



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 107 OF 2018

MOHAMMED BOCHA GOBU.....CLAIMANT

VERSUS

H YOUNG & CO (EAST AFRICA) LTD.....RESPONDENT

JUDGMENT

INTRODUCTION

1. Mohammed Bocha Gobu brings this claim against H Young & Company (East Africa) Ltd. Gobu claims that the Company terminated his employment unfairly on 3rd October 2017.
2. The claim is documented by a Memorandum of Claim dated 22nd February 2018 and filed in court on 2nd March 2018. The Respondent filed a Statement of Response on 29th May 2018.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Security Manager, Edward Patrick Muriuki. The parties further filed written submissions.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent on 7th June 2017, in the position of Pickup Driver. He was deployed at the Respondent's Garsen-Lamu Road Project and earned a monthly salary of Kshs. 22,745.
5. The Claimant claims that the Respondent terminated his employment on 3rd October 2017, unilaterally without justifiable cause and in complete disregard of the procedure expressly set out in the Employment Act.
6. The Claimant avers that prior to the termination of his employment, he was not invited to any disciplinary meeting nor was he accorded an opportunity to defend himself against any allegations that may have formed the basis of the termination.
7. The Claimant's claim against the Respondent is as follows:

- a) One month's salary in lieu of notice;
- b) Damages for unlawful termination of employment;
- c) Gratuity;
- d) Certificate of service;
- e) Costs plus interest.

The Respondent's Case

8. In its Statement of Response dated 11th April 2018 and filed in court on 29th May 2018, the Respondent admits having employed the

Claimant as a Pickup Driver on 7th June 2017, at a monthly salary of Kshs. 22,745.

9. The Respondent denies the Claimant's claim that his employment was unlawfully terminated and states that the Claimant's employment was terminated on account of gross misconduct.

10. The Respondent avers that prior to termination, the Claimant was arrested and taken to Garsen Police Station where he was questioned for creating disturbance. The Respondent maintains that it is only after investigations that the Claimant's employment was terminated.

Findings and Determination

11. There are two (2) issues for determination in this case:

- a) Whether the Claimant's termination was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

12. The Respondent produced a termination letter dated 3rd October 2017 addressed to the Claimant. The letter states as follows:

"RE: TERMINATION OF EMPLOYMENT

The Management has terminated your services effective 3rd October 2017.

Your final dues shall be calculated and paid as follows:

Salary up to and including 3rd October 2017, outstanding leave days and pay in lieu of notice less any company liability.

Please clear with the site and stores before you leave.

Your final dues will be processed and prepared for collection.

Yours faithfully

For: H YOUNG & CO (EA) LTD

(Signed)

MARK DIXON

PROJECT MANAGER

GARSEN-LAMU PROJECT"

13. This letter, which admittedly was not served on the Claimant does not disclose the reason for termination of the Claimant's employment.

14. However, from the evidence on record, it emerged that on 3rd October 2017, the Claimant was driving the Foreman to Garsen Town, when he was intercepted by the Project Manager, Mark Dixon because the Foreman's employment had been terminated.

15. The Claimant was accused of creating disturbance at the project site upon which he was arrested and booked at Garsen Police Station. However, the Respondent's officers did not follow up the complaint and the Claimant was released unconditionally.

16. The Respondent's Security Manager, Edward Patrick Muriuki told the Court that upon being questioned by the Project Manager, the Claimant turned violent. Muriuki however admitted that he was not present during the alleged altercation.

17. The allegations against the Claimant were within the province of gross misconduct. The Claimant therefore had a right to be heard prior to any adverse action being taken against him on account of these allegations. This did not happen. In fact, the decision to terminate the Claimant's employment was made on the same day he was arrested. None of the persons who were present during the incident of 3rd October 2017 was called to testify before the Court.

18. The Court was referred to the decision in **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR** where my brother **Radido J** restated the procedural fairness requirements set out under Section 41 of the Employment Act. In a nutshell, the employer is required to inform the employee of the charges upon which termination of employment is being considered and the employee must also be given adequate time to prepare and present their defence to those charges.

19. In this case, the Claimant's employment was terminated instantly without any prior notification or opportunity to respond. The termination was therefore substantively and procedurally unfair and the Claimant is entitled to compensation.

Remedies

20. Pursuant to the foregoing findings, I award the Claimant three (3) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service accentuated by the Respondent's callous conduct in effecting the termination.

21. There was no evidence that the Claimant was paid one month's salary in lieu of notice. I therefore allow this claim as well.

22. No basis was established for the claim for gratuity which therefore fails and is dismissed.

23. Finally, I enter judgment in favour of the Claimant as follows:

a) 3 months' salary in compensation.....Kshs.68,235

b) 1 month's salary in lieu of notice.....22,745

Total.....90,980

24. This amount will attract interest at court rates from the date of judgment until payment in full.

25. The Claimant is also entitled to a certificate of service plus costs of the case.

26. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 20TH DAY OF FEBRUARY 2020

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JUDGE

Appearance:

Mr. Mwakio for the Claimant

Ms. Olendo for the Respondent