



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 162 OF 2016

BONIFACE FRANCIS MWANGI.....CLAIMANT

VERSUS

B.O.M. IYEGO SECONDARY SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant has sued the Respondent for unlawful termination and avers that he was employed by the Respondent as a night watchman on 1st October 2006 and that he served as such up until 10th September 2014 when he alleges that he was constructively unilaterally terminated from employment by the Respondent. When he was employed he earned Kshs. 150/- per day and in 2010 the salary was increased to Kshs. 200/- and later to Kshs. 250/- in the year 2012. He avers that the Respondent made allegations that there was theft of assorted items in the school on 9th September, 2014, thus causing the claimant to be arrested on 10th September 2014 and charged with the offence of breaking into and stealing vide Kangema PMC criminal Case No 352/14 which matter was fully heard and he was acquitted on 9th June 2016 under Section 215 of the Criminal Procedure Code. The Claimant avers that since arrest the Respondent never paid him any salary which implies that there was constructive dismissal. The Claimant avers that he was grossly underpaid and was entitled to house allowance and seeks to recover the withheld salaries and house allowances as well as severance pay. The Claimant sought a declaration that his termination was unlawful thus entitling him to payment of compensation, 1 month's salary in lieu, annual leave not taken pay, rest days (381days), public holidays (75 days), house allowance, underpayments, severance, compensation for loss of employment and costs of this suit.

2. The Respondent filed its memorandum of response on 27th October 2016. It averred that there was theft and arrest but it denied causing the arrest of the Claimant and asserts that it only made a report to the Police who in turn responded and arrested the Claimant and another suspect on grounds that they were on duty that fateful night. The Respondent further asserted that the Claimant never returned to work after he was released on bail and has never been in touch with the Respondent hence terming it absconding duty.

3. The Claimant and the Respondent's witness testified. He stated that he was a watchman and that there was theft in the school and he was arrested and charged with the offence and that upon being granted bail on 15th September, 2014 he went to school to work but he was told to go home by the principal and wait for the case to be determined. Upon conclusion of the case he went back to school again and he was told to wait for a letter which he has never received to date. On cross-examination Claimant maintained that he went back to school and was told to wait for a letter by the Principal.

4. The respondent's witness, Rahab Murimi Nderitu the Principal of the school, told the court that she was in school on the night of 19th September 2014 when the burglary took place and school equipment stolen. She thereafter reported the incident to Kangema Police station and that the Police investigated and arrested the Claimant. She testified that she has never seen the Claimant since he was acquitted and said that the Claimant did not go back to work. She also stated that she has never heard from the Claimant either verbally or in writing. She therefore maintained that the Claimant absconded duty since he never went back to work after being released. On cross-examination she confirmed that she never gave him a notice to show cause nor did she give him a letter terminating his services. She testified that the Claimant used to go on leave while in employment. She also admitted that the Claimant used to work on Sundays and public holidays.

5. Both parties filed their submissions as directed by the court. The Claimant submitted that after securing his release on bond, he reported to his place of work and was told to go and await the outcome of the criminal proceedings. He submitted that evidence was corroborated by the Respondent's witness who stated in court that the Claimant never came to work after the acquittal. He averred that the statement implied that he contacted the Respondent during the subsistence of the proceedings. He further submitted that he approached the Respondent after acquittal but was told to wait for an official reinstatement letter which letter has never been received to date. The Claimant submitted that by alleging that he absconded duty, the Respondent suggests that it had invoked the provisions of Section 44(4) of the Employment Act. However, he contended that that this Section is not absolute and that he was entitled to a hearing before the drastic action was taken. He submits that the Respondent should have issued him a letter informing him of the summary dismissal and the reasons thereof. The Claimant argued that there was implied termination and it was in violation of Section 45 and Articles 41(1) and 50 of the Constitution. He submitted that he was entitled to be granted the prayers in his claim.

6. The Respondent on the other hand refuted that the Claimant's service was unlawfully terminated. It maintained that after the Claimant was charged and released on bail, he never reported back to work nor make any contact with the school and therefore absconded duty. The Respondent argued that Section 44(4)(b) of the Employment Act permits an employer to summarily dismiss an employee if without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work. The Respondent placed reliance on the case of **Joseph Njoroge Kiama v Summer Ltd [2014] eKLR** where the court held that if the court came into conclusion that the claimant absconded duty, then his claim would not lie, if on the other hand, the court comes to the conclusion that he was unlawfully terminated then the court can proceed and assess damages. The Respondent submitted that the Claimant absconded duty and therefore the claim should be dismissed with costs to the Respondent in line with this decision.

7. After considering the rival positions and the testimony adduced, the following issues fall for determination: -

- i. Whether the Claimant was constructively dismissed or whether he absconded duty?
- ii. Whether the Claimant is entitled to the remedies sought.

8. As to whether the Claimant was constructively dismissed or whether he absconded duty, it is not in dispute that the Claimant was arrested and charged for with the offence of theft and in the alternative failing to prevent a felony. He was acquitted after trial under Section 215 of the Criminal Procedure Code. He was emphatic that upon being granted bail on 15th September 2014, he reported to his place of work but he was however told to wait for the conclusion of the case by the principal. Upon being acquitted he went back to work again and was told to wait for a letter which has not been sent to date. It is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for the failure to present themselves for work. In this case it was even more compelling as the Respondent was aware of the trial and the Claimant made effort to contact the Respondent only to be informed that he was to abide by communication from the Respondent. I am fortified in this by the decision in the case of **Simon Mbithi Mbane v Inter Security Services Limited [2018] eKLR** where **Abuodha J.** stated that "*an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.* Similarly **Nduma J.** in the case of **Joseph Nzioka v Smart Coatings Limited [2017] eKLR** stated that "*dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties*"

9. From the evidence adduced in court, it is clear that the Respondent never made any attempt to contact the Claimant. It thus fell short of the standard duty of care owed in terms of the decisions by my learned colleagues. The Claimant's dismissal was thus dismissal without notice and the same unilaterally done. The Respondent may have felt uncomfortable retaining the Claimant in its employment after being suspected of involvement in theft, his acquittal notwithstanding. The employer is however required to abide by the procedural requirements of the law set out under Section 40 and 41(2) of the Act by ensuring the employee is given notice and allowed a fair and reasonable chance to present a defence. The Claimant herein was not issued with any notice and neither was he taken through any disciplinary hearing. The termination of the Claimant was unfair within the meaning of Section 45 of the Employment Act. He is therefore entitled to

- a. one month's salary in lieu of notice – Kshs. 12,000/-
- b. damages for the dismissal set at 6 months – Kshs. 72,000/-
- c. costs of the suit
- d. interest at court rates from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 24th day of May 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar