



REPUBLIC OF KENYA



KENYA LAW
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**Emoit v Radar Limited (Cause 1871 of 2017)
[2023] KEELRC 2882 (KLR) (10 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2882 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1871 OF 2017
SC RUTTO, J
NOVEMBER 10, 2023**

BETWEEN

JOSHUA OMONGOJEL EMOIT CLAIMANT

AND

RADAR LIMITED RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim filed on 19th September 2017, the Claimant avers that he was employed by the Respondent as a Security Guard from August 2020. It is the Claimant's case that on 19th June 2017, while undertaking his duties at the Soko Investment Premises, he was instructed by the Respondent's Human Resource Manager to go home as his services were no longer required. According to the Claimant, this amounted to summary dismissal which he contends was unlawful and against the *Employment Act*, the principles of natural justice and the tenets of good and fair labour practices. It is on account of the foregoing that the Claimant seeks the following reliefs against the Respondent:
 - a. A declaration that his dismissal from employment was unfair and unlawful and he is entitled to his terminal dues and compensatory damages;
 - b. An order for the Respondent to pay him his terminal dues and compensatory damages totaling Kshs 554,319.00;
 - c. Interest on (b) above from the date of filing till full payment; and
 - d. Costs of this suit plus interest thereon.
2. The Claim was opposed through the Respondent's Statement of Response dated 4th May 2022, in which it avers that the Claimant was summarily dismissed from employment on grounds of stealing at his place of assignment. The Respondent further avers that it had a valid reason for summarily



dismissing the Claimant and that it followed due process. Consequently, the Respondent has asked the Court to dismiss the Claimant's claim with costs.

3. The matter proceeded for hearing on diverse dates during which both sides called oral evidence.

Claimant's Case

4. The Claimant testified in support of his case and for starters, he sought to rely on his witness statement to constitute his evidence in chief. He proceeded to produce the documents filed alongside his Memorandum of Claim, as his exhibits before Court.
5. It was CW1's testimony that on 19th June 2016, while in the course of his duties, he was instructed by the Respondent's Human Resource Manager by the name Mr. Mwanzia to go home and report back on 20th June 2016. He reported back on 20th June 2016 and was shocked when he was informed that his services were no longer needed and that he should not report back to his assignment. No reason was given to him for that decision.
6. He further stated that he was not issued with any notice and due process was not followed in summarily dismissing him. The Claimant was categorical that he had not committed any wrongful act to warrant summary dismissal. On the same note, he stated that he had not been charged with theft.
7. Concluding his testimony in chief, the Claimant asked the Court to award him damages as he really suffered following his termination.

Respondent's Case

8. The Respondent called oral evidence through its Human Resource Manager, Ms. Beryl Odhiambo, who testified as RW1. To begin with, she adopted her witness statement and the documents filed on behalf of the Respondent to constitute her evidence in chief.
9. RW1 testified that on 19th June 2016, the Respondent's client called its control room to report that he had noticed an individual with civilian clothes carrying iron sheets out of his premises, which was to be guarded by the Claimant. Upon investigation, the Claimant admitted that he had called his neighbour to go and collect the iron sheets, who then dashed in when he (Claimant) opened the gate.
10. It was RW1's testimony that the Claimant was summarily dismissed from employment on grounds of stealing at his place of assignment.
11. She further stated that the Claimant was accorded an opportunity to be heard before a disciplinary committee, which deemed it fit for him to show cause why his services should not be terminated. It was upon the recommendations of this committee that the Claimant was summarily dismissed.
12. RW1 further averred that the Claimant was paid all his statutory dues during his tenure of employment with the Respondent.
13. According to RW1, the Respondent does not owe the Claimant. She further told the Court that the Claimant was not entitled to notice or salary in lieu of notice.
14. Closing her testimony in chief, RW1 asked the Court to dismiss the Claimant's suit with costs.

Submissions

15. It was submitted by the Claimant that no evidence was brought forth to prove the allegation of stealing. He further posited that the Respondent did not bring a record of the complaint that is alleged to have been made by its client nor any witness who could confirm that he was guilty of the theft.



