



**Mumbo v Oduol t/a Time Sharp Enterprises (Cause 209 of 2018)
[2023] KEELRC 1195 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1195 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 209 OF 2018
M MBARÚ, J
APRIL 27, 2023**

BETWEEN

KEVIN GUMBA MUMBO CLAIMANT

AND

**PHILBERT ODIWOUR ODUOL T/A TIME SHARP
ENTERPRISES RESPONDENT**

JUDGMENT

1. The claim herein was heard in the absence of the respondent who was served with a Hearing Notice dated March 13, 2013 to attend on March 27, 2023 but failed to do so. There are returns to confirm service.

Claim

2. The claimant is a male adult and was employed by the respondent company in the year 2017 as a customer attendant.
3. The claim is that on December 20, 2017 while the claimant was working in the night shift, a motorbike customer came and demanded to be attended to but since there was a que of other customers waiting, the claimant attended to them first but he was attacked by the other customer and a fight ensued.
4. On December 21, 2017 the respondent directed the claimant not to report to work which action amounted to summary dismissal from employment without notice, a hearing or being paid terminal dues. the claimant is seeking payment of the following dues;
 - a. One months' notice pay at Ksh 16,725;
 - b. 12 months' salary compensation Ksh 200,700;
 - c. Pay for 21 days worked in December, 2017 Ksh 11,707.50;



- d. 42 leave days Ksh 33,450; and
 - e. Costs of the suit.
5. The claimant testified in support of his case that when a customer came to his station on the night of December 20, 2017 he found other customers waiting in line but he attacked the claimant and a fight ensued. The claimant defended himself but the matter was alter resoled between them but when the respondent learnt about it, he was directed not to report to work leading to summary dismissal which was unlawful, unfair and without justification and the claims made should be awarded by the court against the respondent.

Response

6. In response, the respondent's case is that on December 20, 2017 the claimant assaulted a motorcycle customer while seeking services at the station and this exposed the respondent and its employees at the station to danger and for this reason the claimant was dismissed from his employment on January 5, 2018 in accordance with Section 44(4) (c) of the *Employment Act*. Through letter dated December 21, 2017 the claimant was asked to elaborate on the events which took place on December 20, 2017 at the Total kwa Jomvu Petrol Station where he was on duty and it was noted that he had failed to report the incident to the respondent. The claimant was invited to write his statement on the matter while the motorcycle customer was present and hence there was a chance for a hearing and the claims made should be dismissed with costs.
7. The response is also that on January 22, 2018 the claimant acknowledged payment of his terminal dues and nothing is owing to him from the respondent.
8. No witness was called as the respondent remained absent as noted above.

Determination

9. In a letter dated January 1, 2018 the respondent summarily dismissed the claimant on the grounds that he was involved in a fight with a customer who had sought services at the respondent' service station hence putting the entire station and other employees of the respondent in danger.
10. Before the summary dismissal notice issued, on December 21, 2017 the respondent had issued the claimant with notice to show cause why disciplinary action should not be taken against him over his conduct of assaulting a customer on December 20, 2017. The claimant replied the same day and noted that he had met the motorcyclist and agreed to forgive each other and the matter settled.
11. Section 44(4)(g) of the *Employment Act, 2007* (the Act) allow an employer to summarily dismiss an employee who engages in criminal conduct or conduct that is likely to put into jeopardy the property of the employer. Where the employee is found to be of such gross misconduct, summary dismissal is allowed without notice or with less notice due to breach of contract through acts of gross misconduct as held in *Cooperative Bank of Kenya Limited v Yator* (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR) (22 October 2021) (Judgment).
12. The safeguard to the employee who is found to be of gross misconduct is for the employer to ensure that there is hearing and the employee allowed a fair chance to defend his conduct. The employer is required under the provisions of Section 41(1) of the Act to hear the employee and allow him to make his representations;

"(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an



employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make."

These provisions are couched in mandatory terms.

13. Even where an employee has committed gross acts of misconduct, which acts warrant summary dismissal, the law requires that before such sanction is undertaken, an employer must ensure procedural fairness to the employee by allowing him to give his defence. Where the employer is unable to hear the employee in defence, such must only be in exceptional circumstances which the employer must demonstrate.
14. Upon the claimant being issued with a notice to show cause on December 21, 2017 there is no evidence that he was called to attend a hearing. Had such been the case, the respondent would have filed such record which is lacking in this case.
15. The lapse in addressing a mandatory requirement set out in law renders the summary dismissal of the claimant unlawful and pursuant to Section 45 of the Act, such is unfair.
16. On the remedies sought, on January 22, 2018 the claimant was paid terminal dues, an amount of Ksh 16,725 which is equivalent to one month's gross wage. The claimant accepted this payment save, his leave days had not been utilised for a year.
17. Under the provisions of Section 28 of the Act, in a given year, an employee enjoys 21 leave days unless there is agreement for more days. In this regard, the claimant is only entitled to 21 days' pay based on his wage of Ksh 16,725.
18. The claimant filed a document with his pleadings indicating that he was paid Ksh 16,725 as part of his leave allowance. This being part of the claimant's record, the court cannot doubt its authenticity.
19. Compensation is due where the court finds there is unfair termination of employment save, pursuant to Section 45(5) (b) of the Act, the court is required to look at the conduct of the employee at the time of summary dismissal. The claimant testified that he was involved in a fight with a customer, he was required to show cause on his conduct and leading to his summary dismissal. Save for failure to adhere to the due process, the claimant was indeed of gross misconduct and to award him compensation would be to reward such gross misconduct. No amount shall be assigned.
20. For lack of due process, notice pay is due at one month's gross wage all at Ksh 16,725.
21. On the claim for days worked, through letter dated January 5, 2018 the respondent dismissed the claimant from his employment and there is no record filed that from December 21, 2017 when the altercation took place and until the claimant received his notice to summary dismissal he was paid. The salary for December, 2017 is due together with pay for 5 days in January, 2018 being Ksh 16,725 + 2,787.50 = 19,512.50.
22. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
 - a. Compensation ksh 16, 755;
 - b. Pay for days worked Ksh 19,512.50; and
 - c. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 27TH DAY OF APRIL, 2023.



M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

