



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 272 OF 2014

GODFREY NJUNECLAIMANT

VERSUS

EAST AFRICAN COURIER LTDRESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant has brought this suit claiming ksh.919,314 being employment benefits plus compensation for unfair dismissal from employment by the respondent on 25/3/2014. The reason cited for the dismissal was losing clients phones of which the claimant averred that it was false and that he was denied an opportunity to defend himself.
2. The respondent has denied liability for the damages sought and averred that the claimant was dismissed for negligently losing 40 pieces of Sumsung mobile phones and after being given an opportunity to explain the loss. In addition the respondent avers that the claimant worked between 1/7/2012 to 25/3/2014 and that he was instructed to go for his terminal dues from the head office.
3. The case was heard on 18//9/2014 when the claimant testified as CW1 but the defence did not attend court to defend the suit although the date had been fixed by consent in the open court on 16/7/2014.

CLAIMANT'S CASE

4. CW1 told the court he was employed by the respondent on 1/1/2011 as a Sales Executive for a gross salary of ksh.25000 per month. He produced appointment letter dated 7/2/2011 and a confirmation letter dated 11/6/2012 (Exh 1 a & b respectively). On 1/7/2012 he became Station/Branch Manager with a gross salary of Ksh.35000.
5. On 25/3/2014 he was served with a dismissal letter (ex.2) by the respondent. The reason cited for the dismissal was loss of Samsung Phones while in his custody. CW1 dismissed the allegation as false. According to him the alleged phones were contained in 14 sealed cartons whose contention was undeclared. The CW1 explained that he delivered the said (4 cartons) while sealed to one Diana Kirathi, an employee of Samsung when she went to claim at the respondents' office on 24/1/2014. He produced Courier Delivery Record for the said delivery as Exh.3.
6. The allegation of loss of phone arose in March 2014 after CW1 discovered that all NHIF,

NSSF and PAYE deducted from his salary were not being remitted to the relevant Agencies and lodged a complaint with the respondents Chief Accountant who referred CW1 to the PA of the Director. He produced NHIF and NSSF statements as Exh.4(a) and (b) respectively. According to CW1, the allegation of lost phone and his subsequent dismissal was as a result of his pursuit for the unremitted NSSF, NHIF and PAYE after deductions from his salary.

7. CW1 contended that his dismissal was unfair because he was not given an opportunity to defend himself. According to him he was only served with a dismissal letter by an officer from Head Officer Nairobi.

8. CW1 prayed for ksh.28554 being reimbursed personal money spend as petty cash in the office with the authority from the respondent. He produce a schedule of the petty cash returning and supporting vouchers as Exh.5. He prayed for ksh.420000 being 12 months salary as compensation for the unfair dismissal at the rate of ksh.35000 per month. He further prayed for ksh.10500 being 3 years leave at the rate of one month per year. He also prayed for Ksh.35000 being one month salary in lieu of notice. He further prayed for ksh.190760 being refund of the unremitted PAYE at the rate of ksh.5000 for the 38 months served. He also prayed for severance pay for 3 years served being ksh.105000. He finally prayed for certificate of service.

ANALYSIS AND DETERMINATION

9. It is not in dispute that CW1 was employed by the respondent from 1/1/2011 and worked continuously until 25/3/2014 when he was summarily dismissed by the respondent. It is the claimants uncontested evidence that the alleged wrong doing was false and that he was dismissed before being accorded any opportunity to defend himself.

10. The issues for determination is whether summary dismissal of the claimant amounted to unfair termination. Secondly the court is being called upon to determine whether the reliefs sought should issue.

Unfair termination

11. There is no doubt that CW1 has discharged his burden under Section 47 of the Employment Act when he gave uncontested evidence to the effect that he was dismissed on ground of false allegations and before being accorded a chance to defend himself as required under Section 41 of the said Act. On the other hand the respondent failed to discharge his burden of proving that she dismissed the claimant on account of a valid and fair reason and after following a fair procedure as required under Section 45 of the said Act.

12. Under Section 43 of the Act, the burden of proving the reason for the dismissal is placed upon the employer in a case like this one where the employee challenges his dismissal. The procedure for dismissing an employer for misconduct is provided in mandatory terms under Section 41 of the said Act. It involves a mandatory oral hearing of the employee, in the company of another employee of choice and the proceedings to be in a language they understand. In this case that procedure was not followed. Consequently, the court finds on a balance of probability that the dismissal of the claimant from employment by the respondent on 25/3/2014 was unfair both procedurally and substantively.

Reliefs awarded

13. Under Section 49 of the Employment Act an unfairly dismissed employee is entitled to salary in lieu of notice, accrued employment benefits plus compensation for unfair termination. The claimant is therefore awarded ksh.35000 being one month salary in lieu of notice, ksh.29166.70 being salary for 25 days worked in March 2014, ksh.73500 being pay in lieu of 63 leave days outstanding and ksh.52500 being service pay for the 3 years served without any NSSF remittances. The claim for reimbursement of ksh.28554 used as petty cash is dismissed for lack of

evidence of the authority to spend personal money and of the promise to repay from the employer. There is also no evidence that the money spent belonged to CW1. Similarly the prayer for refund of the unremitted PAYE of ksh.190760 is dismissed for lack of evidence that the tax was deducted and never remitted. The claimant should have at least produced some evidence from KRA to support his allegation as he did in respect of NSSF.

14. As regards the prayer for compensation for unfair dismissal, the court is aware from evidence that CW1 was dismissed in March 2014. That is less than 12 months from the date of dismissal. Possibly with due diligence, he can get another job before the end of 12 months after his dismissal. The court therefore awards him ksh.280000 being gross salary for 8 months. In so awarding, the court has considered the fact that the dismissal was unfair both substantially and procedurally. The court has also considered the rank of the claimant and the monthly salary he was earning and reached a considered opinion that the claimant could not get an alternative employment in less than the period awarded.

15. Lastly the court awards the prayer for a certificate of service.

DISPOSITION

For the reasons and findings stated above judgment is entered for the claimant for the sum of Ksh.470,166.70 plus costs and interest. The respondent will also issue the claimant with a certificate of service.

Orders accordingly.

Dated signed and delivered this 31st October 2014

O. N. Makau

Judge