



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI

CAUSE NUMBER 358 OF 2017

(Before Hon. Justice Ocharo Kebira on 31st January, 2022)

DAVID NZOMO KIKUVI.....CLAIMANT

-VERSUS-

UZURI FOODS LIMITED....RESPONDENT

JUDGMENT

Introduction.

1. At all material times the Claimant was an employee of the Respondent as a general worker having been so employed in the month of May 2007. The employment relationship lasted till the 3rd of October 2016, when the Claimant was dismissed. The Claimant holding that the dismissal was unfair and unlawful, commenced the cause herein against the Respondent, through a memorandum of claim dated 17th January 2017, seeking for the following reliefs and orders;

- a. A declaration that the Claimant's dismissal from the Respondent's service was unfair and unlawful and totally failed to follow due process.
- b. An order for the Respondent to pay the Claimant his full terminal dues and compensatory damages totaling to Kshs. 210,000.
- c. The Respondent do pay the Claimant costs of this cause plus interest thereon.

2. The memorandum of claim was contemporaneously filed with the Claimants witness statement of the even date and a list of documents under which the documents that he intended to place reliance upon in fortification of his case were filed. The documents being, copy of his pay slip for the month of August 2015, treatment notes in a bundle, and a demand letter dated 14th October 2016.

3. Upon being served with summons to enter appearance, the Respondent did enter appearance and file a reply to the memorandum of claim dated the 20th June 2018, wherein it admitted the employee-employer relationship that were, but denied the Claimant's claim in toto, and his entitlement to the reliefs sought in the memorandum of claim.

4. At the close of pleadings, there was a joinder of issues, the matter therefore got destined for hearing *interpartes* on merit. It was heard on the 4th October 2021 and 2nd November 2021, when the, Claimant's and Respondent's cases were taken, respectively.

5. Directions were given to the parties to file their submissions within specific timelines, they obliged.

The Claimant's case.

6. The Claimant testified in Court on the above-mentioned date, urging the Court to adopt the contents of his witness statement as part of his evidence in chief, and the above-mentioned documents as his documentary evidence. The Respondent did not object to this, the adoption was so done. The Claimant however briefly gave an oral testimony, clarifying a few aspects of the witness statement and the documents, which he thought it was imperative to do.

7. The Claimant stated that he came into the employment of the Respondent in or about the month of May 2007, as a general worker with a gross salary of **Kshs. 14,000**. He worked continuously, diligently, and with dedication as such, till the month of June 2016, when things started going south.

8. Early the month of June 2016, he was taken ill and was advised to visit the Respondent's in-house clinic for treatment. The clinic was not well equipped to handle his ailment adequately, he was consequently referred to Shalom Hospital whereat he was diagnosed with Pneumonia and Tuberculosis, among other ailments.

9. The Claimant further stated that he was admitted to hospital for 3 [three] weeks whereupon being released, he was referred to the T.B Treatment Centre Nairobi for specialized where he remained under treatment for a further period of [three] months. The Claimant asserted that all these was well within the knowledge and authority of the Respondent.

10. The Claimant further stated that on the 31st September, 2016, tests were conducted on him, he was cleared for resumption of duty.

11. He stated that he consequently reported to his work place on the 3rd of October 2016, ready to resume work. He presented to the Respondent's personnel manager, Mr. Nyagaka with the approval sheet together with other treatment documents for the Respondent's record. To his perturbation, the manager told him that there was no work for him, the Respondent was no longer in need of his services, His efforts to get an explanation and reasons why his employment was terminated bore no fruits.

12. He asserted that he was not paid his terminal dues and the salary arrears that were.

13. He contended that the dismissal was unfair, unlawful and counter to the tenets of fair labour practices and the principles of natural justice. The decision to dismiss him was unwarranted and unjustified. He was not heard before the decision was arrived at. He contended that he was not guilty of any misconduct or any conduct at all that would stir the sanction against him.

14. Cross examined by Counsel for the Respondent, the Claimant stated that he would not remember the exact date of June 2016 when he was taken ill. However, he was authorized to proceed to hospital by the personnel manager, Mr. Nyagaka.

15. He reiterated that he was under admission at Shalom Hospital for three weeks. He was discharged on the 21st June 2016. That when he got discharged he on the 22nd day of June 2016, went personally to the manager and notified him.

16. The Claimant stated that between 21st June 2016 to 3rd October 2016, he was on sick leave. He asserted that he fully recovered on the 3rd October 2016. He admitted that paragraph 6 of his witness statement, indicates 31st September 2016, as the date when he was given a clean bill of health to resume duty. He states that the approval to get back to work came from Reuben Centre, Center which he had earlier on stated he went to only to pick medicine.

