



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO 41 OF 2013

1. HEDRICK OUMA WANDERA
2. ROSEMARY ABIGAEL ANGITACLAIMANT

VERSUS

DRIFTWOOD BEACH CLUB LTDRESPONDENT

J U D G M E N T

The claimants have sued the respondent claiming terminal dues and compensation for unfair termination of their employment. The respondent had denied liability for unfair termination and instead counter claimed for money owing from the claimant to the respondent plus staff uniform and bedsheets.

The case was heard on 4/6/2013 and 2/7/2013 when 1st and 2nd claimant testified as CW1 and 2 respectively and the respondent David Kaziwa Muzungu and Alfred Tsuma Mwachite as RW1 and 2 respectively. CW1 told the court that he was employed by the respondent on 22/8/2009 as an accounts clerk and IT on permanent basis. That he served until 1/8/2011 when he was dismissed summarily by a letter dated the same date. That the reason for his dismissal was stealing of case of beer and money belonging to the respondent. That the case of beer was an offer from the supplier Kioko enterprise while the money was a refund of an overpayment made for shoes supplied by Bata. That he was not given a hearing before the dismissal.

That the dispute was reported to Labour Officer and their trade union and after amicable discussions, the respondent agreed in writing to reduce the dismissal to a normal termination. That in addition the respondent offered to pay 2 months salary but the claimant rejected the offer because the termination was unfair. That according to him the dismissal was unfair because his duties did not include purchases of beer case or shoes. That as for the overpayment money refunded, he admitted receiving the same on behalf of the respondent as her accountant and handed it over to his boss RW2 in December 2010.

That before that time he had loaned it to the CW2 under "I O U" voucher which was a normal practice in the accounts department. That she promptly repaid the money. That in upshot he denied all the charges in the dismissal letter. As at the time of dismissal, his gross salary was Ksh.33,726.

On cross examination he denied taking away the crate of beer and returning it after demand. He further denied ever seeing the alleged case of beer. He however admitted receiving the refund of money from Bata shoes but lent it to CW2 as an "I O U" facility. That the loan was in writing and it was properly within his powers as the accountant.

He admitted that as at the time of his dismissal he had a loan of Ksh.10,000/ from the respondent and he offered that the same can be reduced from his dues. As for the staff uniform he contended that he returned them to Mr. Thomas Karisa the shop steward. He maintained that his July 2011 salary was not paid. He denied being present when his union discussed with the respondent the reduction of his dismissal to normal termination.

CW2 on the other hand was also employed by the respondent on permanent basis from 25/11/2008 as a House Keeper and worked until 31/7/2011 when she was summary dismissed. By then her salary was ksh.26829 per month. That from 1/7/2011 she went on leave and on 31/7/2011 and while still on leave she was called to the work place. On arrival she found the Director in the office who told her that she was dismissed because after stock taking a problem was noted. That she was accused of selling bedsheets and taking away the proceeds. In addition she was accused of taking away money refunded by Bata shoes. That she denied all the accusations but the Director told her that the dismissal letter was already with the shop steward from whom she collected it.

That the shop steward was in the office with the Director, RW2 and Mr. Leonard Changawa the Front Office Manager. She was not paid her dues including July 2011 salary, service charge and service. On cross examination she admitted collecting Ksh.6800/ from Bata Shoes being a refund of over payment made in respect of shoes supplied. That she was send by CW1 to collect the money and handed it to him.

That the borrowed money from the CW1 the same day she brought the refund from Bata. She denied selling any bedsheets in 2011 but admitted that was occasionally being permitted to sell old bedsheets by the respondent. That in 2011, the CW2 did not sell the old bed sheets because they were used as cleaning materials for the floors and tables.

She admitted a loan of ksh.12000 from the respondent which she agreed to repay using terminal dues. She admitted that before going for leave in July 2011 she received Ksh.3000 for leave travelling allowance plus Ksh.3000 for salary advance. She denied receiving ksh15300 before going for leave. She denied also receiving service charge for July 2011 and demanded ksh.5500/- as such.

RW1 told the court that he was the Financial Controller for the respondent. He admitted that the CW1 was dismissed on 1/8/2011 for stealing a crate of beer gifted to the respondent by the supplier after the CW1 brought 10 crates of beer. That he accounted only for the 10 cases and stole the extra free case only to surrender it after demand on 24/6/2011.

That the second reason for dismissal of the CW1 was that he received on behalf of the respondent a refund of money from Bata shoes and converted to his own use. He contended that the CW1 has no authority to loan money vide "I O U" facility because that was a preserve of the Financial Controller or the Manager on duty.

He admitted that CW1 loaned the money to CW2 but denied loaning it to him (RW1) . That the CW1 and CW2 had loan of ksh.10540 and 12500 respectively from the respondent. That the dismissal was reduced to a normal termination with two months pay in lieu of notice after an amicable agreement with the claimants union. That before the CW2 went for leave in July 2011 he paid to her ksh.15300/- being kshs. 3250 leave travelling allowance and ksh.12050 – salary advance for that month. That she signed for the payment.

That he admitted debt of ksh.48738 and ksh.33500 to the CW1 and 2 respectively as their net terminal dues. On cross examination he admitted that the CW1 was employed in the Accounts Department but contended that he worked hand in hand with the purchasing department. He confirmed that the crates of beer was brought by CW1 on 24/6/2011 and the money from the Bata Shoes was refunded on 25/11/2010. That according to system generated LPO, the 10 crates of beer was done by the CW1 on 23/6/2011 but it had no signature.

He could not however confirm or deny whatever the system could be manipulated. He could not also prove that the CW1 had agreed to pay for the case of beer. He denied that he borrowed Bata Shoes

money from CW1 vide "I O U". He contended that CW2 never took stock on June 2011 yet she was supposed to do every month. He could not however deny or confirm whether she did stock taking for June with Benard and Leonard before she went on leave because he was not involved in leave approvals. He admitted that stock taking was within his docket but they only called her on 30/6/2011 the day CW2 was dismissed to explain the whereabouts of missing property.

RW2 is the Food and Beverage Manager for the respondent. He knew the CW1 as a former accounts clerk for the respondent who was dismissed on 1/8/2011 for stealing a crate of beer which he returned late after demand by the respondent. That the crate was an offer after purchasing 10 crates of beer. That the CW1 raised the LPO for the 10 crates of beer without authority.

On cross examination he contended that CW1 was not employed in the purchasing department but he raised LPO for 10 crates of beer and used the respondents vehicles to collect the beer as per the motor vehicle control log book. He however clarified that the log book did not indicate that CW1 went out to collect beer.

That the one crate missing was discovered after stock taking at the end of the month. He could not however confirm whether or not the CW2's stock was okay because the only person who could verify was the Head of her Department Mr. Changawa. After close of the hearing, the parties filed written submission.

I have carefully perused the pleadings and considered the evidence adduced plus the written submission filed. The court is satisfied that it has the jurisdiction to determine the dispute herein because it relates to employment and labour relations as contemplated by Section 12 of the Industrial Court Act read with Article 162(2) of the Constitution of Kenya.

The evidence before the court shows several agreed issues including the employment relationship, the terms of Service, the time of dismissal, the existence of the CBA and also the fact that an amicable agreement was reached between the respondent and the claimant union to reduce the summary dismissal to a normal termination with benefits.

I will therefore not waste my effort in dealing with whether or not the summary dismissal was unfair because that was settled by the post dismissal agreement between the respondent and the claimants union. Holding otherwise would be prejudicial to the spirit of social partnership between unions and employers in which the trade unions are expected to represent their members in dispute settlement. The court will therefore only answer the question of the remedy payable to the claimant.

In view of the foregoing, the prayer for 12 months salary for unfair termination is dismissed. I will however award the prayer for employment terminal dues. The claimants prayed for two months salary in lieu of notice and the respondent admitted to pay after negotiating with the union. The claimants have also prayed for service charge and salary for July 2011. There is no evidence adduced to show that the claimants were paid their salary and service charge for July 2011. The respondents produced an undated sheet headed staff leave payments for July 2011. It shows that the 2nd respondent was paid Ksh.3250 for travelling plus 12050/- as advance pay.

The 2nd claimant denied the signature thereon and insisted that she was only paid Ksh.6000/- and no more. The respondent did nothing more to prove the authenticity of the leave payment which was a photocopy. The burden of proof of such payment was on the respondent and she did not. Consequently the court will only deem that the claimant was paid ksh.6000/- before going on leave being Ksh.3000 for leave travelling and Ksh.3000 for salary advance.

There is also no evidence to prove that the claimant were paid their service charge for July 2011. The respondent produced an undated sheet for service charge for July 2011 which showed that both claimants were entitled to Ksh.4260 as service charge. I award to the claimant their salary for July 2011 plus service charge. The 2nd claimant will however have her salary reduced by Ksh.3000 advance payment given before going for leave. The claimants have prayed for any other relief available to them

which the court deems fit to grant. I award them service pay at the rate of 15 days for every completed year of service.

In summary therefore I enter judgments for the claimant against the respondent for payment of the following less the advances stated above plus that pleaded in the counter claim which was not contested.

1ST CLAIMANT

- a. 2 months salary in lieu of notice67,452
- b. July 2011 salary33,726
- c. July 2011 service charge 4,260

d. service pay for 2 years33,726

.139,164

less loan advanced..... 10,240

128,924

2ND CLAIMANT

- a. 2 months salary in lieu of notice 53,658
- b. July 2011 salary 26,829
- c. July 2011 service charge 4,260
- d. service pay for 2 years26,829

111,576

less advances(3000+12540) 15,540

96,036

Each claimant will have costs and interest from the date of dismissal.

Orders accordingly.

Signed dated and delivered this 6th September 2013

ONESMUS MAKAU

JUDGE

