



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 258 OF 2013

SYLVESTER MUSYOKA MULOKE.....1ST CLAIMANT

ALEXANDER NGOVI MUNYOKI.....2ND CLAIMANT

VERSUS

ROTO MOUNDERS LIMITED.....RESPONDENT

JUDGEMENT

1.The claimants, Sylvester Musyoka Mulokwe and Alexander Ngovi Munyoki are both adults who were employees of the respondents, Roto Moulders Limited, a company incorporated in Kenya. On 26th February 2013, both claimants filed their claim against the respondent for unfair termination and non-payment of terminal dues. On 16th April 2013, the respondent filed their defence admitting that the claimant were their employees but they both absconded duty and failed to inform the employer of their whereabouts and therefore there is no claim against them. Both the claimants testified in support of their case while the respondent called Dominic Nyoro Kahura and Jeremiah Nyaga Murithi as their witnesses. At the close of the hearing both parties filed their written submissions dated 9th and 16th September for the claimants and respondent respectively.

Claimant's case

2. The 1st claimants were employed by the respondent in September 2006 as a Loader and the 2nd claimant was employed in July 2007 as a General Labourer. On 3rd October 2012, while at work the claimants were loading plastic tanks onto a motor vehicle when Mr Santosh summoned them and told them to go home pending investigations on ground that they had been suspected of stealing the respondent's plastic tanks. On 13th October 2012, the claimants, upon failing to hear from their employer decided to go back and check and Mr Sunil directed the 1st claimant to accompany him to Industrial Area Police station where he was arrested and detained for three days without being charged. Upon release on 17th October 2012, both claimants went back to the respondents premises where the Human Resource Officer advised them that they had been dismissed. No reasons or notice was issued for the dismissal and due process was not followed. The respondents also failed to pay their terminal dues which are outlined as;

1st claimant

a. One month's salary in lieu of notice at kshs.9.782.00

- b. Payment for untaken and unpaid leave for three years at Kshs.29, 346.00
- c. Damages for wrongful termination at 12 months all being Kshs.117, 384.00
- d. Damages for loss of employment at 12 months all being Kshs.117, 384

Total dues is kshs.273, 896.00

The 2nd claimant

- a. One month's salary in lieu of notice at kshs.9.782.00
- b. Payment for untaken and unpaid leave for two years at Kshs.19, 564.00
- c. Damages for wrongful termination at 12 months all being Kshs.117, 384.00
- d. Damages for loss of employment at 12 months all being Kshs.117, 384

Total dues is kshs.264, 114.00

3. In evidence the 1st claimant testified that in September 2006 he was employed as a Loader/Turn Boy by the respondent with duties to load tanks on Lorries and taking them to different customers. On 3rd October 2012 while at work he was asked to help a colleague to load a tank by putting it up the lorry as it was heavy. He was called by Security control officer Zaddock and together with the 2nd claimant was told to go home as he had stolen a tank. By 10th his salary had not been paid as this was supposed to be deposited at his bank and therefore decided to go back to the respondent for it but was instead arrested and taken to industrial Police Station where he spend 3 days without any charges. Upon release he went back to the respondent and the human resource office gave him a letter of summary dismissal. He went to the labour officer and when the respondent was called they only paid for days worked and nothing else. While in employment, all NSSF and NHIF dues were remitted. That no due process was followed before the summary dismissal and is thus seeking notice pay, 3 years unpaid leave from 2006 and compensation as he has been unable to get a new job and has a family to support. He was called a thief yet he had not stolen anything. He was arrested but was not charged.

4. In cross-examination the claimant stated that he never stole a tank belonging to the respondent and was never summoned to a hearing on the issue of a stolen tank. There is security at the respondent premises and nothing was stolen. No pay slip was issued to show leave due was paid.

5. The 2nd claimant testified that he was employed in July 2007 as a Loader and general duties. On 3rd October 2012 while at work he was told by Zaddock to go home together with the 1st claimant on the grounds that he had stolen a tank. When the 1st respondent went back, he was arrested. The human resource officer issued summary dismissal letters which he took to the labour officer and when the respondent came, he only paid for days worked. That he wants the respondent be directed to pay for stopping him from working without a good reason and spoiling his name by calling him a thief.

