



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 300 OF 2014

CHARLES NYAKUNDI MIRUKACLAIMANT

VERSUS

POLLMAN'S TOURS & SAFARISRESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant's claim is contained in the Amended Plaintiff dated 1/7/2014. It is based on the alleged unfair termination of the claimant's employment by the respondent on 10/12/2010. The suit seeks to recover Ksh.1,337,720 being employment dues plus compensation for unfair termination.
2. The respondent has denied liability through her amended defence dated 4/8/2014. She has averred that the claimant's dismissal was justified because he admitted in writing that he had committed gross misconduct against the employer. She however admitted to pay Ksh.39,724 being claimant's salary for May 2009 plus Ksh.118,509.93 in lieu of 89.5 outstanding leave days.
3. The suit was heard on 10/9/2014 when the claimant testified as CW1 and the respondent called Lambodara Holta and Gerishon Odhiambo as RW1 and 2 respectively.

BACKGROUND

4. The suit was initiated in the subordinate Court and indeed proceeded partly. The defence made application to file supplementary exhibits but the court declined to grant the application. When the defence appealed to the High Court, the said court transferred the appeal to this court on ground of jurisdiction. Before the appeal was heard the parties agreed to compromise the appeal and have the lower court file transferred to this court for hearing denovo. They also agreed to amend their pleadings and filed additional documentary evidence.

CLAIMANT'S CASE

5. CW1 told the court that he was employed by the respondent in November 2000 as an Account's Clerk in Mombasa. In 2002 he was transferred to Nairobi on promotion as a cashier. His services were appreciated through internal memos throughout his service to the respondent.
6. On 27/5/2009, Mr. Holta (RW1) visited his office which CW1 shared with the cashier Mr. Munyao. RW1 checked payment vouchers on the cashiers desk to verify some payments and alleged that there were alterations in some payment. RW1 only dealt with Mr. Munyao and never called CW1 to the exercise.
7. CW1 explained that the cashier Mr. Munyao dealt with petty cash control system called Tally ERP

- in which he used to enter the details of the payments vouchers into the tally system after which the cashier forwarded hard copies to CW1 to post them to the Tour Plan accounting system. CW1 thereafter forwarded hard copies of the Tour Plan to the Head Quarters in Mombasa. According to CW1 the system is online and is accessible but once posted only the HQ in Mombasa could alter the information.
8. CW1 further explained that RW1 convened a meeting of CW1, the cashier and Mr. Daniel Mungai the Reservation Manager. RW1 told the meeting that an audit was going to be done and directed CW1 and the cashier to record statements about the alleged alterations of payment vouchers and thereafter cooperate with the auditors. He however denied CW1 access to the allegedly altered copies of altered documents, but never the less, CW1 recorded his statements after which he was suspended to pave way for the exercise of audit. He was however never called for the promised audit. He was also not paid any salary and as such on 12/12/2010 he went to the Nairobi office to collect a certificate of service in order to look for another employment. He found Mr. Abdi Hilal (Operation Officer) who told him he could only give him the certificate of service after signing receipt of summary dismissal letter. CW1 signed without any option because he needed another job which he had been promised elsewhere.
 9. He produced his documents filed on 22/8/2011 and 2/7/2014 and prayed for pay in lieu of 159.59 leave days as per his last payslips for April 2009. CW1 explained that the payslips were prepared by Rakesh Rawal (Payroll officer) at the Head Office and sent to him at the branch and it showed that he had an outstanding leave of 159.57 days. He disputed the leave records produced by the defence stating that they were not supported by manual leave application forms. He prayed for ksh.213,068 pay in lieu of leave based on a monthly salary of ksh.42724.
 10. He also prayed for ksh.42724 being salary in lieu of notice plus the same amount as salary for May 2009. He also prayed for salary arrears for June 2009 to November 2010 being ksh.555,412. In addition he prayed for ksh.512,688 being 12 months salary for unfair termination.
 11. On cross examination by the defence counsel, CW1 said that he started working for East African Growers ltd in January 2011. During his suspension he also worked for a week on casual basis in another place but he could not get any formal employment without a certificate of service. In addition Mr. Abdi kept on telling CW1 to wait to be called back.
 12. CW1 explained that his gross pay was ksh.42,724 per month of which his basic pay was ksh.39,724 as per the April 2009 payslip. He however contest that the copy of payslip for April 2009 filed by the defence was altered with respect to leave days balance. He maintained that there was a manual leave application form like document No. 8 filed by the defence which is supposed to indicate the leave days sought and whether or not it is approved. He denied having applied for the leave indicated by the defence documents which are computer generated.
 13. CW1 maintained that he was denied copies of the allegedly altered accounting documents and he was not allowed to call another employee of his choice to accompany him in the meeting at the Reservation Manager's office on 27/5/2009. He denied that the HR Manager (RW2) called him on 27/5/2009 or severally thereafter to collect a dismissal letter. He further denied that he declined to take up a senior post in Mombasa. CW1 also denied that on 27/5/2009 he went back at 3.00pm to ask RW1 to accept a settlement without an audit. CW1 maintained that he was entitled to leave and salary for the period between 27/5/2009 and November 2010. He admitted that he never worked during the said period. He prayed for 12 months salary as compensation for unfair termination.

DEFENCE CASE

14. RW1 is the Finance director for the respondent based in Mombasa. On 27/5/2009 he was the Financial Controller for the respondent. In February 2009, Mr. Prakera the outgoing Financial Director recommended to RW1 that CW1 should be promoted to be the Financial Controller to succeed RW1 but CW1 declined. Thereafter CW1 stopped sending reports regularly and accurately and RW1 visited the Nairobi office for a follow up.
15. He explained that there are two systems for finance management at the office including Tally System and Tour Plan. The former is an accounting package and the latter is an accounting and operational package. Tally System maintains details of transactions including all cash receipts, cash payments, stores and stocks. It was prepared by the cashier and posted to CW1 on the tour

- Plan. Tour Plan on the other hand is the summary of cash receipts and payments obtained from the Tally System. The cash balance of the Tally system ties up with the cash balance of the Tour Plan.
16. On 27/5/2009, RW1 found that although the postings were agreeing between the tally and the tour plan in the computer, the same was not in harmony with the hard copies. According to RW1 the hard copies reflected lesser amounts than the ones reflected in both the Tally System and the Tour Plan. RW1 noted 9 entries which had been falsified on the system in the month of May 2009. He took the documents showed them to Mr. Abdi Hilal the Operations Manager who was in charge of the Nairobi Office and Daniel Mungai, the Reservation Manager Nairobi officer. Mr. Abdi called CW1 and the Cashier in a disciplinary meeting attended by RW1 and Mr. Mungai and asked CW1 and the cashier to explain themselves out.
 17. According to RW1, CW1 and the cashier were told to call any union official or another worker to accompany them to the meeting. The CW1 and the cashier however requested that the matter be done secretly without involving other workers. CW1 and the Cashier then accepted their mistake and confessed the falsification. They also pleaded that they should not be taken to the police and promised to cooperate with the audit exercise which Mr. Abdi had directed. They also undertook to pay any money that the audit would reveal to have been stolen. According to RW1, CW1 and the cashier recorded statements on condition that the matter was not to be reported to the police. At 3.30 pm CW1 and the cashier submitted their written statements and he told them to go and wait for the outcome of the deliberations.
 18. RW1 explained that after CW1 and the cashier left, he, Abdi and Mungai discussed the matter and decided to dismiss the CW1 and the cashiers. They then called the HR Manager (RW2) to take up the matter from them. According to RW1 CW1 admitted the offence of falsifying the system. In addition, RW1 said it was CW1's duty to verify cash balances and do reconciliation before sending the report to the Head Office at Mombasa. RW1 maintained that the cashier could not defraud alone without the input of CW1.
 19. On cross examination by the claimant's counsel, RW1 admitted that CW1 was a good worker who was recommended for a promotion. RW1 confirmed CW1 was sending to him daily reports since 2007. He did not produce any letter warning CW1 that he was not sending daily report as required. RW1 admitted that he produced only documents for Tally Systems and not Tour Plan. He confirmed that CW1 was dealing with Tour Plan but with Tally System when the cashiers was absent.
 20. RW1 admitted that he agreed with the CW1 that the respondent was going to do an audit to confirm whether fraud was done but the audit was never done. RW1 could not tell how much money was defrauded because no audit was done. He confirmed that CW1 had agreed to cooperate with audit exercise. RW1 explained that the dismissal letter was by the HR manager and was received by CW1 on 10/12/2010.
 21. RW2 is the HR Manager for the respondent based at the Head office at Mombasa. He confirmed that CW1 was employed by the respondent as an Accountant based in Nairobi. RW1 explained that he issued a dismissal letter to CW1 on 27/5/2009 after the finance director discovered that CW1 and the cashier Mr. Munyao had fabricated finance documents to defraud the company of money. He relied on information from the finance director who was at Nairobi that CW1 and the cashier had admitted the offence. RW2 send the dismissal letter to Mr. Abdi Hilal in Nairobi by bus the following day to deliver to CW1. CW1 however never went to collect the letter after being called over the phone by Abdi to collect it. CW1 finally collected the letter in December 2010.
 22. RW2 contended that as at 27/5/2009 CW1 had 89.5 leave days outstanding. He admitted that the leave software had a problem around 2009 when the company tried to interface it with payroll. According to him the leave system was computerized and as such manual application was not needed.
 23. RW1 maintained that CW1 was not entitled to pay in lieu of notice because he was summarily dismissed. He explained that CW1's basic salary was ksh.39724 while his house allowance was ksh.3000. He admitted that CW1 is entitled to salary for May 2009 plus 89.5 leave which he would have been paid had he gone for his dismissal letter.
 24. On cross examination by the claimant's counsel, RW2 admitted that it is a must for manual leave application to be filled to support the numbers of days sought like the one produced by the defence

