



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 143 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

PIUS SITATI MABAKU..... CLAIMANT

VERSUS

DEVYANI FOOD INDUSTRIES KENYA LIMITED

(FORMERLY SAMEER AGRICULTURE

AND LIVESTOCK LIMITED).....RESPONDENT

JUDGMENT

1. This suit was initiated by a statement of claim dated 16th January 2017 and filed on 27th January 2017 alleging that his termination on 28th October 2016 was unlawful and illegal. The Claimant prays for –

- (a). One month's salary in lieu of notice.....Kshs.35,000
- (b). 12 months' salary as compensation for unfair termination.....Kshs.420,000
- (c). Overtime (21 hours per week for 48 weeks).....Kshs.76,400
- (d). Public holidays worked (44 days).....Kshs.51,333
- (e). Leave pay due 21 days.....Kshs.28,269

Total claim.....Kshs.711,002

2. The Claimant's case is pleaded as follows:

3. That he was employed by the Respondent as a Dispatch Supervisor on renewable contract terms on 29th September 2015 to 30th September 2018 at Kshs.35,000 per month. His duties included receipt of invoices from accounts office for purposes of recording and confirmation for the supervisor to have the product loaded for dispatch; liaising with the dispatch manager on issues for directions and co-ordinating with inbound clerks on demand for milk for collection from the production department.

4. It is averred that on 26th October 2016, the Claimant realised that stock had fallen short by 184 cartons. That investigations revealed that the cartons had been loaded onto another truck and the culprits were held accountable. That the Claimant was terminated on 28th October 2016 without justification or fair hearing.

Respondent's Case

5. In its amended response to the memorandum of claim dated 19th October 2021, the Respondent admits that the Claimant was its employee effective 29th September 2015.

6. That the Claimant failed to discharge his duties diligently and as a consequence the Respondent lost 184 cartons of stock. That the Claimant was given an opportunity to explain the loss but failed to do so.

7. It is contended that termination of the Claimant on 28th October 2016 was lawful and legal and the Respondent denies that it owed the Claimant the sum of Kshs.711,002/-. It also denies having received the notice to sue and prays for dismissal of the suit with costs.

Claimant's Evidence

8. The Claimant adopted the witness statement and was cross examined. He confirmed that he had worked for one year and one month. That while in Nairobi, he was the Supervisor of those who parked goods in vehicles.

9. He further confirmed that it would have taken about 30 – 45 minutes to load 377 cartons into a vehicle. That he was neither accused of having stolen the product nor arrested but was a suspect and that was why he was dismissed. That he apologised in writing on 1st November 2016, that he had been negligent and not vigilant as required. That he had apologised earlier on in 2006 for some mistake at the Kisumu Depot.

10. That he cleared with all departments and was paid Kshs.53,107/- as terminal dues including 22.5 leave days.

11. He also stated that he was not paid notice pay and overtime that he used to work for three hours overtime per day translating to 21 hours per week. He also confirmed that his compensation of public holidays pay was erroneous.

Respondent's Evidence

12. RW1 testified that the Claimant was terminated on account of negligence which resulted in the loss of 184 cartons of milk. That the Claimant admitted having been negligent in the discharge of his duties and apologised twice and begged for a second chance on 28th October 2016 and 1st November 2016.

13. RW1 testified that the Claimant was paid one month's salary in lieu of notice and leave days but the October salary was not paid.

14. In cross examination, RW1 confirmed that the Claimant was terminated on 2nd November 2016. That the Respondent had sign in sheets for staff.

Claimant's Submissions

15. The Claimant isolated two issues for determination; whether the Claimant's termination was substantively and procedurally fair and whether the Claimant is entitled to the reliefs sought.

16. As regards termination, reliance is made on the decision in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** on the essence of substantive and procedural fairness in termination of employment contract.

17. On substantive fairness, the Court of Appeal decision in **Geoffrey Gikonyo Mathu v Inter Construction Company Limited [2017] eKLR** where the dismissal was substantively fair but procedurally unfair is relied upon to urge that the Respondent did not address the issue of substantive fairness.