16. It was the Claimant's further submission that there is no evidence on record to prove that the allegation raised in the termination letter was investigated. In the same breath, the Claimant submitted that no investigation report was filed by the Respondent as proof that the allegations were substantiated.
17. The Claimant further submitted that the Respondent has not proved that there was a valid and fair reason to terminate him as required under Section 45 of the *Employment Act*. In support of this argument, the Court was invited to consider the determination in the case of Joseph Sitati Nato vs Kenya Ports Authority (2010) eKLR.
18. On the question of due process, the Claimant submitted that he was never given a hearing as contemplated under Section 41 of the *Employment Act* and that there is no evidence on record to show that a disciplinary hearing took place. It was further submitted by the Claimant that the Respondent's testimony that he was given an opportunity to be heard was not supported by evidence. To buttress this position, the Claimant referenced the case of Donald Odeke vs Fidelity Security Limited (2012) eKLR.
19. The Respondent did not file written submissions as the same were missing from the physical record of the Court and were not traceable on the online portal. This is despite being given an additional seven (7) days from 19th September 2023, to comply.

Analysis And Determination

20. Having evaluated the issues arising from the pleadings filed by both parties, the evidentiary material on record and the Claimant's submissions, the issues falling for the Court's determination can be condensed as follows: -
 - a. Whether the Claimant's termination from employment was unfair and unlawful;
 - b. Is the Claimant entitled to the reliefs sought?

Unfair And Unlawful Termination?

21. In order to prove that an employee's termination from employment was fair, an employer is required to satisfy two requirements, being that there was substantive justification to warrant such termination, and that the same was undertaken procedurally. Such was the determination in the case of Walter Ogal Anuro vs Teachers Service Commission [2013] eKLR. That said, I will proceed to apply the two tests to the instant case.

Substantive Justification

22. Under Section 43(1) of the *Employment Act* (Act), an employer is required to prove the reasons for termination, and in absence thereof, such termination is deemed to be unfair. That is not all. Section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
23. The aforestated position was reiterated by the Court of Appeal in the case of Chairman Board of Directors (National Water Conservation and Pipeline Corporation) vs Meshack M. Saboke & 2 others, (2019) eKLR.
24. From the record, the Claimant herein was summarily dismissed on grounds of stealing. His letter of summary dismissal is couched as follows:

“ Ref: Summary Dismissal



On the 19th June 2016 whilst assigned guarding duties Solco Investment at around 1407 hours the client called the control room to report that on his way in he noticed an individual with civilian clothes carrying iron sheets upon further query you stated that you had called your neighbour who had dashed in as you opened the gate to come and collect their iron sheet.

Be advised that stealing is a serious offence which leaves the company with no alternative but to issue you with a summary dismissal with immediate effect under the [Employment Act 2007](#) Laws of Kenya.”

25. As stated herein, an employer is required to prove that there was substantive justification to warrant an employee’s termination. Essentially, an employer must prove by way of evidence that the reasons for the termination of the employee were fair and valid.
26. It is noteworthy that the Claimant did not deny that he was with a stranger at the premises where he was assigned to work. However, he categorically denied the allegations of theft of the iron sheets from the Respondent’s client’s premises
27. Revisiting the reasons for the Claimant’s summary dismissal, I must say that the Respondent failed to prove that the same were fair and valid. I say so because first, the Respondent stated that its client reported seeing a person dressed in civilian clothes carrying the iron sheets out of his premises. During cross-examination, RW1 stated that the theft incident was recorded on the Occurrence Book. However, the said Occurrence Book was not exhibited in Court.
28. Further, it was indicated in the Claimant’s letter of summary dismissal that he admitted calling his neighbour who dashed in as he opened the gate to go in and collect the iron sheets. Again, the Respondent did not indicate the manner in which the Claimant’s admission was captured. Indeed, there was no evidence to confirm that the Claimant had made an admission to this effect.
29. It is also noteworthy that in her testimony before Court, RW1 stated that the Claimant’s mistake was letting a stranger into the client’s premises. Be that as it may, this was not the reason for his dismissal. The main reason for his dismissal was stealing and it was upon the Respondent to connect the Claimant to the said allegation.
30. As stated herein, the Respondent did not adduce evidence to back up its allegations that the Claimant was culpable of stealing at his place of assignment. Indeed, the respondent failed to draw a nexus between the alleged theft of the iron sheets and the Claimant, even to a remote extent. Simply put, the allegations against the Claimant were not substantiated.
31. To this end, I cannot help but find that the Respondent has not satisfied the requirements of Section 43 as read together with Section 45(2) (a) and (b) of the Act in that it had a valid and fair reason to summarily dismiss the Claimant on account of stealing.

