result the claimant was dismissed by email. The reason for the dismissal was gross misconduct which disqualified the claimant from claiming any dues. RW1 further contended that CW1 was not entitled to leave because he did not complete one year of service.

RW1 maintained that CW1 was paid Kshs.40,000/- as his due salary for August 2013. He explained that the dismissal letter provided for pay for 13 days but he deducted the Kshs.42,000/- which CW1 received from a client but failed to account for it. Again on 17.8.2013, CW1 received Kshs.39,500/- from RW1 and signed for it to pay casual workers and a sub contracts Kshs.10,000/- out of the said sum. He however did not pay the sub contractor his Ksh.10,000/-. He denied the claimant's claim for Kshs.20,000/- allegedly for mobilizing machinery contending that the money was used as a bribe to the traffic police against the RW1's instructions not to pay the bribe.

On cross-examination by the claimant's counsel, RW1 admitted that he dismissed CW1 without notice after sending him 2 warnings. He also admitted that he did not issue a certificate of service to CW1 after the dismissal.

He contended that the workers downed tools because the respondent did not have enough funds to pay the

salaries for one week. According to RW1 the workers were being paid weekly.

RW1 appreciated that stealing was a crime but admitted he did not report the matter to the police. He contended that by the time the theft was verified, the claimant had already been dismissed. For example Johnstone Kimanthi, a client notified RW1 on 30.9.2013 that he had already paid Kshs.42,000/- to CW1. RW1 admitted that CW1 was not a signatory to the company's bank account.

He confirmed that the said Mr. Johnstone trading as Josfirm East Africa, hired respondents machinery and paid Kshs.600,000/- on 6.9.2013 vide voucher dated 5.9.2013.

He maintained that the Kshs.20,000/- being claimed for by CW1 was a bribe not money genuinely spent on machinery at Mshomoroni. RW1 admitted that by the email dated 24.8.2013 he tabulated how money for machine hire being Kshs.2,457,500 to be paid as at 30.9.2013.

After the close of the hearing the parties filed written submissions.

ANALYSIS AND DETERMINATION

The court has considered the evidence and submissions filed and the following issues arose for determination:

- 1. Whether the summary dismissal of the claimant on 12.9.2013 was wrongful and unlawful.**
- 2. Whether the reliefs sought ought to issue.**

Wrongful and unlawful termination

Termination is wrongful when it is done in breach of term of contract regarding termination notice. It however becomes unlawful if the reason cited is not valid and fair and if the procedure followed in dismissing the employee is in breach of the law or the employers termination procedures.

In the present claim, the termination was by summary dismissal. The reason cited for it was gross misconduct and poor performance of duty. RW1 contended that the employment contract entitled him to dismiss the claimant summarily without any benefits. CW1 denied the alleged gross misconduct and poor performance. He contended that he did his best to turn round the respondent's business through strategic recruitments and soliciting business from clients. According to CW1 by the time of his dismissal the company was vibrant and not in financial crisis. CW1's evidence was corroborated by the evidence of CW2 which was not subjected to any cross examination.

On the other hand, RW1 did not produce any documentary evidence to prove the alleged financial misappropriation or theft by the claimant. He did not also prefer any criminal charges against the claimant. Indeed his testimony on oath was that he got the evidence of the theft of Kshs.42,000/- on 30.9.2013 after he had dismissed the claimant.

In addition, RW1 never produced in court written evidence that he gave CW1 Kshs.39,500/- for payment of casual workers and a subcontractor which RW1 alleged that CW1 never paid to the subcontractor. Likewise RW1 did not prove that the Kshs.20,000/- spent by CW1 to mobilize machines from Mshomoroni to Miritini was a bribe given to the police. Lastly, RW1 did not prove that indeed the claimant disobeyed him by hiring out machines to clients on credit or otherwise without RW1's authority. Consequently, the court finds that the reason cited for the dismissal was not valid although related to the claimant's capacity, conduct and the respondent's operational requirements.

As regards the procedure, the law applicable in this dispute is Section 42 of the Employment Act because CW1 was still serving his 6 months probation. The said provision of the law dis-applies provisions of Section 41 of the Act and limits the termination notice period during probation to not less than 7 days. It follows therefore that except for cases of gross misconduct under Section 44 where obviously notice need not be given, the claimant was entitled to only 7 days notice in writing before termination.

The court has perused the employment contract and noted that it provided for a notice of 24 hours during the probation period. That was unlawful clause in the contract because it breached Section 42 *supra*. Section 3, 7 and 8 of the Employment Act subjects all contracts of employment in Kenya to the provisions of the said Act and as such this is a good case for the court to interfere with the parties contract to the extent of the said illegality regarding the notice period before termination.

In conclusion of this part, the court finds on a balance of probability that the claimant's dismissal by the respondent was wrongful and unlawful for want of a valid reason under Section 43 and 45 of the Employment Act and for failure to serve a 7 days notice under Section 42 of the Act.

Reliefs

In view of the foregoing finding, the claimant is awarded salary for 7 days in lieu of notice. He is also awarded his salary for August 2013 and the 12 days worked in September 2013 because RW1 did not prove payment. He will also get 7.5 leave days earned on pro-rata basis for the 5 months served. The foregoing award shall be calculated based on a monthly salary of Kshs.40,000/- which was the agreed fixed salary exclusive of bonus.

The prayer for refund of petty cash of Kshs.20,226/- and Kshs.20,000/- respectively spent on behalf of the respondent is dismissed for lack of documentary evidence to prove the said debt. All what CW1 told the court is that the record was in the custody of the RW1. The court could have appreciated if at least copies of the said documents were produced by the claimant.

Lastly the claimant prayed for a Certificate of Service during his testimony although he did not plead it in the suit. The law provides that an employee shall be issued with a certificate in default of which the employer may be contemned to pay a fine of Kshs.100,000/- to the Government. The court awards the request for the certificate of service.

DISPOSITION

Judgment is entered for the claimant as follows:

(a)	7 days salary in lieu of notice	9333.33
(b)	Salary for August 2013	40000
(c)	Salary for 12 days worked in September 2013	16000
(d)	7.5 leave days (7.5 / 26 x 40000	<u>11538.46</u>
		<u>76,871.80</u>

The claimant will have Certificate of Service, costs and interest.

Dated Signed and delivered this 25th July 2014.

O.N. Makau

Judge

