



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

CAUSE NO 1228 OF 2016

PETER MUTINDA NGEL.....CLAIMANT

VERSUS

RENTOKIL INITIAL (K) LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant vide a memorandum of claim filed on 23rd June, 2016, averred that he was unfairly terminated from employment in that he was not given any notice or plausible reasons prior to his termination. He further averred that the same was undertaken without due regard to the provisions of the Employment Act. He thus sought various reliefs including a declaration that his termination was unfair, notice pay, compensatory damages for unfair termination, severance pay, compensation for overtime worked and untaken leave days.

2. The claim was defended vide a response filed on 11th August, 2016, through which the respondent asserts that the claimant's employment was terminated on account of dishonesty and further, that he failed to show cause why disciplinary action should not be taken against him. The respondent further averred that the claimant was taken through a disciplinary hearing on 7th September, 2015 but he refused to make an oral or written representation in his defence.

3. The matter proceeded for hearing on 18th November, 2021 and each side called one witness.

Claimant's case

4. At the commencement of the hearing, the claimant adopted his witness statement together with the bundle of documents which were filed together with the claim, as part of his evidence in chief. The documents were also produced as exhibits before Court.

5. He told court that he was employed by the respondent as a pest control technician sometimes in August, 2013. He stated that on 3rd September, 2015, while at work in Mugoya, he received a call from one Mr. John Nthama, a manager at the respondent company, who instructed him to report back to the office immediately. That upon arriving at the office, he found Mr. Nthama in the company of two directors. That one of the directors, who was in charge of finance, gave him a cell phone number and asked him to dial the number on his phone. That the director asked him if he knew the owner of the mobile phone number, to which he responded in the affirmative as they belonged to the same Chama. He further told court that the director turned the computer screen towards him and showed him Mpesa messages together with other messages allegedly retrieved from his mobile phone. That the said director accused him of stealing from the respondent company and thereafter, dismissed him verbally. That he was later asked to clear with the respective departments.

6. The claimant denied giving the respondent access to his Mpesa statement. He further denied the respondent's assertions that he was issued with a show cause letter and that he appeared for a disciplinary hearing on 3rd September, 2015. He averred that he only came to learn of the accusations against him upon being called by Mr. Nthama. He further denied being served with the letter of termination and stated that he only caught sight of the same during the hearing. He concluded his testimony by informing the court that he worked for the respondent beyond the stipulated hours and never proceeded on leave but was not compensated accordingly.

7. During cross examination, the claimant maintained that the money he received from Mr. Githiri was in respect of a Chama, they both belonged to. He denied that the money was in exchange of products he had allegedly stolen from the respondent.

Respondent's case

8. On its part, the respondent tendered oral evidence through its Human Resource Officer, Mr. Geoffrey Nyoro, who testified as RW1. He also adopted his witness statement, the bundle of documents and supplementary documents filed on behalf of the respondent, to constitute part of his evidence in chief. The documents were also produced as exhibits before Court.

9. RW1 told court that the claimant was dismissed following investigations commenced in the month of September, 2015. That the investigations were necessitated by the fact that there was a high usage of chemicals within his service zone. That there was also information that some employees were engaging in competing businesses and/or associating themselves with competitors. As a result, the staff who had been mentioned adversely including the claimant, were asked to avail their Mpesa statements.

10. Mr. Nyoro further told court that the investigations in regard to the claimant revealed that he was working closely with one Mr. Gerald Githiri who was a competitor to the respondent's business. That as a result, the claimant was invited to appear on 3rd September, 2015 for a disciplinary hearing, where he admitted knowing the said Mr. Githiri but declined to record any statement in that regard.

11. RW1 further told court that following the claimant's disciplinary hearing, it was determined that he was conflicted and was engaging with the respondent's competitors, thus was in breach of his employment contract and the trust bestowed on him by his employer. That the said actions by the claimant amounted to gross misconduct hence the decision to dismiss him from employment. He thus prayed that the claim be dismissed with costs.

12. In cross examination, RW1 asserted that the claimant gave the respondent his Mpesa statement on 1st September, 2015 upon a verbal request. He further admitted not knowing whether the claimant and Mr. Githiri were acquaintances hence could transact beyond work related issues. He further stated that the respondent relied on reports that the claimant was engaged in some conflict of interest and admitted that the respondent never called the said Mr. Githiri.