Procedural Fairness

32. Section 45(2) (c) of the Act provides that for termination to be fair, it ought to be in line with fair procedure. With respect to this, Section 41 of the Act requires an employer to accord an employee a hearing prior to termination. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations, in the presence of another employee or a shop floor union representative of his or her choice.



33. In this case, the Respondent stated that the Claimant was given an opportunity to defend himself. Despite the Respondent's assertion, there was no evidence to support the same. For instance, there was no evidence that it notified the Claimant that it was considering terminating his employment on the allegations of theft. Indeed, it is worth mentioning that during cross-examination, RW1 admitted that the Claimant was not issued with a notice to show cause.
34. Additionally, there was no evidence that the Claimant was invited for a disciplinary hearing and if so, that he was heard on his defence in accordance with the provisions of Section 41 of the Act.
35. Further, cross-examined, RW1 testified that the Claimant was invited to appear orally for a disciplinary hearing. It was her further evidence that present at the disciplinary hearing was the Human Resource representative, the operations team and the Claimant's supervisor. Be that as it may, there was no evidence in the form of a disciplinary record to confirm this fact.
36. Let's suppose that the Respondent's assertion is true that it undertook a disciplinary hearing, there is still a gap as it failed to confirm that the Claimant was notified of his right to call a union representative or a colleague to accompany him, ahead of the hearing.
37. Being the employer in this case, the Respondent carried the burden of proving that it subjected the Claimant to a fair process prior to terminating his employment.
38. All in all, the Respondent has failed to prove that it subjected the Claimant to a fair process in accordance with Section 45(2) (c) as read together with Section 41 of the Act. Ultimately, the Claimant's dismissal from employment was procedurally unfair hence unlawful.
39. In the end, I find that the Claimants' termination was both unfair and unlawful within the meaning of Section 45 of the Act.

Reliefs?

40. As the Court has found that the Claimant's termination was unfair and unlawful, he is entitled to compensation under Section 49(1) of the Act. To this end, he is awarded one (1) month's salary in lieu of notice and compensatory damages equivalent to six (6) months of his gross salary. This award takes into account the length of the employment relationship as well as the circumstances attendant to the Claimant's dismissal from employment.
41. The Claimant is further awarded leave pay as the Respondent did not exhibit his leave records in line with its obligation under Section 74(1) (f) of the Act. As a matter of fact, RW1 admitted during cross-examination that the Claimant did not proceed on leave. The Claimant is therefore entitled to payment in lieu of leave.
42. However, in terms of Section 28(4) of the Act, the Claimant's entitlement shall be limited to 18 months preceding his termination from employment.
43. The Claimant has prayed for unpaid house allowance in the sum of Kshs 150,147.00. A perusal of his payslip reveals that he was paid house allowance in the sum of Kshs 1,026.00 per month. Therefore, this relief does not lie.
44. The claim for service pay is similarly declined as it is evident from the record that the Claimant was a registered member of the National Social Security Fund (NSSF). Therefore, he falls within the exclusions under Section 35(6) of the Act, hence is not eligible for payment of service pay.
45. The claim for unpaid public holidays is equally declined as the Claimant's pay slip reveals that he was paid overtime. In this regard, the Claimant did not justify his claim by proving that the overtime pay



did not cover the period he alleges he worked on public holidays. For this reason, the relief for unpaid public holidays cannot be sustained.

Orders

46. It is against this background that I enter Judgment in favour of the Claimant against the Respondent and he is awarded: -
- a. One (1) month's salary in lieu of notice being the sum of Kshs 16,683.00.
 - b. Compensatory damages in the sum of Kshs 100,098.00 being equivalent to six (6) months of his gross salary.
 - c. Unpaid leave being the sum of Kshs 17,517.00.
 - d. The total award is Kshs 134,298.00.
 - e. Interest on the amount in (d) at court rates from the date of Judgment until payment in full.
47. The Respondent shall release the Claimant's Certificate of Service within 30 days from the date of this Judgment.
48. The Claimant shall also have the costs of the suit

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER 2023

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Omamo

For the Respondent Mr. Gitonga

Court Assistant Abdimalik Hussein

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of [the Constitution](#) which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of [the Constitution](#) and the provisions of Section 1B of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes

