



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 341 OF 2017

BARASA WANDERA JOHN.....CLAIMANT

VERSUS

SOBOCON ASSOCIATES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent seeking recompense for his alleged unlawful dismissal as well as underpayment of salary vide his memorandum of Claim filed on 20th February 2017. The Claimant averred that he had been employed as a general/office assistant. He asserts he was not provided with housing and neither was he paid any house allowance. The Claimant averred that he was underpaid as his salary was below statutory minimum. He averred that on 20th June 2016 he arrived at work as usual and carried out his duties but was summoned by the Respondent's director Mr. Emmanuel Odhuno who indicated that the Claimant was supposed to report to work at 7:00am. The Claimant averred that evening he was summoned to the office of the Respondent's Human Resources Manager Ms. Purity Gatwiri Gitobu and given a dismissal letter. He averred that he had done nothing wrong to warrant the dismissal.

2. The Respondent was opposed to the suit and filed a defence. The Respondent in their response state that they reported the disappearance of some items at Kilimani Police Station items which the Claimant had access to by virtue of his position of a cleaner. In the Respondent's response to Claimant's claim, the Respondent averred that due process was followed in dismissing the Claimant and thus the Claimant is not entitled to the terminal dues and compensatory damages as pleaded in his memorandum of claim which the Respondent sought to be dismissed with costs.

3. The Claimant testified that he was unfairly and unlawfully terminated from his employment. He stated that he was issued with a termination letter on 20th June 2016 by the Respondent's Human Resource/Operational Manager one Ms. Purity Gatwiri Gitobu which letter he states was founded on malicious and unsubstantiated allegations. It is the Claimant's testimony that due process was not followed as he had done nothing wrong to warrant such dismissal, no show cause letter had been served upon him prior to his dismissal, he was never subjected to any disciplinary hearing and that the decision to dismiss him was harsh and unjustified considering that he had performed his duties diligently and to the Respondent's satisfaction. The Claimant further testified that during the period of his employment he was underpaid and he now seeks compensatory damages as tabulated in his Memorandum of Claim. The Claimant testified that he was never issued with a show cause letter or subjected to any disciplinary hearing to charges framed against him. The Claimant testified that during the period of engagement with the Respondent, he was being paid salary below the statutory minimum wage.

4. Despite the Respondent being aware that this matter was coming up for hearing on the 26th July 2021, the Respondent did not attend Court to defend the case. The Court closed their case and parties were to file written submissions. The Claimant submitted that his claim was on unfair and unlawful termination of employment and non-payment of terminal dues. The Claimant submitted that the Respondent failed to attend the hearing despite being aware of the matter coming up for hearing on that material day. The Claimant submitted that from this analogy, it is clear that there is no cogent reason that has been put forth by the Respondent to purport to sever the employment relationship between itself and the claimant. The Claimant submitted that the effect of the Respondent's failure to appear in court to defend their case is that there is no evidence adduced in support of the defence case. The Claimant submitted the authority of **Stanely Mwangi Gachungu & Another v Barclays Bank of Kenya Ltd [2019] eKLR** for this proposition. The Claimant submitted that the issues for determination were

- i. Whether there were valid reasons warranting Claimant's dismissal from employment?
- ii. Whether the Claimant was accorded due process prior to his dismissal?
- iii. Whether the Claimant is entitled to the relief sought?

5. As to whether there were valid reasons warranting Claimant's dismissal from employment? The Claimant submitted that the Respondent alleged that the Claimant was guilty of gross misconducts which led to his termination. No evidence was tabled before this court to show that investigations on the said allegations against the Claimant were carried out and that the Claimant was found guilty of any of the alleged misconduct. No police abstract was availed in court as evidence that the Claimant was in any way connected to the disappearance of the items it reported missing at Kilimani Police Station. Furthermore, no formal charges that have been preferred against the Claimant personally. The Claimant submits that these are just mere unsubstantiated allegations and he was blamed just because of the position he held in the Respondent's company. The Claimant submitted that the Respondent therefore failed to discharge the burden of proving that the Claimant's dismissal was fair and justified as required by Sections 43 and 45 of the Employment Act. The Claimant submitted that the employer shall be required to prove the reason or reasons for the termination and where an employer fails to do so, termination shall be deemed to have been unfair within the meaning of Section 45. The Claimant submitted that the duty is cast upon the Respondent to demonstrate to court that there existed valid grounds to justify the termination of the Claimant. The Claimant cited the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** where the Court held that

"... The duty was on the respondent to demonstrate to this Court that there existed valid grounds to justify the termination of the Claimant."

6. The Claimant submitted that there were no valid reasons for the dismissal and the Respondent's act of dismissing the Claimant was therefore premeditated upon. As to whether the Claimant was accorded due process prior to his dismissal, the Claimant submitted that the procedure of terminating an employee summarily is well set out in the Employment Act No. 11 of 2007. The Claimant cited the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR** where Mbaru J. stated that *Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair is the affected employee has not been accorded a hearing in the presence of their union representative.* The Claimant submitted that he had testified that he was never issued with a show cause letter or subjected to any disciplinary hearing to charges framed against him. He submitted that if at all the Respondents thought that he was guilty of any gross misconduct, they ought to have subjected the Claimant to a fair disciplinary process. The Claimant submitted that the court has in countless occasions held that if an employee is not heard, the termination is *ipso facto* unfair. The Claimant submitted that there is no doubt that he was not offered any explanation as required under Section 41 of the Employment Act. Section 45 of the Act stipulates that an employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure. The Claimant urged the court to be guided by the case of **Donald Odeke v Fidelity Security Ltd [2012] eKLR** where Ndolo J. observed that

an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them. The learned Judge went ahead to add that it does not matter what offence the employee is charged of. If the employee is not heard, the termination is ipso facto unfair

7. The Claimant submitted that it is so clear that the fairness test in this case was never achieved as there was no justification for the Respondent to dismiss the Claimant. Equally, due process was also aborted in the haste to unlawfully terminate the Claimant's employment. As to whether the Claimant is entitled to the relief sought? The Claimant submitted that this is a typical case of an unfair, unlawful and inhumane dismissal. The Claimant submitted this Court has held innumerable times that the provisions of the Constitution of Kenya, 2010, and the Employment Act, 2007 were not enacted for cosmetic purposes. The Claimant submitted that he has proved his case the required standards and seeks the relief sought. On the issue of underpayment, the Claimant had testified that during the period of engagement with the Respondent, he was being paid salary below the statutory minimum wage. Owing to this, the Claimant submitted that he is entitled to the balance of the difference between what he was earning and the statutory minimum wage as provided by the various **Regulations of Wages Orders** for the years, 2012, 2013 and 2015 respectively. The Claimant submitted that the Respondent did not avail records to the court that they actually paid the Claimant as required in the law. This claim therefore remains due and owing. The Claimant submitted that due process was not followed in terminating the services of the Claimant and that the Claimant was unfairly and unlawfully terminated, and is thus entitled to his terminal dues as required under Section 49 of Employment Act which provides for remedies for wrongful dismissal and unfair termination. The Claimant thus sought that the claim be allowed as prayed. We also pray for interest on the award from the date of filing of the case as well as costs.

8. The Claimant was required to discharge the burden that an unfair or unlawful termination took place and the Respondent had the burden of justifying the termination. The Respondent asserted that it had reasons for the dismissal but failed to advance any reasons nor avail any evidence for the Court to consider. It accused the Claimant of misconduct involving theft of items and no accusation however colourfully made can dislodge the requirements under the law for proof. The Claimant testified that he was underpaid and that at the time of dismissal he was not subjected to any disciplinary process i.e. he was not heard prior to dismissal in terms of Section 41 of the Employment Act. As stated in the case of **Donald Odeke v Fidelity Security (supra)** an employee facing termination must be accorded an adequate opportunity to respond to any charges before action is taken against them and it does not matter what offence the employee is charged of. If the employee is not heard, the termination is *ipso facto* unfair. I find that the Claimant's dismissal was unfair within the meaning of the law and he is entitled to compensation as well as payment of the underpayment of wages for 1 year as he failed to move the court within 12 months of the underpayments in previous years as provided or under Section 90 of the Employment Act. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- i. One month's salary in lieu of notice – Kshs. 16,872/-
- ii. Salary underpayments for the year preceding filing of the suit (16,872-14,000/- x 12) – Kshs. 34,464/-
- iii. 3 month's salary as compensation for unlawful dismissal – 50,616/-
- iv. Costs of the suit
- v. Interest on the sums in i), ii) and iii) above at Court rates from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE