



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 381 OF 2013

PHILIP LENTIRAGOICLAIMANT

VERSUS

LA-VARANDA RESTAURANT PIZZERIARESPONDENT

J U D G M E N T

INTRODUCTION

The claimant has sued the respondent claiming kshs.376,922 as his employment terminal dues plus compensation for wrongful dismissal by the respondent on 23/5/2013. The gist of the suit is that the claimant was prevented, by factors beyond his control from reporting back to work on the day he was scheduled to return from his annual leave. That when he finally reported back to work, the respondent dismissed him although it was his first such incidence in his 12 years of service. Lastly the claimant contends that he was not allowed to explain his absence.

In her response, the respondent has denied liability for the alleged wrongful dismissal of the claimant. She has pleaded that after the claimant absented himself for 18 days after his leave, without any communication to her, the respondent was forced to dismiss him. In addition the respondent has pleaded that the claimant had indeed secured employment elsewhere and that entitled the respondent to summarily dismiss him.

Lastly the respondent has contended that she accorded the claimant a hearing but his explanation regarding his absence did not hold water forcing her to dismiss him. The suit was heard on 13/2/2014 and 24/4/2014 when the claimant testified as CW1 and Mr. Leshmta Sagiroyi testified for the respondent as RW1.

CLAIMANT'S CASE

CW1 explained that he was employed by the respondent as a security guard on 1/1/2001 and worked well until 5/4/2013 when he proceeded on his annual leave. He was scheduled to resume duty on 5/5/2013 but due to security reasons caused by fighting in his Baragoi area, he was not able to reach Mombasa on schedule. According to him vehicles could only move under police escort. He called the respondent's accountant to explain his problem and to ask for financial assistance because the fares had gone up but the phone call was disconnected. CW1 finally reported back to work after 13 days but he was dismissed without any benefits.

On cross examination by the defence counsel, CW1 admitted that he failed to return to work on 5/5/2013 as instructed because he lacked transport caused by insecurity. CW1 contended that he called his boss on 8/5/2013 after he got stuck on his way back but he could not tell whether the accountant passed on the report about the reason for his absence from work.

CW1 confirmed that after the dismissal he reported the matter to the labour office who wrote a letter to the respondent. He explained that his home was at Baragoi in Samburu, the place where police were killed. He denied ever absconding work and maintained that he should not have been dismissed without notice after reporting his difficulties to his boss over the phone. He added that if he had transport, he would return to work as scheduled. He confirmed that the respondent paid NSSF for him.

RESPONDENT'S CASE

RW1 is the respondent's Accountant/Administrator since 2011. He confirmed that CW1 was employed by the respondent as a security guard. He alleged without proof that CW1 was employed on 1/11/2004. RW1 confirmed that CW1 went on leave and was to resume work on 6/5/2013. CW1 however never returned from leave as scheduled and made no communication to the respondent. On 14/5/2013, the respondent allegedly notified the labour office about the CW1's absence.

The claimant reappeared on 24/5/2013 ready to work but when he was called to the office to explain his absence from work, CW1 disappeared and returned on 30/5/2013 accompanied by a stranger (his spokesman). The said stranger insulted the respondent's manager forcing the manager to allegedly report the matter to the police vide OB No. 25/31/213. That when CW1 was summoned by the police to explain why he brought the abusive stranger to respondent's office, CW1 allegedly said that he was illiterate and he did not understand what the stranger said and the matter ended there.

Thereafter the respondent received a letter from the labour officer which was responded to by explaining why the CW1 was dismissed. RW1 explained that CW1 was a member of NSSF and his pay was consolidated salary.

On cross examination by the claimant, RW1 denied ever receiving a call from the claimant while CW1 was at Baragoi. According to RW1, had CW1 called him, RW1 should not have reported CW1's absence to the labour office. RW1 maintained that CW1 told the police that he did not understand the language of the strangers.

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

ANALYSIS AND DETERMINATION

The court has carefully read the pleadings and considered the evidence and the written submissions filed. The following issues arose for determination.

- a. Whether the dismissal of the claimant was wrongful and/or unfair.
- b. Whether the relief sought ought to issue.

Wrongful and/or unfair dismissal

The burden of proving that dismissal was wrongful or unfair lies with the employee while employer is burdened with justifying the ground for dismissal as per Section 47(5) of the Employment Act.

The claimant contends that the dismissal was wrongful and unfair because his absence from work was for reasons beyond his control and has reported his transport problems to the RW1. That when he finally returned to work after 13 days delay, he was dismissed summarily without being allowed to defend himself. According to him he had no warning for any wrongdoing for 12 years and as such the dismissal before a hearing and without payment or any dues was unfair.

The defence on the other hand contends that the claimant absented himself from work for 18 days and made no communication to the respondent. That when he reappeared he was accorded opportunity to defend himself but he disappeared only to return with a stranger as his spokesman who abused the respondent's manager prompting police action.

The question that arises from the above position is whether each party has discharged his/her burden under Section 47(5) *supra*. The claimant is required to prove that the reason for termination was not valid and fair and that the procedure followed to dismiss him was not fair. According to CW1, he had a good reason but he was not allowed to explain it.

The court is satisfied that the claimant has discharged his burden of proving unfair dismissal on ground of procedural unfairness. The court is convinced that the claimant was not heard before the summary dismissal for two reasons. Firstly the person who allegedly invited the claimant for hearing did not testify. RW1 merely alleged in his testimony that CW1 was called to the office to explain his absence from work but disappeared and returned with a stranger. There is no evidence adduced by the defence to prove that a fair disciplinary hearing was given to CW1 as provided for under Section 41 of the Employment Act. The said provision require in mandatory terms that before dismissing any employee for misconduct under Section 44 of the said Act, he must explain the reason for intended dismissal to the employee in a language the employee understands. That in the said hearing, the employee has a right to be accompanied by a fellow employee of his choice and the two must make their representations before a final decision is made by the employer. It is no doubt that the claimant is illiterate and had a lot of difficulties expressing himself in kiswahili while giving his testimony before the court. No evidence was given by defence to show how, if at a disciplinary hearing was accorded to the claimant under Section 41 of the Act, she addressed the language barrier for the claimant.

The second reason why the court believes that no hearing was accorded before dismissal is the wording of paragraph 6 and 9 of the defence. Paragraph 6 states that after claimant absented himself from work for 18 days without an explanation or a phone call to explain for his absence, the respondent was forced to relieve him (claimant) from his duties. Paragraph 9 on the other hand stated that the claimant had obtained another work elsewhere and that action warranted summary dismissal.

From the foregoing pleadings, the claimant was dismissed without hearing even before he returned to work on 23/5/2013. Such dismissal was unfair procedurally for breaching Section 41 and 45 of the Employment Act. Consequently the court finds that the claimant's dismissal was unfair within the meaning of Section 45 of the Employment Act.

Reliefs

Under Section 49 of the said Act entitles the claimant to one month salary in lieu of notice and upto 12 months gross salary for unfair compensation all totaling to ksh.130,000/-. The prayer for severance pay is however dismissed because the claimant was not declared redundant. Even if the claimant, who was not represented by counsel, meant to claim service pay, the same would not issue because the claimant was a contributor of NSSF. Likewise the prayer for gratuity is dismissed for want of legal basis and evidence.

Finally the prayer for housing allowance is dismissed because the salary for the claimant was a consolidated pay according to the payslips produced by the claimant.

DISPOSITION

For all the reasons stated above, judgment is entered for the claimant for ksh.130,000 plus costs and interest. The respondent shall also give claimant a certificate of service.

Signed, Dated and delivered this 25th July 2014

O.N. Makau

Judge