Respondent's case

6. The respondent stated that they had employed the claimants but the 1st claimants was employed in August 2008 while the 2nd claimants was employed in September 2009 and are thus not entitled to the claims as outlined. The claimants breached their contractual obligations by absconding duty for a period of 7 days without leave having been suspected of being involved in stealing three 250 litres tanks belonging to the respondent. The claimants then left for home fearing arrest. The summary dismissal was due to gross misconduct of absconding work for over 7 days which was in breach of their contracts. All dues were paid at the labour office and nothing is outstanding.

7. In evidence, Dominic Nyoro Kahura testified that he is a Supervisor and Factory Manager with the respondent. On 3rd October 2012 the security office alerted him and told him that he had observed the loaders loading extra tanks while loading other purchased tanks. He went to where the lorry was and found a 1000 litre tank inserted with 250 litres tank. One tank being bigger than the other could accommodate the smaller tank. One tank was for sale and when loading the sold big tank, the claimants rolled the stolen one hidden inside the big tank. He confirmed the case and went to check on the records and security officer and instructed them not to let the lorry leave the premises. The claimants were called but they left without a word. He informed the human resource officer but the claimants had run away.

8. Upon cross-examination, the witness stated that he has worked with the respondent for long since 1990 and is conversant with all procedures at the factory. When the claimants were observed stealing, he was called and confirmed. He found the tanks stolen hidden inside the bigger tanks. The design of packing the tanks was for purposes of stealing. There was intention to steal and the human resource office had to deal with the case. The claimants run away but he had already witnessed the theft but when the tanks were being packed by the claimants he did not observe it as he was only called by the security and dispatch officers.

9. The second witness, Jeremiah Nyaga Murithi testified that he is the human resource manager of the respondent and recalls on 3rd October 2012 the claimants were summarily dismissed for absconding duty. There were allegations that they were involved in theft and this was reported to the police. When he checked the attendance record he found that they had absconded. They had signed in on this last day but did not sign out. There were summonses by the labour officer where he attended and deposited the terminal dues of the claimants. There was theft that was reported to the police and the person who witnessed it did a statement with the police. There was no hearing as the claimants were not at work for them to get a hearing. Nothing is outstanding unpaid.

Extermination of the issues

10. Section 73 and 74 of the employment Act make it mandatory for an employer to keep an employee's records even after such an employee has been terminated. In a case contested like this one, documentary evidence in support is crucial. The claimants state that they were employed in September 2006 and July 2007 whereas the respondent admitted that they employed the claimants from August 2008 and 2009 for the 1st and 2nd claimants respectively. However, no written contract of pay schedules or slips were attached in defence to confirm these averments. In the absence of the employer producing these record which the employer is supposed to keep, this will be applied for the benefit of the claimants and the date of employment is as both had stated, September 2006 and July 2007 for the 1st and 2nd claimants in that order.

11. Section 44 of the employment Act, outline matters that may result into summary dismissal. Absconding duty is one such matter as set out under section 44(4) (a);

4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

(a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

12. Did the claimants then abscond duty? On 19th October 2012, the respondent wrote two notices to the claimants, both for summary dismissal. The summary dismissal arose from what the respondent noted to be;

...this decision has been arrived at after you fundamentally breached your contractual obligations by absconding duty from 3rd October 2012 to date on suspicion that management could have known the truth about your alleged involvement in stealing three 250 litre tanks

We belief [believe] that because of your own guilt and having realised that your intentions had been known you willingly without permission fled away from the company

...

13. Therefore the circumstances of the claimants' absence from work relate to what is stated as *suspicion by management in alleged stealing of 250 litres tanks*. Indeed the 1st claimant was on 10th October arrested. Was he convicted to having stolen 250 litres tank? What about the 2nd claimant and what became of his suspicion of having stolen? These are matters that cut across the reason for what is stated as absconding duty. This allegation has been denied by the claimants. I take it then the absence of the claimants did not rise from nothing and the return of the 1st claimant to the respondent premises on 10th October 2012 was not out of nothing.

14. In evidence, the claimants stated that while at work they were called by Zaddock and told that they had stolen tanks. They were told to go home and when their salaries were not paid, the 1st claimants decided to go back and check. The 1st defence witness gave evidence that he was at work when security and dispatch officers alerted him that the claimants had stolen tanks. He went and confirmed that indeed they had stolen tanks. This confirmation was due to the fact that the tanks were packed inside others with intention to conceal the small ones. But where did the claimants steal these tanks from and what is stealing?

15. Stealing is a serious criminal act that has serious consequences as once convicted, there is a heavy sanction. Stealing or theft is specifically defined in law section 268 Penal Code thus;

268 – Defining Stealing

A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

*(e in the case of money, an intent to use it at the will of the person who takes or converts it,
) although he may intend afterwards to repay the amount to the owner;*

16. Did the claimants do as outlined above? If they did, were they charge and or arrested and where they were are they convicted thieves? I find no such evidence.

17. Even where such evidence is lacking, the Employment Act has gone beyond the Penal Code definitions and at section 44(4) (g) provides;

(g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

18. Therefore, in labour relations where there are sufficient grounds to suspect an employee of having committed a criminal offence against the employee which could lead to substantial loss of property, this may result in summary dismissal. But there is a rider, that even in such serious cases that warrant summary dismissal, the provisions of section 41 with regard to such an employee being heard and due process being followed must be adhered to.

19. From the evidence it is apparent that when defence witness one was called to witness what the claimants are said to have been stealing, there must have been a commotion as stealing is a serious offence. It is however not said how or from where the claimants were able to remove the property of the respondents from their ownership for purposes of stealing. The fact is an employee who is suspected of stealing is an unwelcome person at the work place. These are people who should have been detained once the security and dispatch officers as well as the first defence witness confirmed that indeed the claimants had stolen or were in the process of stealing property belonging to the respondents. But they were left to walk away by the security placed at the respondent premises. Otherwise there was no purpose of such security.

20. The law required the respondent to do more than just the claimants walk away. Take them through the process as set out under section 41 of the Employment Act even in a serious case as this one that warranted summary dismissal. There is no evidence that such a process was undertaken. The criminal allegations against the claimants were never pursued to confirm that indeed they had packed properties of the respondent with the intention of stealing. Such intent is not demonstrated. It is not enough to just state that they were seen with tanks inside other tanks. The procedure used to dismiss the claimants did not follow due process and therefore became unfair.

Remedies

21. The claimants admit that they received some payments from the labour officer. The paid dues relate to salary for September leave and overtime. Dismissal was on 19th October 2012; these days were never paid for and will be awarded.

22. On the finding that there was no due process before dismissal, notice pay arise. This will be paid for one month's amounting to kshs.9783.00 for each claimant.

23. Leave as due even where one is dismissed is a right that an employee has. In the final dues the claimants collected from the labour officer, leave was computed. This the claimants failed to outline with regard to the total number of days outlined leaving a gap as to how much is owing. This was the duty of the claimant to address and in the circumstance; this will not be granted as it will lead to ambiguity.

24. The claimants are also seeking damages for loss of employment. This was however not outlined as against the claim for unfair termination. Where such a claim is pleaded, specific evidence in this regard must be outlined. This will not be granted. On the finding that there was unprocedural unfairness in the dismissal of the claimants, the court will award three (3) months' pay to each claimant as compensation. This will be Kshs.9783 for 3 months being kshs.29, 349.00 for each claimant.

Judgement is hereby entered for the claimants as against the respondent in the following terms;

- a. A declaration that the summary dismissal was procedurally unfair;**
- b. An award of kshs.58,698.00 for both claimants;**
- c. Notice pay of kshs.19,566.00 for both claimants; and**
- d. Each party will bear their own costs.**

Delivered in open court at Nairobi this 24th Day of September 2014

M. Mbaru

Judge

In the presence of:

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