



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1897 of 2011

ALEX LUYAHA AFANDACLAIMANT

VERSUS

RAMCO HARDWARE LIMITED DEFENDANT

JUDGEMENT

This is a claim dated 11th October 2011 by Alex Luvaha Afanda seeking judgement against the defendant for wrongful dismissal from employment and unfair termination of employment. The claim commenced ex-parte and orders made on October 12th 2012 but the same were set aside by mutual agreement of the parties upon payment of throw-away costs of kshs.20, 000.00. Court also granted leave and defence dated 22nd November 2012 was admitted.

The defence is of the nature that the Claimant being employed as a casual worker was unfaithful and was warned severally. That in June 2011 he was sent to the bank to collect change as one of his routine assignments and in the process was mistakenly given extra money which was noticed and followed up with the respondent. That the act of dishonesty resulted in his summary dismissal.

It was the evidence of the claimant that he was employed by the respondent as a casual worker on 1st March 2005. He was however not issued with a letter of employment and it was therefore verbally agreed that he should be paid Kshs.365.00 per day payable at the end of every week on Saturday. That this salary and or wage would be reviewed on a yearly basis. That he continued with his employment as a casual worker for six years and three months until the wrongful summary dismissal.

That the claimant's nature of work with the respondent was at a hardware store where he would run several errands, carrying cement and mixing colours and ensuring that all customers were served and their needs attended to. He also performed other general duties as indicated by the respondent staff. That his work was of the nature that could not reasonably be expected to be completed within a period or on a number of working days amounting in the aggregate to the equivalent of a day. Therefore for all intents and purpose, the claimant was on a term contract and was covered by provisions of Section 35(1) (c) of the Employment Act

In evidence, the claimant submitted that on the 12th of June 2011, being employed as a person running general duties at the respondents work premises, he was sent to the bank to get change. That he had Kshs. 20,000 in 1000 bills which were to be reduced in small currencies at the bank. That the claimant did this task and returned to the respondent where they discovered that he had been given excess money by the bank all amounting to Kshs.40, 000, double the amount he had taken to the bank. That around 3 pm when the bank manager discovered the anomaly, he called the respondent premises and the claimant admitted

that indeed there was an error and offered to return the excess money against the wishes of the respondent who had asked the claimant not to admit that there was excess money from the bank.

That on 13th June 2012, when the claimant reported on at his place of work he was summarily dismissed the told that he was no longer required to work there. All his efforts to seek and negotiate for his terminal dues have been rejected by the respondent who advised him to come to the industrial Court. It was the evidence of the claimant that he has since his wrongful dismissal tried to get a new job but has failed to get one forcing him to go back to his village in Western Kenya. Most prospective employers have been asking him to produce his certificate of service with his last employer, a document that the respondent has failed to issue to the claimant.

On the other hand the Respondent gave evidence and called Mr. Alexander Maina as the witness. That he is the Personnel Manager of the respondent company and the claimant's case came to his attention on the 13th of June 2011 when the general manager informed him about the case. That the Bank Manager from Guardian Bank called the Claimant after realising they had made an error by giving him more money than was supposed to receive. That through the use of CCTV they traced the overpayment to the claimant and thus came to the respondent premises just adjacent to their bank to ask that he surrenders the overpayment to them.

That the claimant was cooperative and since he had already banked the cash in his phone MPESA service, he proceeded to an agent and got the money and gave it back. That this put the respondent reputation at risk as this was theft by servant. That they decided not to call the police and instead terminate him immediately.

The witness further stated that they had not employed the Claimant to work for more hours and that all staff left work at 1 pm on Saturdays as they all worked together in loading goods and he could not have been left working alone. That indeed the respondent company is a big supplier and thus could not separate the work of the claimant alone.

Upon Court interrogation of the claimant, it emerged that on the 12th of June 2011 the claimant was sent to the Bank at 10 am to get change of Kshs.20, 000.00, which was given to him in different bills but the teller gave him back the money he had produced as well. That the claimant noticed the anomaly but proceeded to the bank corridor where he separated the money due to his employer and kept the rest in his pocket. That upon return to his work place he surrendered to the cashier the due amount but kept the excess. He left for lunch around 2 pm and preceded to an MPESA agent and using his phone is deposited the excess money. Upon the bank manager realising the mistake of the teller, they proceeded to the respondent company and demanded to see the claimant who had been traced through the CCTV cameras where he surrendered back the money.

Court notes that under the Employment Act a casual employee is the one defined as:

... A person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period those twenty four hours at a time.

The claimant, even though initially employed as a 'casual employee' has been working with the respondent for six years and three months continuously without a break, leave or payment of overtime. His status under the law therefore becomes a full time employee eligible for all benefits and legal dues.

Further Court notes that even though the respondent failed to give the claimant a written contract, the provisions of the Employment Act apply for both oral and written contracts vide Section 8 of the Act. It was the duty of the respondent to regularise the employment status of the claimant once the relationship with him ceased being that of a casual worker to a full time employee with benefit and eligible to pay the statutory deductions.

However, even with the finding that the claimant was employed by the respondent, where an employee under Section 44(4) (g) of the Employment Act:

(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...

Is subject to summary dismissal with loss of all benefits. This stands out as one such case where the claimant, having due knowledge that he had received money by mistake went ahead to cause the same to be separated and failed to declare it and further went and deposited it in his phone account MPESA. This was an act of theft by savant, a criminal act in law and should have been arrested. I therefore find the summary dismissal a most reasonable thing in the circumstances of the case.

For the above reasons the Court finds that the Claimants termination of his employment was fair.

I will therefore dismiss the claim save that the Claimant should receive his Certificate of Service.

Costs to the Respondent.

Delivered at Nairobi this 12th day of February 2013

**M. W. Mbaru
JUDGE
INDUSTRIAL COURT OF KENYA**

In the presence of:

Court clerk.....

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