18. As to whether the Claimant is entitled to the reliefs sought, it is submitted that the Claimant's salary for October 2016 was not paid. That the Kshs.1,510/- and Kshs.3,500/- described as days worked (3) days was not explained. That the payslip was hurriedly prepared.

19. It is submitted that it is safe to conclude that the Respondent did not pay the one month's salary notice pay. That the Claimant is entitled to one month's pay in lieu of notice.

Respondent's Submissions

20. The Respondent identified two issues for determination, namely whether the Claimant's termination was unlawful and unfair and whether the Claimant is entitled to the reliefs sought.

21. On termination, reliance is made on Section 45 of the Employment Act to urge that the Claimant was given reasons for his termination as per the letter dated 2nd November 2016 and was given a chance to explain what had transpired and apologised for the occurrence and management considered the explanation and admission of negligence.

22. Reliance was made on the decision in **Samuel Mwangi Wachinga v Endarasha Farmers' Co-operative Society [2018] eKLR** where Nzioki Wa Makau J. dismissed a claim where the Claimant had written an apology and admitted culpability having chosen to go it alone. The Learned Judge held that the absence of a letter of invitation to the hearing was not sufficient cause to disregard the process undertaken if the process gave the employee an opportunity to be heard and present his defence.

23. The decision in **Elizabeth Mukuhi Kimondo v Karangi Coftea Limited [2021] eKLR** was also relied upon where the Claimant was asked to give an explanation and the dismissal followed thereafter since the explanation was found to be unsatisfactory. The Learned Judge dismissed the suit on the ground that the Claimant had failed to demonstrate that the termination was unlawful or unfair.

24. On the reliefs sought, the Respondent submits that the Claimant is not entitled to the reliefs particularised under paragraph 11 of the statement of claim on the grounds that: -

- a) The one month's (1) salary in lieu of notice was paid as part of the exit package, the sum of Kshs.53,107.00 which the Claimant acknowledged receipt.
- b) The 12 months' compensation fails because the termination was effected in compliance with the law on account that the Claimant was given not only the reason for termination but a chance to be heard.
- c) The claim for overtime is not supported by any particulars and supportive evidence. (See **Fred Makori Ondari v the Management Committee of the Ministry of Works Sports Club [2013] eKLR.**)
- d) The claim for payment for public holidays is exaggerated and inaccurate and as special damages must be specifically pleaded and proved. The claim for 44 public holidays for one (1) year and one (1) month is unrealistic and parties are bound by their pleadings.
- e) The claim for leave days was abandoned in Court and should fail.

25. It is submitted that the claim should be dismissed with costs.

Determination

26. From the pleadings, evidence on record and submissions, the issues for determination are: -

- a) Whether the Claimant's termination was fair;
- b) Whether the Claimant is entitled to the reliefs sought.

27. As submitted by the Claimant, for a termination of employment to pass the fairness test, it must have been substantively and procedurally fair as provided by Sections 45 and 41 of the Employment Act, 2007 and as elaborated in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the Court stated that

“For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason of the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

28. In **Naima Khamis v Oxford University Press (EA) Limited [2017] eKLR**, the Court of Appeal explained that:

“... termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”

29. Sections 43 and 47(5) for the Employment Act prescribe the burden of proof to be discharged by the employer and the employee.

Reason

30. In the instant case, the termination letter dated 2nd November 2016, stated that the Claimant's explanation dated 28th October 2016 and apology letter dated 1st November 2016 did not explain the loss of 184 cartons of stock and were unacceptable.

31. It is common ground that the Claimant was the Supervisor for the Dispatch Unit and among his duties was to ensure that products in the store were safe and goods destined for customers were loaded and dispatched without any delay.

32. On re-examination, the Claimant confirmed that he was dismissed for negligence. 184 cartons for milk were lost under his watch.

33. On cross examination, the Claimant confirmed that loading

377 cartons would have taken about 30- 45 minutes which is reasonably long for the excess product to have been noticed. The Claimant further confirmed that he was not vigilant enough at the work place.

