



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 37 OF 2014

BAKARI ABDALLA NJAMACLAIMANT

VERSUS

DIPAN SHAH T/A RAISONS TRADING CO. LTDRESPONDENT

J U D G M E N T

INTRODUCTION

The claimant brings this suit claiming accrued employment benefits of Kshs.771,240/ plus damages for unfair termination of his employment by the respondent. The respondent has denied liability and contended that the claimant was dismissed for his material breach of the employment contract by stealing company money and failing to follow employment instructions.

The suit was heard on 25/5/2014, 5/6/2014 and 3/7/2014 when the claimant testified as CW1 and the respondent called Khalid Ahmed Malik as RW1.

CLAIMANT CASE

CW1 was engaged by the respondent on 20/2/2004 as a driver earning ksh.s 6000 per month. The said salary was later increased to ksh.15000. His duties as a driver started at 8.00 am and ended 9.00pm and it involved transporting goods to customers outlets. On 11.1.2012, his loader collected money from customers and instead of putting it in the safe in the truck, the loader pocketed the money and later disappeared. CW1 did not notice the theft until evening when he returned to the office where the safe key was kept, when he found no money in the safe after opening as usual.

CW1 reported the matter to his boss after realizing that the loader switched off his phone. CW1 and his bosses went to the loaders house at mshomoroni and found that his house as broken into and his belongings removed. The boss took CW1 and the second loader to Nyali police station where they recorded statements and locked until the following day when they were charged in court with stealing by servant. CW1 was released on a bail of ksh.80000 after one day of being charged. He never reported back to work until he was acquitted from the charges by the court. When CW1 returned to work, RW1 allegedly instructed security guards that he was not willing to see the claimant. CW1 denied ever being served with the summary dismissal letter dated 15/1/2012.

CW1 contended that he was never invited to any disciplinary hearing before dismissal from work. He

prayed for compensation for unfair termination plus salary and service pay for the period he was being prosecuted in the criminal case. He also prayed for pay in lieu of leave, accrual for last year of service.

On cross examination by counsel for the respondent, CW1 confirmed that his appointment letter allowed the employer to regulate the working hours. He also admitted that his salary was a consolidated pay. CW1 maintained that his duty was only to drive the truck to deliver goods and it did not involve loading, offloading or handling of money or cheques. He maintained that he signed only for the goods loaded on his truck but not to receive any payment. He however admitted signing cash/cheque collection voucher dated 5/1/2012 but denied knowledge of the source of the said document. He maintained that it is the loader who carried the invoices to effect deliveries to the customer.

CW1 confirmed that there was a safe at the body of the truck behind the cabin where the loaders put the money. He admitted that previously there was a short in the sales and money was deducted from his salary. The debt was about ksh.20000 of which he was being deducted between ksh.5000 and 3000 per month. He confirmed from the payslips for October and November 2011 that his salary was ksh.16000. He also confirmed that after his released on bail he never went back to work but stayed away until he was acquitted 20 months later. He maintained that he was a stranger to the dismissal letter dated 15/1/2012.

On re-examination he denied ever taking any loan from the respondent. According to CW1 he was on duty with 2 loaders when goods worth ksh.30000 was lost and as such each should only be held liable to pay ksh.10000. Of the ksh.10000 CW1 contended that he paid ksh.9000 through salary deductions for 3 months.

RESPONDENT'S CASE

RW1 is the General Manger for the respondent. He confirmed that CW1 was employed by the respondent by letter dated 1-2-2004. His basic salary was ksh.13600 plus house allowance of ksh.2400 subject to statutory deductions including NSSF, NHIF and PAYE. RW1 confirmed by records produced that all the statutory deductions were remitted to the relevant authorities including NSSF. RW1 told the court that on 10/1/2012 at 12noon, he received report from Mr. Patel, a cashier at Nyalı office, to the effect that CW1 had reported to him that CW1 had given ksh.437,527 to his loader to put in the truck safe but instead disappeared with the money.

When RW1 asked the CW1, the latter told him that the driver is supposed to deposit the money in the truck safe. RW1 confirmed that the safe key is kept in the office. According to RW1, the stolen money was ksh.150,000, Ksh.255,277 and Ksh.32,250 collected from Sharin Stores, Newsave way and Sharin stores respectively.

RW1 contended that CW1 was the person responsible for handling of the lost money. He also contended that CW1 had previously lost between ksh.70000 and 80,000 which was being recovered from his salary at the rate of between ksh.3000 and 4000 per month. According to RW1, CW1 had an outstanding balance of ksh.28829 as at the time of his dismissal. RW1 explained that after taking CW1 to police, a summary dismissal letter was done but CW1 never came for the letter dated 15/1/2012. RW1 admitted that CW1 was acquitted of the offence charged.

RW1 contended that CW1 had been paid all his leave allowances as at the time of his dismissal. According to RW1, the dismissal for misconduct did not require notice. He further contended that CW1 was not entitled to any salary or benefits for the period of 20 months he was being prosecuted because he did not attend work. RW1 denied ever chasing CW1 away after his acquittal and maintained that it is the claimant who declined an invitation by the Directors of the respondent to discuss settlement.

On cross examination by the claimant's counsel, RW1 admitted that he recorded a statement which was filed with the defence herein. He confirmed that CW1 had assistants (loaders) in the truck. RW1 confirmed that the appointment letter gave CW1 the duty to drive but not to keep or handle money. He also clarified that the alleged loan balance contained in exhibit d.6 was short in sales which was being treated as loan for accounting purposes.