Submissions

13. Upon close of the hearing on 18th November, 2021, the court directed both parties to file written submissions. In this regard, the claimant was given 14 days to file and serve its submission, whereupon the respondent would respond with its written submissions within 14 days after service. The matter was scheduled for mention on 16th December, 2021 for purposes of confirming compliance and taking a judgement date. On the said date, the claimant was absent from court and respondent's counsel Ms. Nekesa informed court that she was yet to be served with the claimant's submissions, hence she had not complied on her part. Accordingly, the court granted both parties more time to file their written submissions and reserved its Judgment for 28th January, 2022. The respondent filed its submissions on or about 23rd December, 2021 but the claimant only filed its submissions on 24th January, 2022, 4 days to the delivery of Judgment. By then the court had already written its Judgment, hence did not have the opportunity to consider the claimant's submissions.

14. The respondent, submitted that it had valid grounds to terminate the employment of the claimant as he was unable to account for the high usage of chemicals within his service zone. That further, it gave the claimant an opportunity to be heard prior to terminating his employment. It placed reliance on several authorities including **Kenafric Industries vs John Njeru (2016) eKLR** and **Kenya Power & Lighting Company Limited vs Aggrey Lukorito Wasike (2017) eKLR**.

Analysis and determination

15. Arising from the issues raised in the pleadings, the submissions on record, as well as the documentary and oral evidence, the Court is being called to determine the following twin issues;

a. Whether the claimant's termination was unfair and unlawful?

b. Is the claimant entitled to the reliefs sought?

Was the claimant's termination unfair and unlawful?

16. The claimant has alleged that his termination was unfair in all respects. He contends that the respondent did not adduce valid reasons to justify his termination and neither did it comply with the requirements of fair hearing in so doing.

17. In order to prove fair termination under the Employment Act (Act), an employer must satisfy that there was substantive justification to warrant termination of an employee and that it accorded the employee procedural fairness.

i. Substantive justification

18. Substantive justification entails proving reasons for which an employee was terminated. The Act addresses this issue under **Section 43(1)**, which requires an employer to prove reasons for termination, and in absence thereof, such termination is deemed to be unfair. Further, **section 45 (2)** 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 is related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer. The burden of proof in this instance, lies with the employer.

19. The courts have time and again restated this position. To sample a few, the Court of Appeal in the case of **Chairman Board of Directors (National Water Conservation and Pipeline Corporation) vs Meshack M. Saboke & 2 others, Nairobi Civil Appeal No. 241 of 2015**, held thus;

“In light of the above provision, termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair. Section

43 of the Employment Act deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45.”

20. Further, in the case of **Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR**, the Court of Appeal had this to say on the burden of proof;

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions.

21. Accordingly, it is apparent that in any case of termination, the employer bears the burden of proving that there was justification in terminating an employee’s services. Such justification entails providing the reasons and proving that the same were valid and fair.

22. The validity and fairness of the reasons advanced by the respondent can only be determined upon the court evaluating the evidentiary material before it.

23. The reasons for which the claimant was terminated, are aptly captured in his letter of dismissal which reads in part as follows;

“Following loss of business and high chemical usage in your allocated service zone that could not justifiably be accounted for. Investigation carried out clearly shows that you breached the duty of care and trust expected of you by trading with and selling company chemicals and products to a competitor of the company. You have transacted business with, including receiving payments, from a person who owns a company in the same business as that of Rentokil Initial. While asked to substantiate, you were unable to explain the nature of business with the said individual, beyond any reasonable doubt. You claimed that you were a treasurer of a dowry committee and the money was in support of your friend’s dowry function. This you know very well was incorrect as the payments were for services rendered and for the products you had delivered to him after stealing them from the company. Your actions are contrary to company rules and regulations, and particularly against company policies on business protection, conflict of interest, and anti-bribery and corruption policies. It is further contrary to the Company Code of Conduct, all of which you are aware of and have signed acknowledgement of...”

24. It is apparent that the reasons for the claimant’s dismissal bordered on criminality and pointed towards dishonesty on his part. Indeed, the respondent indicated in the said letter that it had undertaken investigations into the allegations against the claimant and had confirmed the same as true, hence his dismissal.