- as documents number 5. He admitted that on 27/5/2009 he received a telephone call from RW1 telling him to issue a summary dismissal to CW1. RW2 admitted that he issued the dismissal letter without first hearing CW1 and without RW1 telling him how much money had been defrauded.
25. After close of the hearing the parties filed submissions which the court has considered carefully herein.

ANALYSIS AND DETERMINATION

26. The employment relationship and the salary for the claimant is not dispute. There is also no dispute that on 27/5/2009 RW1 allegedly visited the respondent's Nairobi office and alleged that CW1 and the cashier Mr. Munyao had falsified financial entries in the soft copies and defrauded the company money. It is also not in dispute that RW1 and CW1 and the cashier agreed to have the records audited to verify if any theft had been done of which CW1 and the cashier undertook to reimburse to the respondent if found culpable. It is also not disputed that thereafter RW2 issued a summary dismissal letter to the CW1 on direction of the RW1 and before giving CW1 a hearing. It is also not dispute that CW1 received the dismissal letter in December 2010 and before any audit being done to find CW1 guilty.
27. The issues for determination are whether the summary dismissal of the CW1 was unfair and whether the reliefs sought should issue.

UNFAIR TERMINATION

28. There is no doubt that the dismissal of the claimant on 27/5/2009 was unfair. RW2 admitted that he did not give the CW1 a hearing before issuing the dismissal letter on 27/5/2009. He only acted on the telephone direction by the RW1. In addition to the foregoing procedural breach, RW2 did not act on any valid reason. As per the RW1's testimony the company was to do an in depth audit on the financial records prepared and handled by the CW1 and the cashier but that audit was never done. The dismissal letter was therefore prematurely written because the guilt of the CW1 had not yet been proved. It was also not proved in this case as required by the law.
29. Under Section 45 of the Employment Act, termination of an employee's employment is unfair unless the employer proves that the termination was based on a valid and fair reason and that the same was reached after following a fair procedure. Section 43 of the Act put the burden of proving the reason for termination on the employer. On the other hand Section 41 of the Act requires that before an employer dismisses an employee for misconduct poor performance, or incapacity, he shall accord the employee a hearing. In addition the employee is entitled under the said section to be accompanied by a fellow employee of his choice to the said hearing which must be conducted in a language they both understand. The answer to this first question above is therefore that the summary dismissal of the CW1 on 27/5/2009 was unfair and unjustified. The matter was made more unfair by th failure to serve the dismissal letter on CW1 in time

RELIEFS

30. Under Section 49 of the Employment Act the claimant is entitled to ksh.42724 being one month salary in lieu of notice, Ksh.42724 being salary for may 2009, ksh.211,291.95 being basic pay for 159.59 outstanding leave days. The claim for salary for the period between June 2009 and December 2010 is dismissed for the reason that the court has already held that CW1 was unfairly dismissed on 27/5/2009. The court will however award the claimant 12 months gross salary being Ksh.512,688 for the unfair dismissal. The court has awarded the maximum award for the reason that the unfairness was both substantive and procedural. In addition the respondent prevented the claimant from getting another employment by failing to communicate the fact that CW1 had been dismissed and failing to issue him with a certificate of service in good time. The court treats paragraph 5(e) of the claim to have intended to plead for 12 month salary compensation and not 12 years compensation. The reason for the foregoing is that the testimony adduced by the CW1 and the submissions filed by his counsel were both in respect of the 12 months salary as compensation for unfair termination.

DISPOSITION

31. For the reasons aforesaid, judgment is entered for the claimant in the sum of ksh.809,428 plus costs and interest.

Orders accordingly.

Dated, Signed and delivered this 7th November 2014.

O. N. MAKAU

Judge