17. He maintained that he never absconded duty. He admitted that he was paid his salary for the month of August 2016.

18. In his evidence in re-examination, the Claimant stated that the dismissal letter that the Respondent tendered as evidence, expressed that he was supposed to resume duty in the month of September 2016, but he did not. He further stated that his discharge note is dated 3rd October 2016.

19. He reiterated that he was not called to give any explanation before the dismissal.

The Respondent's Case.

20. The Respondent presented one Douglas Nyagaka, to testify in its defence to the Claimant's case. The witness moved the Court to adopt his witness statement that had been filed herein as his evidence in chief, and admit the documents under its list of documents dated, 20th June 2018, namely a dismissal letter and a pay slip, as the Respondents exhibits. The Claimant did not oppose.

21. The witness stated that he remembers that the Claimant was unwell, upon being so informed by his colleagues. That when he got discharged from hospital, he sent the witness a medical note. According to the sick off note, he was supposed to resume duty on the 1st of September 2016.

22. The witness stated that the Claimant absconded duty since September 2016 after being on sick leave from June 2016 to August 2016. That he did not give a reasonable excuse for his absence.

23. The witness stated that thereafter, he wrote a letter dated 30th September 2016 summarily dismissing the Claimant on account of absconding duty. The reason was explained to the Claimant. He alleged that prior to issuing him with the letter, he had required him to produce documents regarding the extended sick off, but he failed to.

24. He cannot claim for salary for the month of September 2016, yet he did not work, he was not on any authorized sick leave. The Claimant wants to enrich himself unjustifiably, the witness asserted.

25. Cross examined by Counsel for the Claimant, the witness stated that the Claimant fell sick in the month of June. He went off duty without seeking permission to be so. Further that he came to realize that the Claimant had been off duty, when he brought him the sick off notes.

26. Referred to paragraph 3 of his witness statement, the witness admitted that therein he had stated that the Claimant absconded duty from the month of June to August 2016. He stated that they never reached the Claimant for it is the Claimant who was supposed to reach out to the Respondent. It was not the duty of the Respondent to look for him. Nobody knew where he was staying.

27. The witness further stated that they never called the Claimant to show cause why disciplinary action would not be taken against him. The dismissal letter was written and kept to await collection by the employee. There was no need to have his story.

28. The witness boldly stated that one cannot be on sick off forever.

29. In re-examination by the Respondent's Counsel, he testified that he did not receive any medical report from the Claimant after August 2016. He did not have any sick off note. The Claimant did not report that he was sick, the witness only came to know from his colleagues.

30. On whether thy tried to reach the Claimant, he stated that the phone number that he had given the Respondent was not going through.

31. According to the witness, the Doctor gave the Claimant only two months sick off. There was no extension thereof. This is what prompted him [the witness] to write the dismissal letter.

32. He contended that the Claimant absconded duty for that period 1st September 2016 to 3rd October 2016. When he reported back, there was no place for him, he had been replaced.

The Claimant's Submissions.

33. In his written submissions, Counsel for the Claimant identified three issues as follows:

a. Was fair procedure applied before dismissing the Claimant?

b. Were the issues substantively and factually proved as cause for dismissal?

c. Is the Claimant entitled to the prayers sought?

34. On the first issue Counsel submitted that Under Section 45 of the Employment Act, the time of termination but also that the employment was terminated in accordance with fair procedure.

35. It was argued that if at all the Respondent had a ground to dismiss the Claimant, they ought to have subjected him to a fair disciplinary process. Absent of the process, the dismissal was *ipso facto* unfair. Reliance was placed on the decision in **Justine Omwoyo v Mount Kenya University [2016] eKLR** and **Walter Ogal Anuro vs Teachers Service Commission [2013]eKLR**.

36. On the second issue it was submitted that in his evidence under cross examination, the Respondent's witness admitted that the Claimant was not issued with any notice to show cause. He was just dismissed. In the circumstances there was not substantive justification for the reasons leading to the dismissal.

37. Submitting on the reliefs sought, Counsel stated that having demonstrated that the was unfair, unlawful and inhuman, the Claimant is entitled to the reliefs. He was terminated without notice, consequently he should be granted the prayer for a one month's salary in lieu of notice pursuant to the provisions of Section 36 of the Act.

38. Counsel submitted that the Claimant did place evidence before this Court, demonstrating that for the entire period of August to September 2016, when he was on sick leave, he was not paid salary.

39. It was argued that since the dismissal was unfair and unlawful, the Claimant should be granted a compensatory relief equivalent to 12 [twelve] months' gross salary. The extent should be informed by the length of time the Claimant was in the employment of the Respondent, and the inhumane manner in which the dismissal was handled.

The Respondent's Submissions.

40. The Respondent's Counsel identified the following issues as the issues for determination in this matter, thus;

a. Whether the Claimant's termination was fair.

b. Whether the Claimant is entitled to the terminal benefits and compensatory damages sought in the memorandum of claim.

41. As regards the fairness in the termination, he argued that the case was one of summary dismissal, dismissal which was anchored on reasonable and sufficient grounds. That the sanction was attracted by gross misconduct on the part of the Claimant that fell under the ambit of section 44[4] of the Employment Act, to with; he absented himself and without leave kept away from his place of work. The employer had given him a whole three months to seek medication. That the dismissal was justified, Counsel placed reliance on the decision in **George Okello Munyolo vs Unilever Kenya Limited [2019]eKLR**.

42. It was asserted that the Claimant was unable to explain his absence between 1st September2016 and 3rd October 2016. The evidence that he gave to the effect that he was declared fit for resuming duty on the 31st September 2016, was devoid of any probative value as it is marred with inaccuracies. That the document was purposely acquired on the same day that the Claimant got back to work, 3rd October,2016.

43. As regards the prayer for salary for August 2016, Counsel argued that the same is an abuse of the court process and only intended to unjustifiably enrich the Claimant. The Claimant did admit that he received the salary under the pay slip of the month, August 2016.

44. The Claimant is not entitled to the compensatory relief since the summary dismissal was anchored on reasonable grounds and therefore not unlawful and unfair.

Analysis and Determination.

45. Upon the pleadings, the evidence and material before this Court, the following issues commend themselves to me as the issues for determination in this matter, thus;

- a. Whether the dismissal of the Claimant was procedurally fair.**
- b. Whether the summary dismissal of the Claimant from his employment was substantively fair.**
- c. Whether the Claimant is entitled to the reliefs he has sought.**
- d. Who should bear the costs of this matter?**

Whether the summary dismissal of the Claimant from employment was procedurally fair.

46. Section 45 of the Employment Act commands that no employer shall terminate the employment of an employee unfairly. Section 45[2] [c] gives the reason why an employer contemplating terminating an employee's employment or summarily dismissing him or her must engage a fair process, a default in engaging the process will render the termination or summary dismissal unfair, putting the employee in the path of entitlement to one or more of those remedies provided for under Section 49 of the Act, as a consequence.

47. Section 41 of the Employment Act provides an answer as to what fair procedure entails:

“1. Subject to section 42[2] an employer shall before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

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.”

48. On this, this Court in the case of Daniel Ochieku Achochi vs Dynaplast Limited, ELRC No. 533 of 2013 observed;

“It is clear therefore that once an employer conceives an intention of terminating an employee's employment or summarily dismissing him or her, an employer shall:

- a. Clearly indicate his intention to the employee, and the reason forming basis of the intention, and the intended action.**
- b. Express to the employee that he has the right to be accompanied by a colleague [where the employee is not a member of a union] or a shop steward [where the employee is a member of a union], and allow it happen, when the employer shall be explaining the grounds to the employee and receiving representations on the grounds from the employee.**
- c. Accord the employee and or his colleague an opportunity to make representations on those grounds.**
- d. Make a reasoned determination, which must consider the representations by the employee and or his colleague.”**

49. The fair procedure contemplated in Section 41 of the Act therefore entails three components, information, hearing, and consideration. Absence of any of these components in the process leading to termination of an employee's employment or summary dismissal of an employee shall render the process unfair.

50. The Respondent was under duty to demonstrate that the procedure was followed. In his evidence, the Respondent's witness admitted that the Claimant was not heard before the decision to dismiss him was arrived at. According to the witness in his evidence under cross examination, there was no need for the Respondent to receive the Claimant's story. This testimony supports the Claimant's claim that he was not accorded an opportunity to explain himself, contrary to what fair procedure expects. The testimony reflects the Respondent as an employer who is still stuck in the Common Law way of handling termination of contracts of service and or summary dismissals of employees, without realizing or caring that in 2007 a new dawn arrived regarding our employment and labour relations legal system. The Common Law principles and or ways were obliterated immensely.

51. I note that in his testimony under re-examination, the witness in contradiction to what he had stated under cross examination, attempted

to say that the Claimant was heard. When and how, was not explained to this Court. The pleadings by the Respondent and the witness statement by the witness did not address this. One cannot help but conclude that this position that was only taken in re-examination was an afterthought.

52. By reason of this premises, I am of the view that the summary dismissal was procedurally unfair.

Whether the summary dismissal was substantively fair.

53. Before I delve further into this issue, it is important to point out what the Respondent stated in its pleadings on why and how the summary dismissal occurred. I state this conscious of the fact that it is trite law that in an adversarial system such as is ours parties set the agenda of the case through their pleadings, and that they are bound by their pleadings. To allow a party to present a case otherwise than that brought forth in his or her pleadings, shall be tantamount to allow an ambush on the adversary and water down the whole essence for the existence of the requirement for pleadings in matters.

54. At paragraph 4 of the reply to the Memorandum of Claim, the Respondent stated;

“ The Respondent denies the contents of paragraph 6 of the memorandum of claim and puts the Claimant to strict proof. In further answer, the Respondent avers that it issued a dismissal letter dated 18th August 2016 after the Claimant’s long absence from work was experienced.”

And at paragraph 5,

“The Respondent denies the contents of paragraph 7 of the Memorandum of Claim and puts the Claimant to strict proof thereof.

In further response, the Respondent avers that the Claimant did not report to work from 1st August to 18th August 2016 yet he did not inform the supervisor nor give any explanation for his long absence.”

55. The evidence that was presented by the Respondent’s witness is at variance to a great degree in respect of the why and the how. In the pleadings that were never amended, the Respondent averred that the dismissal was through a letter dated 18th August 2016, yet the witness stated, and tendered in evidence a dismissal letter dated 30th September, 2016, showing, that the dismissal occurred on the 30th September 2016.

56. According to the pleadings therefore, the period when the Claimant got off duty without permission and which formed substratum of the dismissal was that between 1st August 2016 and 18th August 2016. Yet the witness’s evidence revealed that during this period the Claimant was off duty courtesy of a doctor’s sanctioned sick off. The testimony further got at variance with the pleadings when the witness stated that the period that formed the basis for the dismissal was that of between 1st September to 3rd October, 2016.

57. The Claimant contended that he was not given any reason for the termination and that he was not given a dismissal letter. The contradictions that I have pointed out hereinabove, attracts an inescapable conclusion that the Claimant was telling the truth.

58. Section 43 of the Employment Act places upon the employer the burden of proof of the reason for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45 of the Act. Under section 45, a termination of employment by an employer can only be said to be fair if the employer proves that the reason for the termination was fair and valid, related to the employee’s misconduct, capacity or compatibility, or based on the operational requirements of the employer.

59. The Respondent casted doubt on the Claimant’s medical not dated 3rd October 2016, suspecting that it was only authored to suit his case his return to work. Nothing would have been easier for the Respondent to take a step to check on the authenticity of the document by calling on the hospital for that purpose.

60. I am of the view that at all material times the Respondent was aware of the Claimant’s medical condition, and that they arbitrarily dismissed him without caring about that. This position finds fortification in the Respondent’s witness’s bold but unfortunate statement in his testimony that **“an employee cannot be on sick off forever.”**

61. In the circumstances, I have no doubt in my mind that the Respondent did not act with equity and justice. The summary dismissal has not been expressed to the requisite standards that it flowed from a fair and valid reason.

62. Consequently, I hold that the summary dismissal sanction that were against the Claimant was without substantive fairness.

What reliefs are available to the Claimant if any?

63. Having found that the summary dismissal was both procedurally and substantively unfair, I now turn to the reliefs sought by the Claimant. The claimant pleaded for a one month’s salary in lieu of notice. The Respondent took a position that the separation was a summary dismissal and therefore there cannot be an entitlement to the notice pay. The Respondent’s position would have been right had I not found that the same was not merited. Consequently, I am of the view that under the provisions of section 35 of the Act as read together with section 36, the Claimant is entitled to this relief, the court awards him Kshs. 14,000.

64. The Claimant further seeks for compensation pursuant to the provisions of Section 49[1][c] of the Act. In the circumstances of this matter, including that the Respondent did not act with equity and justice, that the summary dismissal was without a valid reason, the substantial deviation by the Respondent from the procedural requirements of the law, and the length of time the Claimant worked for the Respondent, I am convinced that an award of compensation pursuant to this provision and to the extent of 9 [nine] months' gross salary will serve justice. I so award.

65. Under cross examination, the Claimant admitted that he was paid his salary for the month of August 2016. I hold that he is therefore not entitled to an award of the same that he has sought. However, having found as I did hereinabove that the Claimant was off duty with the knowledge of the Respondent and with the advice of a doctor, I am prepared to agree with him that he is entitled to the September salary. He is hereby awarded Kshs. 14,000.

66. In the upshot Judgment is hereby entered for the Claimant in the following terms.

- a. A declaration that the summary dismissal was procedurally and substantively unfair.
- b. One month's salary in lieu of notice, Kshs. 14000.
- c. Salary for the month of September 2016, Kshs. 14000.
- d. Compensation pursuant to the provisions of Section 49[1][c] of the Employment Act, Kshs. 126, 000.
- e. Interest on the awarded sum at Court rates from the date of this judgement till full payment.
- f. Costs of the suit.

READ, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JANUARY, 2022

OCHARO KEBIRA

JUDGE

In Presence of

Ms Omamo for the Claimant.

No appearance for the Respondent.