34. Section 43(2) of the Employment Act provides that –

The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

35. In the totality for the evidence on record and the circumstances in which the termination for the Claimant's contract of employment took place, it is the finding of the Court that that Respondent has discharged the burden of proof on a balance of probabilities that it had a valid and fair reason to terminate the contract of service.

Procedure

36. Section 41(1) of the Employment Act prescribes the procedural steps to be followed in the conduct of a fair termination of a contract of employment.

37. In **Loice Otieno v Kenya Commercial Bank Ltd [2013] eKLR**, Radido J. itemised the requirements of Section 41 of the Employment Act as follows: –

“In my view, an employer must demonstrate as a matter of fact that it

- (i) Explained to the employee in a language the employee understood the reasons why it was considering the termination*
- (ii) Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons*
- (iii) Heard and considered any explanations by employee or his representative*
- (iv) Where the employer has more than 50 employees as required by Section 12 of the Employment Act, that it had and complied with its own internal disciplinary rules.”*

38. The Court has examined the decisions of Nzioki Wa Makau J. in **Samuel Mwangi Wachinga v Endarasha Farmers’ Co-operative Society [2018] eKLR** and **Elizabeth Mokuhi Kimondo v Karangi Coftea Limited [2021] eKLR** in detail and is in agreement with the sentiments of the Learned Judge. However, both decisions are distinguishable in that in the former, the Claimant was invited and participated in a disciplinary hearing while in the latter, the Claimant was a habitual late comer and had received several warnings before termination. In addition, the Claimant conceded in evidence that she was heard before termination.

39. Relatedly, there is sufficient judicial authority for the proposition that the hearing contemplated by Section 41 of the Employment Act need not be oral, an exchange of letters could suffice in certain circumstances. See Omolo, Waki and Nyamu JJA in **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR**, **Local Government Board vs Arlidge (1915) A.C 120, 132-133**, **Selvarajan v Race Relations Board (1975) I WLR 1682, 1694** and **Republic v Immigration Appeal Tribunal ex-parte Jones (1988) I WLR 477, 481**.

40. However, in **Kenya Ports Authority v Fadhil Juma Kisuwa [2017] eKLR**, the Court of Appeal stated that: -

“We have said earlier that where dismissal is on the grounds of misconduct, poor performance or physical incapacity the employer, by the provisions of section 41 is bound, not only to explain the reason for which the employee’s dismissal is contemplated but also to hear and consider any representations he may have. At the disciplinary hearing the employee is entitled to have in attendance, if he/she wishes, another employee or a shop floor union representative of his choice. This requirement only imposes a duty on the court to hear the employee in the presence of his/her colleagues where the employee wishes them to be present. The court cannot impose them on the employee. It must however be stressed that the necessity of oral hearing will depend on the subject and nature of the dispute, the whole circumstances of the particular case.”

41. Relatedly, in **Francis Mbugua Boro v Smartchip Dynamics Limited [2017] eKLR**, Radido J. expressed himself as follows: -

“In the Court’s view, it is as essential ingredient of procedural fairness as envisaged under section 41 of the Employment Act, 2007 that an employer should inform the employee clearly that disciplinary action and/or termination of employment is being considered while putting to the employee the allegations to confront. Further, it was mandatory for the Respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of section 41(2) of the Employment Act, 2007.”

42. Finally, in **Henry Kinyiha Kamami v Star Brilliant (EPZ) K Limited [2021] eKLR**, Onyango J. stated that –

“The Claimant has submitted that the Respondent did not adhere to due process while dismissing him from its employment contending that he was neither accorded a hearing before a disciplinary committee nor was he issued with any notice prior to his termination. There is no evidence tendered by the Respondent to controvert this assertion in terms of minutes of a disciplinary hearing accorded to the Claimant. I agree with the Claimant’s submission that hearing and notification are mandatory under Section 41 of the Employment Act, 2007.”

