



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 208 OF 2017

AMOS OTIENO OWANDO.....CLAIMANT

VERSUS

EUROCRAFT AGENCIES LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant was summarily dismissed on 25th May, 2016 following allegations that he was caught red handed unzipping customer bags aboard FFA KQ 416, with the intention to pilfer therefrom. According to the claimant, the allegations levelled against him by the respondent were false and being aggrieved by its decision to summarily dismiss him, he brought into this court the instant claim through which he seeks various reliefs including compensatory damages, notice pay, service pay and unpaid leave days.

2. Opposing the claim, the respondent averred that the claimant's behavior rendered him liable for summary dismissal. That his conduct put at risk its corporate reputation, viability and profitability. It prayed that the claimant's suit be dismissed with costs.

Claimant's case

3. The matter proceeded for part hearing on 12th October, 2021, when the claimant's case was concluded. The matter was then adjourned for defense hearing on 15th November, 2021 when the court took the respondent's case. Each side called one witness during the trial.

4. At the commencement of the hearing, the claimant adopted his witness statement to constitute part of his evidence in chief. He also produced the documents filed together with his claim as exhibits before court.

5. The claimant told court that he was employed by the respondent as a porter with effect from 10th October, 2014 until 25th May, 2016 when he was summarily dismissed. It was his testimony that on 24th May, 2016, he was assigned to load an aircraft which was headed to Entebbe. That he was with another coworker by the name, David Ndirangu. That as they proceeded with the loading exercise, they were confronted by an officer in charge of security at the Airport, who instructed them to disembark from the aircraft. That the security officer accused them of opening bags belonging to customers and subsequently, proceeded to frisk them.

6. The claimant further informed court that upon being frisked, nothing was found on him but nonetheless, the security officer reported the incident to the respondent company and as such, his pass was confiscated from him whereafter he was ordered out of the premises. He further stated that he was not taken through a disciplinary process and neither was he paid terminal dues. In concluding his testimony, he asked the court to allow his claim as prayed.

7. During cross examination, he stated that his colleague, David Ndirangu only incriminated him in his statement because he panicked after they were confronted by the airport's security personnel.

Respondent's case

8. The respondent called oral evidence through Mr. Joseph Etenyi Lweya who testified as RW1. At the outset, he also adopted his witness statement to constitute part of his evidence in chief. He also produced the documents filed on behalf of the respondent as exhibits before court.

9. RW1 informed court that he is in charge of operations and human resource at the respondent company and that he was familiar with the case at hand. He further stated that the claimant was caught red handed by the respondent's security agents, unzipping bags belonging to customers with an intent of pilfering. That as a result, he was ordered by the security agents to disembark from the aircraft. That

subsequently, the matter was escalated to the Kenya Airways (KQ) and the claimant's airport access permit was confiscated. That thereafter, the KQ formally wrote to the respondent advising them to remove the claimant from the airline with immediate effect. That as such, and since his airport access permit had been confiscated, it was difficult for the claimant to access his work station hence the respondent had no option but to let go of him, as all its operations are within the airport and which access to, he had been denied.

10. RW1 further stated that in terminating the claimant's employment, it complied with his contract of employment, which provided for summary dismissal. He further stated that the respondent's dues would be processed upon conclusion of the instant case.

Submissions

11. Both parties filed written submissions upon close of the hearing. On his part, the claimant submitted that his termination was unfair as the reasons for his termination were not fair and valid. On this issue, he buttressed his submissions on the case of **David Kipkosgei Mutai vs Green Palms Academy (2014) eKLR**. He further faulted the respondent for not subjecting him to a fair process contrary to the provisions of section 41 of the Employment Act. He relied on the case of **Kenya Union of Commercial Food and Allied Workers Union vs Meru North Framers Sacco Limited (2014) eKLR**.

12. The respondent on its part submitted that it had cause to dismiss the claimant from employment and the same was done in accordance with his contract of employment and section 44(1) of the Employment Act. That since it had elected to dismiss the claimant pursuant to section 44 of the Employment Act, it was not bound to substantiate that the reasons thereof were valid as required under section 43 of the Act. It further submitted that the standard of proof required was on a balance of probability and that it had discharged the same. It urged the court to consider the findings in the case of **Bamburi Cement Limited vs William Kilonzi (2016) eKLR**.

Analysis and determination

13. Upon considering the pleadings by both parties, the evidence on record and the rival submissions, the court is being called to determine the following questions;

- i. Whether the respondent had justifiable reasons to terminate the employment of the claimant?**
- ii. Whether the claimant was entitled to procedural fairness?**
- iii. Is the claimant entitled to the reliefs sought?**

Whether the respondent had justifiable reasons to terminate the employment of the claimant?

14. Under the Employment Act, it is mandatory for an employer to prove that it had justifiable reasons to terminate the employment of an employee. This is also known as substantive justification and is encapsulated under sections 43(1) and 45(2) (a) and (b) of the Employment Act (Act).

15. **Section 43(1)** of the Act requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair, while **section 45 (2) (a) and (b)** provides that a termination of employment is unfair if the employer fails to prove-

- a) that the reason for the termination is valid;**
- b) that the reason for the termination is a fair reason-**
 - i. related to the employee's conduct, capacity or compatibility; or**
 - ii. based on the operational requirements of the employer;...**

16. Accordingly, in order to determine the question as to whether the claimant's dismissal from employment was fair, it is necessary to establish whether the reasons advanced by the respondent are fair and valid. This is a question that can be well determined upon consideration and evaluation of the evidence presented.

17. The reason for the claimant's dismissal is captured in his letter of dismissal which reads in part as follows;

"On 24th May, 2016, you were caught red handed opening customers bags on FFA KQ 416. Such behavior is unacceptable and cannot be tolerated at all. We cannot have staff who do not respect people's property especially our client's property. Your act is punishable by a summary dismissal as per the Employment Act, 2007 section 44 (g)..."

18. As can be discerned from the letter of dismissal, the respondent based the ground for dismissal on section 44(4) (g) of the Act which reads as follows;

"(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause...(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property."

19. In essence, the reasons for the claimant's dismissal revolved around suspicion of theft hence bordered on criminality. The claimant refuted the allegations of theft and denied opening the bags belonging to the respondent's customers. On its part, the respondent shored up its defence by producing written statements from eye witnesses who allegedly saw the claimant unzipping the customer's bags and dipping his hands inside. These eye witnesses were David Ndirangu and Bernard Mbugua. In particular, David Ndirangu who was at the material time aboard the aircraft with the claimant, stated that he witnessed him unzipping a customer's bag and dipping his hands inside. His account of events on that material day were corroborated by the statement of Bernard Mbugua.

20. It is that specific incident as reported by the said eye witnesses, that led to the claimant's dismissal. The respondent further based its dismissal on the instructions from the KQ to remove him from the airline and the confiscation of his airport access permit.

21. Notably, the eye witnesses did not appear before court to testify but their written statements concerning the incident were produced in evidence by RW1. According to the witness accounts, the claimant was caught red handed with a bag open.

22. From the record, the bag which the claimant was allegedly caught unzipping, was singled out and the owner requested to confirm if all her belongings were intact. From the record, the customer initially stated that she could not trace her flash disk but she later found it in another bag upon disembarking in Entebbe.

23. What presents before me is a case of suspicion of theft by the respondent against the claimant. Evidently, the claimant was not found with any stolen items upon being searched, but nonetheless, suspicion against him had built up.

24. In the case of **Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 others [2019] eKLR**, the Court of Appeal found that the standard of proof required is on a balance of probability and not beyond reasonable doubt, and all the employer is required to prove are the reasons that it **"genuinely believed to exist,"** causing it to terminate the employee's services. The learned Judges further opined as follows;

"The employer was able to show that it genuinely believed that there were reasonable grounds and sufficient grounds to suspect that the respondents had committed gross misconduct in their employment and had done acts which were substantially detrimental to KRA. It is not for the court to substitute its own 'reasonable grounds' for those of the employer."
Emphasis mine

25. Similarly, and being guided by the finding in the aforesaid case, the respondent only needed to prove that the reasons for the claimant's dismissal, genuinely existed at the time. These reasons touched on the claimant's level of honesty and trust it had in him as an employee.

26. The respondent having received accounts of persons who allegedly witnessed the claimant committing the acts alleged of him, availed it reasonable and sufficient reasons to terminate his employment. It didn't matter that nothing was found on him following a body search.

27. The Court of Appeal in the case of **Judicial Service Commission vs Gladys Boss Shollei & another [2014] eKLR**, cited with approval, the Canadian case of **Mc KINLEY –VS- B.C. TEL [2001] 2 S.C.R 161** in which it was held as follows;

"[W]hether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."

28. It was common ground that the claimant was employed as a loader. As such, trust and honesty were key ingredients in the employment relationship as the claimant was entrusted with handling customers' belongings. Therefore, any suspicion of breach of that trust, had a significant impact on the employment relationship.

29. In this case, it would seem that upon the occurrence of the incident, the respondent genuinely believed the claimant was not trustworthy anymore. Seemingly, the trust issues went to the root of the employment relationship and as such, constituted fair and valid grounds to terminate the claimant's employment.

