



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NYERI
CAUSE NUMBER 1512 OF 2012

BETWEEN

WILSON MUDOGO MULIMA.....CLAIMANT

VERSUS

AGS WORLDWIDE MOVERS (K) LIMITEDRESPONDENT

JUDGMENT

1. The dispute between the claimant and the Respondent concerns the manner of termination of the Claimants' services by the Respondent.
2. According to the claimant his services were terminated on 2nd April, 2012 through summary dismissal. He disputes the summary dismissal on the ground that he was not given adequate information as to the reasons for his dismissal and that the decision to dismiss him was arrived at without proper investigation.
3. The Respondent on its part denied dismissing the Claimant. It avers that the claimant absconded duty from 2nd April, 2012 without any reason. According to the Respondent there were ongoing investigations over discrepancies on stock entries and use of fraudulent delivery notes in the departments which the Claimant had responsibility over. The Respondent therefore denies responsibility to compensate the Claimant for wrongful dismissal.
4. At the trial the Claimant testified that he was hired as a warehouse assistant at a monthly salary of Kshs.31,415. It was his evidence that on 2nd April, 2012 while on duty his manager a Mr. Gill asked him to leave work as his services were no longer needed. He was thereafter issued with a letter dated 9th April, 2012 accusing him of not reporting to work. He responded to the letter denying he had refused to report back to work.
5. The Claimant in his testimony denied any responsibility for the discrepancies in the stock entries. He admitted being arrested over the matter but no charges were preferred against him. He further testified that prior to dismissal he was never given a chance to explain himself or go through the questioned invoices.
6. The Respondent on his part called Mr. Gill Recizac as its witness. He denied meeting the Claimant on 2nd April, 2012. According to him the last meeting they had was on 28th February, 2012 over the discrepancies in stock entries. It was his evidence that after the discussions o 28th February, 2012 the Claimant never came to work.

7. According to him he sent several text messages to the Claimant asking his whereabouts but never got any response. It was his evidence that during the investigations they came across some invoices that were signed by the Claimant that did not match with the physical stock.
8. In cross-examination he clarified that the meeting with the Claimant was on 28th March, 2012 and not 28th February, 2012. He further stated that the date for his letter ought to have been 9th May, 2012 and not 9th April 2012 as indicated on the face of the letter.
9. In their closing submissions, Mr. Uvyo for the Claimant submitted that DW1 was not a trustworthy witness since he contradicted himself in material aspect. According to counsel the witness kept changing his testimony on when the Claimant left work and when he got terminated. Counsel further submitted that the Respondent did not explain to the Claimant the reason for his termination nor was he allowed to have another employee or a union representative of his choice present before he was dismissed. Counsel therefore submitted that the Claimants' termination was unfair since no opportunity was accorded him to defend and or explain accusations against him.
10. The Respondent on its part submitted that the Claimant was not terminated but rather absconded duty. According to counsel the Claimant cannot possibly have been orally terminated yet he admits picking the letter dated 9th April 2012 and responded to the same via his letter dated 10th May, 2012. According to counsel, there was no reason for the Respondent to seek explanation from the Claimant on 10th May, 2012 if he had been dismissed earlier as claimed.
11. The question for this Court to resolve in the instant dispute is whether the Claimant's services were terminated and unfairly or whether he absconded duty.
12. According to the Claimant, his services were orally terminated on 2nd April, 2012 for reasons he deemed were unjustifiable and unfair. He also complained that the process of his termination was unfair.
13. The Respondent on its part wrote to the Claimant on the 28th of March 2012 informing him of the detection of discrepancies in physical stock and delivery notes. The letter further informed him that it was the first stage in the investigation and asked the Claimant to furnish any information he may have had on the matter and further advised that such information would be in his favour.
14. On 9th April, 2012 the Respondent wrote to the Claimant complaining that since 2nd of April, 2012 the Claimant had not reported to work despite numerous requests to do so. The letter further warned, the Claimant that his continued absence could justify summary dismissal. The Claimants responded to this letter on 10th May, 2012 stating that he did not agree with the accusation that he had been asked to go back to work but refused.
15. The foregoing positions were echoed in the letter of demand before action issued by the Claimant's counsel and the response thereto by the Respondent's counsel.
16. Whereas an issue was raised on the exact date when the letter dated 9th April, 2012 was actually written, that is to say whether it was written on 9th April, or 9th May, the issue that is clear is that on 2nd April, 2012 the Claimant was not at work whether as a result of the verbal dismissal or unauthorized absenteeism.
17. The Claimant claims he was verbally dismissed by the Respondent on 2nd April 2012 yet when he received the letter dated 9th April, 2012 all he did was to write a note saying he disagreed with the accusation that he refused to return to work despite being asked to do so.

18. It is difficult to understand and appreciate why if the Claimant had been verbally dismissed as he claimed on 2nd April, 2012, the Respondent would seek his whereabouts on the 9th April, 2012. Further, it is also difficult to understand why the Claimant would simply deny that he had refused to return to work without raising the fact that he had been verbally dismissed on 2nd April, 2012 and was the reason for which he was not at work.

19. Section 47(5) of the Employment Act places the burden of proof in any action where an allegation of wrongful dismissal or unfair termination is made on the employee. The employer on the other hand has the burden to discharge that the dismissal was justifiable.

20. Whilst the Claimant claims he was verbally terminated, he did not raise this issue to rebut the accusation by the Respondent that he absconded duty beginning the date he alleges he was verbally terminated to wit 2nd April. Further nothing in his pleadings or evidence at the trial was brought forth to show that he tried to report to work and was turned away by the Respondent. To this extend the Court is not persuaded that the Claimant was verbally terminated on 2nd April, 2012. On standard of proof in a civil case such as this, it is most probable that the Claimant was absent from duty without authority from 2nd April, 2012 as alleged by the Respondent than not. His claim for verbal termination of employment therefore fails and is hereby dismissed.

21. There however remains the issue whether the Respondent validly ended the contractual relationship with the Claimant.

22. The letter dated 9th April, 2012 did not terminate the Claimants' services. It merely warned him that his act of absenting himself from work without authority justified summary dismissal. No such dismissal was done subsequently. The Court however would be reluctant to reach a finding that the Claimant remains an employee of the Respondent until such time as he is validly terminated.

23. Employment relationship thrives on trust and confidence of the parties. It is a personal contract as concerns the worker. That is to say the employee binds himself to provide his labour and skills for the benefit of the employer in return for remuneration. No two unwilling parties can be forced to remain in it.

24. The Respondent complained that there were discrepancies between the physical stock held by the Respondent and the delivery notes and that the Claimant was one of the persons responsible for handling deliveries. The Respondent further complained that preliminary investigations revealed a loss of approximately 13 million shillings. Whereas the Claimant may not have been responsible, his unauthorized absence from work around the time the issue was under investigation coupled by his refusal to return despite being asked to do so by the Respondent to help with investigations can reasonably be said to have significantly eroded the minimum necessary confidence needed for the sustenance of an employer-employee relationship.

25. To this extent the Court proceeds to declare that Claimant's contract of employment was terminated normally on the 10th May, 2012 when he failed to return to work and instead merely refuted in writing the accusation that he had absconded work.

26. The Claimant will therefore be entitled to salary for the month of April, 2012 and 10 days' pay for the month of May, 2012. The Claimant shall further be entitled to one month's salary in lieu of notice as per the contract.

27. In conclusion the Court orders as follows:-

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| (a) Salary for the month of April, 2012 | 24,829 |
| (b) Salary for 10 days in May, 2012 | 8,280 |

(c) One months' pay in lieu of notice

24,829

TOTAL

57,983

28. The award shall attract interest at Court rates but subject to statutory deductions and taxes while each party shall bear their own costs. The Respondent shall issue the Claimant with a certificate of service.

29. It is so ordered.

Dated at Nairobi this 28th day of November 2014

Abuodha J. N.

Judge

Delivered this 28th day of November 2014

In the presence of:-

.....for the Claimant

and

.....for the Respondent.

Abuodha J. N.

Judge