



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2220 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JUSTUS KANGETHE WANYOIKE CLAIMANT

VERSUS

ROY HAULERS LIMITED RESPONDENT

JUDGMENT

The claim herein was instituted vide the claimant's memorandum of claim dated and filed in Court on 15th December, 2014 through the firm of Namada and Company Advocates. It is the claimant's averment in the memorandum of claim that he was employed by the respondent, a limited liability company on or about 26th May, 2006 as an Inspection Supervisor earning a monthly salary of Kshs.36,042/-.

The Claimant avers that he worked diligently and to the Respondent's satisfaction until 17th September, 2014 when his services were unfairly and wrongfully terminated by the Respondent through one of its director's one Shemir Yakub on allegation of recommending fake repairs to a vehicle belonging to a client of the Respondent.

The Claimant contends that the mistake was committed by one of his colleagues one Felix Mutuku who owned up to the same. The Claimant avers that he was nonetheless instructed to report to the Respondent's HR Manager, Jessica Mumo who in turn handed him a summary dismissal letter and ordered him to leave the Respondent's premises. The Claimant asserts that his dismissal was unfair as he had rendered service to the Respondent for 8 years without blemish and that due process was not followed in his dismissal.

Aggrieved by the Respondent's decision, the Claimant filed the instant Claim seeking the following reliefs:

- a) A declaration that the Claimant's Summary dismissal from employment was unlawful, unfair and inhumane.
- b) A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- c) An Order for the Respondent to pay the Claimant his due terminal dues and compensatory damages totalling to Kshs.1,786,698/-.
- d) Interest on (c) above from the date of filing suit till payment in full.
- e) Cost of this suit plus interest thereon.

In response to the Claim, the Respondent filed its Memorandum of Defence on 19th February, 2015, in which it contends that the

Claimant's employment was rightfully and lawfully terminated for reasons advanced in the letter of summary dismissal issued to him on 17th September 2014.

The Respondent further contends that the Claimant's terminal dues at the time of separation were computed together with liabilities owed to it and the balance thereof paid to his Equitorial Commercial Bank.

The Respondent avers that having paid the Claimant his dues at the time of separation he has no claim as against it and consequently the Respondent urged the Court to dismiss the instant Claim with costs to the Respondent.

The matter proceeded for hearing on 3rd April, 2019 with both the Claimant and the Respondent's witnesses testifying. Both parties thereafter filed written submissions.

Claimant's Case

In his evidence, the claimant adopted his witness statement dated 6th December, 2017 and filed in Court on 23rd January 2018 as his evidence in chief. He reiterated the averments made in his Memorandum of Claim. He further testified that he was not issued with a notice to show cause or called for any disciplinary hearing prior to his termination. He therefore contended that on this basis his termination was unfair and unlawful. He urged the Court to allow his Claim as drawn.

On cross examination the claimant confirmed that his last salary while working for the Respondent was Kshs.36,042/-. The claimant further stated he was working alongside Mr. Mutuku, who had admitted committing an error when he referred a motor vehicle for checks that did not require any repairs. He however stated he had no evidence of the admission by Mr. Mutuku.

The claimant contended that no reason was given for his termination in the letter of termination.

On re-examination the claimant confirmed that he worked overtime as he reported for duty at 8.30 am and would sometimes leave duty at 8.00 pm. He further stated that his payslip does not reflect any payment of overtime.

Respondent's Case

The Respondent called one witness, JESSICA MUMO, its Human Resource Manager, who reiterated the averments made in the Memorandum of Defence to the Claim.

RW1 testified that the Claimant was paid his terminal dues at the time of separation through his account at Equitorial Commercial Bank. RW1 therefore contended that the Claimant has no claim against the Respondent and urged the Court to dismiss the Claim with costs to the Respondent.

On cross examination RW1 testified that the Claimant's salary was inclusive of house allowance as provided in his appointment letter and that the payslip did not have an item for the same.

On further cross examination RW1 stated that there was no evidence to prove that the Claimant was issued with the letter of suspension dated 21st February 2010 which set grounds of misconduct as the same is not acknowledged. She further testified that a disciplinary meeting was conducted but no minutes of the same were availed in this matter.

On re-examination RW1 insisted that the Claimant was accorded a chance to make his representation at a disciplinary hearing between himself and the Respondent's directors.

Parties thereafter filed and exchanged their written submissions to the Claim.

Submissions by the Parties

It is submitted on behalf of the Claimant herein that his termination was unfair and wrongful as the Respondent failed to follow the mandatory requirements as provided for under Section 43 and 45 of the Employment Act, 2007. To buttress this argument the Claimant relied on case of *Donald Odeke Vs Fidelity Security Limited (2012) eKLR*.

The Claimant further submitted that he is entitled to the reliefs sought in his Memorandum of Claim.

The Claimant contended that he is entitled to payment of his salary for the 17 days worked in the month of September, 2014 prior to his termination as the same was not paid despite the Respondent's assertion that the same was paid and there was no evidence to support the Respondent's assertion that the same was paid.

The Claimant further submitted that he is entitled to notice pay by dint of Section 36 of the Employment Act, 2007.

The Claimant further relied on the case of *Geoffrey Kariuki Mwaniki Vs Managing Director Nanak Trucking Co. Limited (2013) eKLR* and submitted that his termination was unlawful and thus he is entitled to damages and terminal benefits as pleaded.

In conclusion the Claimant urged the Court to allow his Claim as drawn.

Respondent's Submissions

The Respondent on the other hand submitted that the Claimant's termination was justified and due process was followed as provided under his terms of employment as well as provisions of the Employment Act, 2007.

The Respondent further submitted that the reasons for the Claimant's termination was that:

1. Through his unprofessional conduct or otherwise, the claimant made the company lose a substantial amount of money when he reported fake jobs.
2. He deliberately failed to show up on duty without consent of the head of department. A warning letter was issued to that effect.
3. His performance and attitude towards work kept deteriorating.
4. Despite the warnings given he did not change.

The Respondent further submitted that it did take all the necessary steps during separation including according the Claimant a fair hearing prior to his termination. It is on this basis that the Claimant has no claim against it. It urged the Court to dismiss the instant Claim with costs to the Respondent.

On the unpaid salary for the month of September, 2014 the Respondent submitted that the Claimant is not entitled to the relief the same having been paid through his bank account.

On Overtime payment the Respondent submitted that the Claimant has failed to produce any evidence to show that he worked overtime and as such is not entitled to the same. To buttress this argument the Respondent cited and relied on the case of *Fred Makori Ondari Vs The Management Committee of the Ministry of Works Sports Club (2003) eKLR*.

The Respondent contended that the Claimant is not entitled to 12 months' compensation salary as submitted, as he was accorded a hearing prior to his summary dismissal. To fortify this argument the Respondent cited the Authority of *Charloy Sikuku Madiangi Vs Bunson Travel Services Limited (2018) eKLR*.

The Respondent further contended that in the unlikely event this Court finds the Claimant's dismissal was unfair then one (1) month's salary in compensation would be adequate compensation for the reason that it (the Respondent) has demonstrated a cogent reason for the Claimant's termination. It is further contended that the termination was for a valid reason and therefore he (the Claimant) is not entitled to costs. The Respondent cited and relied on the case of *Ahmed Shee Vs Interior Electrical & Medical*

Solutions (2015) eKLR.

In conclusion the Respondent urged the Court to dismiss the Claim herein with costs to the Respondent.

Determination

Having considered the facts of this cause, evidence, submissions and authorities cited by the Claimant, the following are the issues for determination:

1. Whether the termination of the Claimant's employment was valid both procedurally and substantively.
2. Whether the Claimant is entitled to the reliefs sought.

Unfair termination

Under Section 45(2) of the Employment Act termination of an employee's contract of service is unfair where his employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employee's conduct, capacity or compatibility and that while arriving at the decision to terminate the services of such an employee fair procedure was followed.

Reason for termination

The Respondent contended that the reason for the Claimant's termination was as follows:

1. Through his unprofessional conduct or otherwise, made the company lose a substantial amount of money when he reported fake jobs.
2. He deliberately failed to show up on duty without consent of the head of department. A warning letter was issued to that effect.
3. His performance and attitude towards work kept deteriorating.
4. Despite the warnings given he did not change.

In its letter of summary dismissal dated 17th September, 2014 the Respondent refers to poor performance and the Claimant's attitude towards his duties that had been deteriorating thus occasioning the Respondent losses as reasons for his termination.

The claimant admitted in his evidence that there was a job card for fixing a spring in motor vehicle Registration No. KAX 555S yet the vehicle did not need any repairs. He did not deny this was fake. All he did was point a finger at his colleague but had no evidence that the colleague admitted writing the job card in error as per the testimony of the claimant. The other reasons cited by the Respondent were an afterthought as there was no evidence that the Claimant was issued with any communication from the Respondent detailing the said allegations. In the circumstances I find that the Respondent had valid reason for the termination of the Claimant's employment.

Was procedure followed"

Section 41 of the Employment Act requires that prior to the termination of an employee's services for misconduct, poor performance or physical incapacity, the employer must explain to the employee in a language he understands and in the presence of another employee or shop floor the reasons for which his/her termination is being contemplated and that they be subjected to a fair hearing.

The Respondent contended that it did take all the necessary steps during separation of the Claimant including according him a fair hearing. However, no evidence was adduced in form of minutes of the disciplinary hearing to support the Respondent's assertion that the Claimant was accorded a hearing. Further, RW1 admitted that she did not conduct a hearing herself but the meeting only

took the claimant through job cards. This was without prior notification or representation as required in Section 41 of the Act. I find that the respondent has not proved that it accorded the claimant a hearing in terms of Section 41 of the Act.

In the case of **Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

In **Francis Mbugua Boro –Vs- Smartchip Dynamics Ltd (2017) eKLR** it was held:

“...It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 and missing that essential ingredient and a hearing the court reaches the conclusion that the summary dismissal of the claimant was procedurally unfair.”

I therefore find the termination of the claimant’s employment procedurally unfair.

Whether the Claimant is entitled to the reliefs sought

Having found that the Claimant’s termination was unfair the Claimant is entitled to the following reliefs:

i. Salary for the month of September 2014 Kshs.20,424

The Claimant is entitled to the same. The Respondent despite its assertion that the same amount was paid into the Claimant’s account failed to avail any evidence in terms of a deposit slip to ascertain that the amount was duly paid.

ii. One Month’s Salary in lieu of notice Kshs.25,000

iii. Compensation for unfair termination

Taking into account all the circumstances of the case including claimant’s length of service and the manner in which he was terminated I award him 6 months’ salary as compensation in the sum of Kshs.150,000

Total Kshs.195,425

The Claim for overtime is dismissed for lack of evidence.

The Claimant is further entitled to costs of the Claim and interest shall accrue at court rates from the date of this Judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2019

MAUREEN ONYANGO

JUDGE



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