30. Further, from the defence of the respondent, the dismissal of the claimant was part of a business decision as it needed to guard its reputation and maintain the confidence of its customers. It further stated that the KQ was one of its biggest clients, hence upon its instruction to let go off the claimant, it had no option but to accede to that demand. Apparently, it had to choose between the client or the claimant and being a business decision, the choice was obvious.

31. In light of the foregoing, I am of the considered view that the reasons for the respondent's dismissal were valid and fair.

32. That takes me to the next issue for determination and that is whether the claimant was entitled to a fair hearing.

Whether the claimant was entitled to procedural fairness?

33. The respondent admitted that it did not subject the claimant to a fair hearing as he was summarily dismissed. The respondent further stated that since the claimant's airport access permit had been confiscated, he could no longer access the airport area hence any chance of a hearing was made impossible.

34. The requirement for fair procedure is generally provided for under **section 45 (2) (c)** of the Act. **Section 41** provides the details and specific requirements that must be complied with in order for a termination to pass the fairness test. Subsection (2) is relevant in this case as it relates to summary dismissal. It provides as follows;

“(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.” Underlined for emphasis

35. It is notable that the above stated provision is couched in mandatory terms. This position was further amplified by the Court of Appeal in the case of **Janet Nyandiko vs. Kenya Commercial Bank Limited [2017] eKLR** as follows;

“Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”

36. On this issue, I will adopt and reiterate the findings in above case, to the effect that the respondent was enjoined in mandatory terms to comply with the provisions of section 41. It is therefore not optional for an employer to cherry-pick the statutory provisions and elect whether or not to comply with the provisions of section 41 of the Act. In other words, it was not open for the respondent to opt to dismiss the claimant without giving him an opportunity to be heard and consider any representations he may have.

37. In assessing the import of section 41, the Court of Appeal in the case of **Postal Corporation of Kenya vs Andrew K. Tanui [2019] eKLR**, had this to say;

“It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with...Four elements must thus be discernible for the procedure to pass muster:-

(i) an explanation of the grounds of termination in a language understood by the employee;

(ii) the reason for which the employer is considering termination;

(iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;

(iv) hearing and considering any representations made by the employee and the person chosen by the employee...”

38. I fully concur with the position espoused by the Court of Appeal in the above precedent and hold that the standards set under section 41 of the Act are the minimum requirements that an employer ought to comply with prior to dismissing an employee. There ought to be nothing short of the same.

39. I must also comment on the averments made by the respondent, to the effect that it was not practical to grant the claimant a hearing on account that his airport access permit had been confiscated. With all due respect, that reason cannot fly. In as much as the claimant’s permit had been confiscated, the respondent could still have facilitated him with a visitor’s pass to allow him access its premises for purposes of a hearing. How else do other persons who are not its employees, say visitors access their offices? Just as with most premises, there must be some special passes for such kind of visits.

40. The upshot of the foregoing is that the respondent’s actions of dismissing the claimant without according him a hearing as demanded by section 41, fell outside the legal parameters and on that basis, the dismissal was unlawful and unprocedural.

41. Is the claimant therefore entitled to any of the reliefs sought?

Available Reliefs

One month’s salary in lieu of notice

42. As I have found that the claimant’s dismissal was unlawful for want of procedure, the court awards him one month salary in lieu of notice pursuant to section 35 (1) (c) of the Act.

Service Pay

43. The claimant has sought service pay in the sum of **Kshs 13,317/=**. **Section 35(6)** of the Act only provides for service pay where employees are not members of any pension scheme, provident fund or the National Social Security Fund (NSSF). The claimant confirmed before court, that he was contributing to the NSSF and that deductions towards the fund were being effected from his salary. In light thereof,

he falls within the ambit of exclusions stipulated under section 35 (6) (d) of the Act hence the claim under this head falls.

Compensatory damages

44. The claimant has prayed for compensatory damages in the sum of **Kshs 207,950.40** which is equivalent to 12 months of his gross salary then. As I have found that the claimant's dismissal was procedurally unfair, I will award him compensatory damages equivalent to four (4) months' gross salary.

Orders

45. In the final analysis, I enter Judgment in favour of the claimant against the respondent in the following terms;

One month's salary in lieu of notice 13,317.00

Compensation equivalent to 4 months' gross salary 53,268.00

Total **66,585.00**

46. The award, shall attract interest at court rates from the date of Judgment until payment in full.

47. The respondent shall also bear the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of January 2022.

.....

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Kagunda

For the Respondent Mr. Masaviru

Court assistant Barille Sora

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.

STELLA RUTTO

JUDGE