25. It is also noteworthy that under section 44(4) (g) of the Act, an employee may be dismissed following reasonable grounds that he/she has committed a criminal act against or to the substantial detriment of the employer. It provides as follows;

“[44](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.”

26. The pertinent question now is whether the respondent has proved that indeed, the claimant was engaged in conduct that pointed towards criminality and dishonesty on his part. Put in another way, were the reasons sufficient to warrant the claimant’s dismissal?

27. The respondent presented Mpesa statements extracted from the claimant’s mobile phone number to justify that he was receiving money from one Mr. Gerald Githiri, an alleged competitor to the respondent’s business. While the claimant alleges that the respondent obtained the statements irregularly and without authorization by hacking into his phone, the respondent states that the claimant willingly surrendered the same.

28. The MPesa statement indicates that it was generated on 3rd September, 2015, at 09:25:28 EAT, the very same day the claimant apparently appeared before the respondent’s directors for a hearing. This is contrary to the assertions of RW1 that the same was obtained on 1st September, 2015 upon request to the claimant. This therefore casts doubt on RW1’s testimony in that respect.

29. The claimant refuted the allegation that he was receiving the money from the said Mr. Githiri in exchange of the products he was stealing from the respondent company. He stated that he had social interactions with the said Mr. Githiri and were in the same Chama hence the reason he was receiving money from him.

30. Besides the Mpesa statement, the respondent did not attach any other evidence to prove its allegations against the claimant. The respondent averred that it received reports that the claimant was dealing with the respondent’s competitors hence the reasons it commenced investigations against him. Regardless of these assertions, the respondent did not provide evidence in the form of statements from witnesses who may have given reports of the claimant’s engagement with the competitor.

31. There was also no evidence tendered by the respondent to prove that the said Mr. Githiri was a competitor to its business, thus justifying its suspicions that his interaction with the claimant was work-related and not merely social. In other words, there was no evidence to discount the claimant’s assertion that his interaction with the said Mr. Githiri was merely social. At the very least, the respondent ought to have presented statements from the persons who had knowledge of the claimant’s connection with the said Mr. Githiri. None of the persons testified before court. In any event, the respondent averred that its disciplinary action against the claimant was based on reports and information it received. Who gave these reports and why were they not called to testify?

32. The Mpesa statements were not sufficient to prove dishonesty and theft on the part of the claimant. There was need for more evidence either through documentary or oral means, so as to substantiate the charges against the claimant. The dismissal letter revealed a lot of information the respondent had in regards to the allegations against the claimant but did not adduce evidence to back up the same.

33. As aforesaid, the burden of proof fell squarely on the respondent, hence it had the onus to adduce all the evidence it had against the claimant so as to justify that indeed, he had committed the acts he was accused of, thus the dismissal. This it failed to do. In order to commence disciplinary action against the claimant, there must have been some substantive evidence to implicate him.

34. In light of the foregoing, the allegations against the claimant remained speculative and were not substantiated at all. As a result, the claimant did not discharge its burden under section 43(1) and 45(2) of the Act and as such, it has not proved that there was substantive justification to warrant the dismissal of the claimant.

ii. Procedural fairness

35. **Section 45(2) (c)** of the Act provides that for termination to be fair, it ought to be in line with fair procedure. The specifics of that procedure can be found under **section 41(1)**, which 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.

36. This procedure was amplified by the Court of Appeal in the case of **Postal Corporation of Kenya vs Andrew K. Tanui [2019] eKLR**, as follows;

“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.

In this case, the letter inviting the respondent to appear before the Board was only two lines containing the date and venue. It said nothing about the reasons for such invitation. It said nothing about the respondent appearing with another employee of his choice. The retort that an employer has no obligation to ask the employee to be accompanied does not avail the appellant because the law requires that such other person be present to hear the grounds of termination and if so inclined, make representations thereon. A hearing not so conducted is irregular. At the Board meeting, there is no evidence that an explanation of the grounds of termination was made to the respondent, and if so, in what language. The Board had in its possession the very document that formed the basis of the charges framed against the respondent but kept it away from him. Even in criminal trials, which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting.”

37. In the instant case, the respondent has maintained that it complied with the requirements of fair hearing in that it issued the claimant with a show cause notifying him of the allegations and inviting him to a disciplinary hearing. The claimant has disputed these assertions. On its part, the respondent avers that the claimant refused to receive the hearing invitation. On record, is a letter dated 1st September, 2015 addressed to the claimant. It sets out the allegations against the claimant and invites him to appear for a hearing on 3rd September, 2015.

38. The claimant has denied ever seeing the letter of invitation. He has further denied appearing before any committee for a disciplinary hearing. He contends that he only came to learn of the accusations against him when he appeared before the respondent’s directors on 3rd September, 2015.

39. The respondent through RW1, failed to indicate the manner through which it served the invitation letter upon the claimant and whether there were any witnesses.

40. Nonetheless, there is no indication in the invitation letter whether the respondent availed the claimant with the evidence against him to enable him present an appropriate defence.

41. The respondent produced minutes as evidence of the hearing allegedly convened to determine the claimant’s case. The claimant has denied ever attending a hearing and has termed the minutes as a fabrication by the respondent.

42. The minutes if indeed relates to the disciplinary hearing as stated by the respondent, do not provide sufficient details as to what transpired thereat and more specifically, the defence of the claimant. It merely states as follows, *“Peter made oral commentary of his argument, but failed to write down a statement”*. This short statement is the only indication in the minutes recognizing the claimant’s participation in the disciplinary hearing. Further, the said oral commentary was not reduced into writing.

43. Being the recording of a disciplinary committee hearing, it was prudent for the respondent to record what the claimant stated in his

defense elaborately. He did not have to record a statement having appeared before the hearing committee. All the committee needed to do was to take down the claimant's defence as tendered. As a matter of fact, the minutes are too sketchy as they do not contain the information relevant to a disciplinary hearing.

44. In addition, it is not indicated whether there were other witnesses who testified at the hearing? How did the committee arrive at its findings? Against what evidence did it compare with the defence presented by the claimant? All these questions remain unanswered as the minutes do not avail much.

45. I have also noted that the letter of dismissal do not make any reference to the disciplinary hearing or the claimant's defense. Ordinarily, the decision to dismiss an employee would be based on the findings arising out of a disciplinary hearing, the defence of the employee vis a vis the evidence against him. This appears not to have been the case.

46. The upshot of the foregoing is that the evidence availed to prove that the claimant was accorded a fair hearing, is not persuasive enough to allow the court determine that the hearing was fair.

47. In the circumstances, I find that the respondent has failed to discharge the burden under **section 45 (2) (c)** of the Act.

48. Ultimately, the court finds that there was no substantive justification to warrant the claimant's dismissal, and the same was devoid of procedural fairness. This fell short of the requirements stipulated under **section 45 of the Act** hence his termination was unfair and unlawful.

Reliefs

49. Having found that the claimant's termination was unfair, I will award him five (5) month's salary as compensatory damages. This award has taken into consideration the length of the employment relationship.

50. I will also award him one month's salary in lieu of notice pursuant to section 35 (1) (c) of the Act.

51. The respondent admitted that the claimant was entitled to 13 days leave at the time he left employment. This is also in tandem with my workings. However, the same is spent as the court notes that he was compensated accordingly as part of his terminal dues. The claim for untaken leave days for the previous year, that is 2014, is denied by dint of clause 9 of the claimant's contract which provided that leave "*shall not be accumulated for a period of more than one year.*" As such, the same are deemed to have been forfeited if not taken the year, the leave accrued.

52. The claim for severance pay is also denied as the same is only payable where employment is terminated pursuant to section 40 (1) of the Act, which was not the case herein.

53. The employment relationship having been admitted, the claimant is entitled to a Certificate of Service pursuant to section 51(1) of the Employment Act.

Orders

54. Accordingly, I enter Judgment in favour of the claimant against the respondent as follows;

- a. A declaration that the claimant's termination was unfair and unlawful.**
- b. Compensatory damages in the sum of Kshs 75,000/= which sum is equivalent to 5 months gross salary.**
- c. One-month salary in lieu of notice being Kshs 15,000/=.**
- d. Interest on the amount in (b) and (c) at court rates from the date of Judgement till payment in full.**

55. I would have awarded costs in favour of the claimant as his claim has succeeded. However, he failed to comply with the court's directions issued on 18th November, 2021 as regards filing of submissions. In fact, at the time of writing this Judgment, he was yet to comply. Subsequently, he looses on the issue of costs and in which case each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY, 2022

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Mugo

For the Respondent Ms. Nekesa

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