RW1 denied ever reporting the theft to the police. RW1 confirmed that he did not have any evidence to prove that CW1 admitted to pay the lost money. RW1 contended that CW1 was arrested on 10/1/2012 but denied knowledge that Section 44 barred dismissal unless the employee was imprisoned for more than 14 days. RW1 contended that CW1 was heard on the day he lost money before reporting him to the police but RW1 could not produce any minutes of the hearing.

On re-examination RW1 stated that the employment letter entitled the employer to determine the duties for the claimant. He maintained that CW1 was heard before dismissal whereby he was reminded of the various verbal warnings about lost money. He maintained that CW1 was dismissed for gross misconduct and failure to perform duty as per his employment contract.

After the hearing, both parties filed written submission the quality of which was abit surprising.

ANALYSIS AND DETERMINATION

The court has perused the pleadings and considered the evidence and the submissions and framed the following issues for determination:

- 1. Whether the dismissal of the claimant by respondent was unfair.**
- 2. Whether the claimant is entitled to the reliefs sought.**

Unfair termination

Under Section 45 of the Employment Act, termination of employment is deemed unfair unless the employer proves that the reason for dismissal was valid and fair and that the decision to terminate was reached after a fair procedure. The procedure is fair if it complies with Section 41 of the Employment Act which require that before dismissing an employee for misconduct or poor performance of duty, a disciplinary hearing must be accorded to him in the company of a fellow employee of his choice and in a language they both understood. The reason for dismissal is fair if it relates to the employees conduct, capacity or capability, and the employer's operational requirements. The reason is valid if it existed at the time of the decision to dismiss and if it relates to the employees lawful cause of duty.

In the present case, the employee contends that the dismissal was unfair because it was done without prior warning or notice and no disciplinary hearing was accorded to him under Section 41 *supra*, before the decision to dismiss him was reached. In addition CW1 contends that handling of sales money was not within the scope of his employment as a driver. He further contends that the money in issue was stolen by a loader and not him and that indeed CW1 was acquitted of the charges of stealing by servant. Lastly CW1 contends that he was never served with the letter for summary dismissal dated 15/1/2012.

On the other hand the respondent believes that the dismissal was lawful because the claimant had indeed stolen over ksh.400,000 being sales collections from two customers. In addition she blames the claimant for failing to comply with company policy and instructions regarding handling money collected from sales.

The court has made a few observations from the foregoing contest. Firstly, the claimant failed to return to work immediately after being released on bail pending trial and only returned after acquittal 20 months down the line.

Secondly, the respondent secretly dismissed the claimant on 15/1/2012 and failed to serve the dismissal letter, pay his terminal dues and issue him with certificate of service. Thirdly, the dismissal was done without according the claimant a hearing as prescribed by Section 41 of the Employment Act, *supra* and before the outcome of the criminal charges which was the basis of the summary dismissal. Lastly, the respondent failed to demonstrate through the employment contract that it was the claimant, and not the loader, who was responsible for handling sales money.

Flowing from the foregoing observations, it is obvious that both parties to this suit unilaterally and

separately decided to terminate the contract without notice to the other or without complying with Section 45 of the Employment Act. The claimant on the other hand, voluntarily deserted work from 14/1/2012 when he was released on bail. On the other hand the respondent dismissed the claimant on 15/1/2012 without according him a chance to defend himself. It would therefore appear that the relationship between the two parties irretrievably broke down leading to mutual mistrust and bitterness to the extent that both parties were unanimous that their contract could no longer be performed.

As a consequence of the foregoing view, the court finds on a balance of probability that both parties to the contract were liable for its termination. They voluntarily opted out of the contract after it became impossible to continue performing the contract due to the dispute regarding over ksh. 400,000 for sales allegedly collected by the claimant's assistant (loader) and disappeared. The termination was therefore not unfair.

Reliefs

The prayer for salary for the 11 days worked in January 2012 is awarded being ksh.16000X11/26=ksh.6769.20. The prayer for salary in lieu of notice is dismissed in view of the earlier finding that both parties are to blame for the termination of the contract. Likewise the prayer for salary for the period between January 2012 and October 2013, and the unremitted NSSF and NHIF for the same period when the claimant was being prosecuted is dismissed for lack of basis and merit.

The prayer for leave is dismissed save for the last year of the claimant's service according to his evidence under oath. The respondent did not prove by leave records that Cw1 went for his annual leave during 2011/2012. He is therefore awarded 21 days leave which is equivalent to ksh.16000x21/26=12,923.10.

The prayer for gratuity, overtime, leave allowance and house allowance is dismissed for lack of merits. The reason for the foregoing being that the contract of employment did not provide for gratuity and leave allowance and as such, such prayers lack basis. The claimant did not provide particulars of the overtime worked and the special damages sought for the overtime were never pleaded. The claimant admitted on oath that the salary paid to him was consolidated. The prayer for certificate of service is however granted because it is provided for in mandatory terms under Section 51 of the Employment Act.

DISPOSITION

For the above stated reasons, judgment is entered for the claimant against the respondent for ksh.19,692.30 plus costs and interest. The claimant will also have certificate of service.

Orders accordingly.

Dated, Signed and delivered this 29th August 2014

O. N. Makau

Judge