43. The Court is in agreement with the sentiments of the two Judges.

44. In the instance case, the Claimant was neither notified of the specific allegations facing him nor invited for a disciplinary hearing. He was therefore unaware that the employer was contemplating disciplinary action or termination.

45. Similarly, the Claimant testified that on the material day, the loading was supervised by another supervisor, he was neither accused of the theft nor charged. In re-examination he testified that he was neither investigated nor found guilty of the occurrences on 26th October 2016.

46. Although, the Claimant admitted that he was dismissed for negligence at the work place, the Respondent adduced no evidence to establish that it complied with the provisions of Section 41 of the Employment Act. It is not in dispute that the Claimant wrote two letters on

the issue dated 28th October 2016 and 1st November 2016 explaining what had happened on 26th October 2016. None of the letters indicate that it was a response to a show cause letter by the Respondent.

47. In other words, the Claimant was not responding to any allegations or charges made against him. None had been preferred against him, nor had the Respondent indicated that it was considering his termination.

48. In sum, it is the finding of the Court that the Claimant's termination on 2nd November 2016 was unfair for noncompliance with the provisions for Section 41 of the Employment Act.

Reliefs

49. Having found that the Claimant was unfairly terminated, the Court proceeds as follows: –

(a) One month's salary in lieu of notice

50. The Claimant's payslip dated 28th October 2016 show that the Claimant was paid a sum of Kshs.3,500/- as notice pay and the Claimant testified that he received the sum of Kshs.53,107.00 as final dues. The Respondent's Witness confirmed payment. However, the payslip has a peculiar detail identified as "*days worked (3 days) Kshs.3,500*". It is unclear what this meant since the Claimant had worked for the entire month of October 2016 and the Respondent led no evidence that it had in fact paid the salary as required by law.

51. In the absence of evidence to the contrary, the Claimant is awarded the sum of **Kshs.35,000/-**.

(b) 12 months' salary compensation for unlawful termination

52. Having found that the Claimant's termination was unfair, the Claimant is eligible for the discretionary relief provided by Section 49(1) (c) of the Employment Act. In determining the quantum of compensation, the Court has taken into account the following –

- i) The Claimant substantively contributed to the termination for the contract of employment by the Respondent.
- ii) The Claimant had apologised in writing for a mistake sometime in 2010.
- iii) The Claimant had served the Respondent for one year and one month.

53. In the totality of the circumstances, the equivalent of two months' salary is fair compensation, **Kshs.70,000/-**.

(c) Overtime

54. Although the Claimant testified that he ordinarily reported to work at 7.30 am and left at 8.00 pm which is out of the ordinary, he adduced nor evidence to show that there was an agreement to that effect with the employer or had been paid in the past. The Respondent denied the allegation. It would be unsafe to award an unsupported claim. The claim for overtime is **disallowed**.

(d) Public holidays

55. The Claimant admitted on cross examination that the claim for the public holidays in one (1) year was erroneous. In addition, no evidence was adduced in support for the claim. Analogous to the testimony of RW1, the claim for payment for 44 public holidays lacks the necessary particulars and is **disallowed**.

(e) Leave Pay

56. The Claimant confirmed on cross examination that he had received payment for 22.75 leave days, more than he claims for. He also confirmed that the Respondent did not owe him any leave pay and RW1 confirmed payment. The claim is **disallowed**.

(f) Certificate for service

57. The Respondent is directed to issue a certificate of service to the Claimant henceforth.

(g) Alternative remedy of Kshs.840,000/-

58. The alternative remedy for Kshs.840,000/- in paragraph (d) for the prayer comprises anticipatory earnings which are not available as a remedy under the provisions of the Employment Act, 2007. See **Elizabeth Wakanyi Kibe v Telkom Kenya Limited [2014] eKLR**, **D. K. Njagi Marete v Teachers Service Commission [2020] eKLR** and **Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR**. The claim is **disallowed**.

Conclusion

59. **In summary, judgment is entered for the Claimant against the Respondent in the sum of Kshs.105,000/- with costs.**

60. Interest at Court rates from the date of judgment till payment in full.

61. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26TH DAY OF JANUARY 2022

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE