



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 720 OF 2017

BENSON AMUHAYA.....CLAIMANT

=VERSUS=

ELMAK CHEMICAL LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Through a statement of claim dated 17th April 2017, filed herein on the 18th April 2017, the Claimant sued the Respondent for the following reliefs:

- (i) A declaration that the termination of the Claimant's employment and/or dismissal was unfair.
- (ii) A declaration that the Respondent fundamentally breached its obligations under the Constitution of Kenya and the Employment Act, 2007.
- (iii) An order directing and/or compelling the Respondents to pay the Claimant the calculated sum being Kshs. 218,400 as particularized in paragraph 18 and 19 of the Statement of Claim with interest at the court rates from the date of filing this suit.
- (iv) The Claimant seeks determination of his overtime at court rates.
- (v) An order directing and/or compelling the Respondent to issue a certificate of service to the Claimant in accordance with section 51 of the Employment Act.
- (vi) An order that the costs of this suit be awarded to the Claimant with interest thereon at court rates from the date of filing the claim.
- (vii) Any other relief as the court could deem just and expedient to grant.

2. Upon being served with Summons to enter appearance, the Respondent did not enter appearance and file a response to the claim within the requisite period, birthing an exparte Judgment herein by Hon. Justice Ongaya, of 31st May, 2018.

3. Through its Notice of motion application dated 28th January 2019, the Respondent successfully sought the setting aside of the aforesaid judgment, and leave to file a response to the claim out of time.

4. Consequence to the stated success, the Respondent filed a statement of response dated 1st July 2019 denying the Claimant's claim and his entitlement to the reliefs sought.

5. The Claimant filed a reply to defence dated 10th July 2019, in reply to the averments in the Respondent's response to the claim. The matter, consequently got headed for hearing on merit. The matter was heard on the 25th October 2021. Upon taking the parties respective cases, the court gave directions to them to file written submissions within specific timelines. The directions were obliged.

The Claimant's case

6. The Claimant's is encapsulated in his pleadings, the contents of his witness statement that he adopted in court as part of his evidence in chief and the oral testimony in court.

7. The Claimant stated that he came into the employment of the Respondent in the month of September 2013 as a loading and receiving clerk. After training he was subsequently promoted to a supervisor. His starting salary was Kshs. 7,200.
8. The Claimant further stated, that as a product of this hard work, his salary progressively increased, and as at the time of the termination of his employment, he was earning Kshs. 12,000 plus an additional supervisor allowance of Kshs. 1,000. His salary was paid monthly in cash.
9. He contended that he worked for a period of three years and two months, with the Respondent, during which period he did not proceed for leave, or get compensation in lieu.
10. He further asserted that he was not given any house allowance or housing in lieu by the Respondent.
11. The Claimant alleged that on or about the 23rd September 2016, his father got unwell. He got constrained thereby to seek for permission from his "boss" to go attend to him. The boss was reluctant to grant the permission. This was the start of a deteriorating relationship between him and the Respondent.
12. His father passed on, on the 2nd October 2016 and he had again to seek for permission to be off duty to enable him make burial arrangements for him. He alleges that his boss did not take that kindly. The boss again reluctantly allowed him permission to go attend to the burial arrangements.
13. After his father's funeral, he got back to his place of work in the month of November 2016. Surprisingly the Respondent's director called him and verbally told him that his services were terminated. He was never given reasons for the termination, he asserted.
14. The Claimant states that on the 3rd day he got to the Respondent's offices, requested for a loan to enable him make the arrangements. The Respondent did not accede to the request. His plea for a salary advance was equally rejected.
15. He asserted that he requested for leave and he was allowed one week's leave commenced on the 25th October 2016.
16. He further stated that, three days after the burial of his father, he called the manager for his October salary only to receive sad news that his employment had been terminated.
17. He testified that on the 7th November 2016, he proceeded to the Respondent's office seeking to know why his employment had been terminated, he was given no reason, but the decision to terminate remained.
18. The Claimant alleged that when he sought for his terminal dues, the director told him off. He was constrained to approach Kituo cha Sheria for legal aid, but the demand letter by them did not attract any response from and/or any action by the Respondent.
19. The Claimant asserts that the termination was unfair and in breach of his legitimate expectation.
20. Cross examined by Mr. Muchiri, counsel for the Respondent, the Claimant stated that he had no written employment contract with the Respondent. He admitted that in his pleadings, he avers that he was first employed as a casual labourer.
21. As regards payments, the Claimant stated that whenever he was paid by the Respondent, he signed a document in acknowledgment. The Respondent could only prove its allegation that it paid him, by tendering a signed document before the court.
22. He reiterated that after the demise of his father, he was given only one week's leave that was to commence on 27th October 2016, and that after burial when he called for his salary, he was informed that his employment had been terminated. He was not able to travel back to work immediately as he did not have any money to enable him do.
23. He asserted that the 7th November 2016 was within the leave day period. Pressed further, he admitted that he reported to work two days after the appointed time.
24. The Claimant stated that he is not the one who computed the figures that he has sought under the head, leave pay. It was done by some professionals.
25. The Claimant tendered as his documentary evidence all those documents that were filed under the list of documents that was contemporaneously filed with the statement of claim.

The Respondent's case

26. The Respondent presented Mr. Abdisalam Mumin Mohamed as its sole witness. At the hearing the witness sought to have contents of his witness statement that was filed on 1st July 2019, as part of his evidence in chief. The court so adopted.
27. The witness stated that the Claimant was retained by the Respondent as a casual labourer sometimes in the year 2014.
28. That on the 23rd September 2016 the Claimant requested for leave for purposes of attending his father's burial at his rural home, request which the Respondent granted.

29. In his witness statement (turned evidence in chief) the witness stated that the Claimant never returned to work for a period of 3 months after proceeding for his father's burial. He refused to pick or return calls from the Respondent's management.

30. The Respondent got constrained to terminate his employment on an account that he had absconded from his place of work without authorization from the Respondent.

31. In his testimony in chief in court, the witness stated that they tried to trace the Claimant without success. The Respondent got constrained to employ another person in his place.

32. He asserted that the Claimant returned to work a month and half after, and at that time he was paid his dues. He was aware that the Claimant was unable to get back to work because of lack of funds. He was not paid because the director had not signed a cheque.

33. He told the Claimant that they would no longer engage him.

34. Cross examined by counsel for the Claimant Mr. Kimani, the witness admitted that his witness statement was contradictory to his oral testimony. That whilst he in the statement, stated that they had given him leave of 3 (three) days, in his oral testimony in chief he stated that it was 7 (seven) days.

35. He further stated that the leave that was given to the Claimant commenced from the start of October 2016.

36. The witness contended that their record showed that the claimant joined them in the year 2014, in 2013 the company had not been incorporated.

37. The Claimant's salary for October 2016, was paid on 1st of November 2016, he asserted.

The Claimant's submissions

38. The Claimant submitted that he placed ample evidence before this court, demonstrating that the termination of his employment was unfair. That the dismissal occurred after he had served the Respondent for a continuous period of 3 (three) years.

39. The Claimant submitted further that in the circumstances of the termination of his employment, he was entitled to a one month's pay in lieu of notice pursuant to the provisions of section 35 (i) and 36 of the Employment Act.

40. He further submitted that section 28 of the Employment Act, provides an employee with a statutory right to leave of 21 days with full pay, annually. That he worked for 4 years without even proceeding for leave, and therefore he is entitled to compensation thereof to an extent of Kshs. 36,400.

41. That his evidence that he worked for the month of October 2016, but was not paid salary for that, Kshs. 13,000 was not challenged.

42. The Claimant submitted further that the statutory procedure for termination of an employee's employment as stipulated in section 41 of the Employment Act was not complied with by the Respondent, rendering the termination of his employment procedurally unfair. Placing reliance on section 49 (1) (c) of the Act, the claimant seeks for a compensatory relief to an extent of 12 (twelve) month's gross salary, Kshs. 156,000.

43. In fortification of his submissions, the Claimant relies on the decisions in **Paul Wachiuri Ndonga -vs- Keroche Breweries Limited, [2018] eKLR**, and **Ngura Muita -vs- Gyto Success Company Limited [2017] eKLR**.

The Respondent's submissions

44. The Respondent's counsel submitted that the Claimant was a casual labourer, and therefore he was not entitled to the leave.

45. As regards the Claimant's claim for the salary for October 2016, counsel submitted that the Respondent's witness testified that the Claimant was paid and in the alternative the Claimant did not work for that month. He should not be granted the amount sought therefore or at all.

Analysis and Determination

46. From the material placed before the court, the following issues emerge for determination:

- a) Whether the termination of the Claimant's employment was procedurally fair.
- b) What reliefs are available to the Claimant, if any?
- c) Who should bear the costs of this suit?

Whether the termination was fair.

47. In determining whether or not a termination of employment or a summary dismissal of an employee from employment was fair or not, it should be borne in mind that the whole unit of fairness has two components, procedural and substantive fairness. Absence of any of these components renders the termination or dismissal unfair, opening a path for the aggrieved employee to be entitled to one or more of those reliefs provided for under the Employment Act. This as the court stated in **Dismas Marende Osiche -vs- Dambusters (Dambusters Bar & Restaurant) Limited ELRC Cause No. 465 of 2016, Nairobi.**

48. The claimant submitted that the termination was not in accord with the provisions of section 41 of the employment Act. In a rejoinder counsel for the Respondent submitted that the termination was a summary dismissal on account of abscondment from duty. Submissions being in the tone that therefore the procedure under the provision was not applicable in the circumstances of this matter.

49. As I shall demonstrate shortly hereafter, the Respondent's submissions with due respect is far off the mark. It is in ignorance of the expansive protection that came in with the enactment of the employment Act, 2007 and the plurality of remedies thereunder created, and available to an employee, whenever an employer shakes the protection.

50. Section 41 of the Act provides for the procedural component.

The section stipulates:

“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on 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), make.”

51. Courts have consistently held that this provision is coached in mandatory terms, non-adherence to the procedure stipulated therein will result to a definite conclusion that the termination or summary dismissal was unfair. Section 45 (2) (c) provides *inter alia* that termination of employment by an employer is unfair if an employer fails to prove that the employment was terminated in accordance with fair procedure.

52. The requirement, for the procedure sets in immediately the employer conceives the contemplation to terminate the employment of, or summarily dismiss an employee, for cause. He or she must be clear on the grounds that have stirred the contemplation, for he or she is enjoined to thereafter clearly express to the to be affected employee, in a manner that the latter understands those grounds. The employer must invite the employee to prepare and make a representation on the specific grounds upon which the employee is considering to base his action on. Depending on the circumstances of each case the employer must be given humble time to prepare for the representation. The right to make a representation goes hand in hand with the right to the employee to have present, a colleague during the representation, and the colleague shall not be a passive participant, he or she shall also be given an opportunity to make a representation whenever the employee desires.

53. Lastly the employer shall have to consider the representations before making a decision. The decision must therefore be an informed decision.

54. The duty to prove that due procedure was followed lay on the Respondent and in absence of any testimony or other form of evidence from its side demonstrating that the procedure was followed, the burden cannot be said to have been discharged. In the upshot I find that the dismissal lacked procedural fairness.

55. Section 43 of the employment Act places upon the employer the burden to prove the reason(s) 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.

56. Section 45 of the Act places a further burden on the employer to prove that the reason for the termination is valid and fair. The section states:

(1) 1. No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment is unfair if the employer fails to prove:

a) That the reason for termination is valid;

b) That the reason for termination is a fair reason.

c) Related to the employee's conduct, capacity or compatibility; or

d) Based on the requirements of the employer.

57. The Respondent contended that it summarily dismissed the Claimant on an account that the latter absconded duty without authority for a period of 3 months after the date when he was supposed to report to work, at end of his leave period. The Claimant on the other hand contended that he reported to work two days outside the appointed date. That this way occasioned by the fact that he was unable to travel

back to work because of financial constraints. The Respondent had not paid him salary for the month of October.

58. In determining appropriateness of the dismissal, this court is enjoined to take into account the totality of the circumstances of this matter and the fact that the burden of prove of validity and fairness of the reason for dismissal rests with the employer. This as this court held in **Lydia Moraa Obara -vs- Tusker Mattresses Limited [2021] eKLR.**

59. The dismissal of the Claimant was summary. According to section 44 of the employment Act, summary dismissal occurs when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled to by statutory provisions or contractual term.

60. In determining validity and fairness of the reason for summary dismissal of an employee, one must take into account the provisions of section 44 (3) of the employment Act.

“3. Subject to the provisions of this Act, an employer may dismiss an employee when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.”

61. By employing the term fundamental breach, the provision demands that the conduct of the employee be repudiatory in character. In the employment contract an employee may be said to have repudiated a contract where his/her conduct and the character it reveals such as to undermine, or seriously impair the essential trust and confidence in the circumstances of their particulars relationship – see **Hunter Engineering Co. -vs- Syn..... Canada Limited [1989, Can LII 129 (SCC).**

62. There must be demonstration by the employer on a balance of probabilities real misconduct rather than simple dissatisfaction with performance or concern as to potential misconduct.

63. To decide whether a misconduct constitutes a valid and fair reason for summary dismissal the court must consider the nature of the misconduct, the consequences arising from the misconduct, within the totality of the employment contract, including the nature and history of the employment relationship.

64. Considering the context of the alleged misconduct, namely that the Claimant did not get back to work immediately after the burial of his father, the fact that the Respondent did not pay him his salary for October timeously leading to the financial constraint that the Claimant asserted, the fact that the Claimant got back to work only two days (and I believe him as I will demonstrate hereunder), two days after the appointed date of his return from leave, the fact that the Respondent was aware the purpose for which the leave was taken, which leave it had authorized, I am not convinced that the contract can be categorized as gross misconduct as contemplated in section 44 (4).

65. The Respondent alleged that the Claimant reported back three months after his leave. That he did not have any authority for the extended period. The Respondent, however besides the bare assertion did not place any evidence before the court to prove this. It was at all material times the owner and custodian of its employees’ records, nothing would have been easier for it than to produce a record to demonstrate this, or give a reason for consideration by the court for the failure to avail.

66. In the upshot, I find that the alleged misconduct was not of a degree that would amount to gross misconduct, with a consequence of attracting the “capital punishment” of an employment relationship, summary dismissal.

67. The summary dismissal was not substantively fair.

What reliefs are available to the Claimant.

68. Having found that the dismissal was neither substantively fair nor procedurally fair, I now turn to the reliefs sought by the claimant.

(i) Compensation for unfair termination.

69. Pursuant to the provision of section 49 (1) (c) of the Act, the Claimant seeks to be compensated to an extent of the maximum compensation awardable namely, gross salary for 12 months. This court is convinced that in the circumstances of this matter, the compensatory relief should be granted to the Claimant considering that procedural fairness and substantive justification were absent in the summary dismissal of the Claimant and the circumstances under which the dismissal took place. I award the Claimant compensation pursuant to the provision in the sum of Kshs. 65,000 being 5 (five) months’ gross salary. I have not lost sight of the fact that the Claimant reported back from leave 2 (two) days after the set date, same contribution to the Respondent’s decision.

(ii) Notice pay.

70. Section 49 (1) of the Employment Act states:

“Where in the opinion of the labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay the employee any or all of the following:

(a) The wages which the employee would have earned had the employee been given notice to which he was entitled to under this Act or his contract of service.”

71. This read with section 36 of the Act forms basis for an award of one month's salary in lieu of notice, in the circumstances that the dismissal was without notice. Under this head, I award the Claimant Kshs. 13,000.

(iii) Unpaid salary for the month of October 2016.

72. The Respondent did not put any record before this court to demonstrate that indeed it paid the claimant, the salary for October 2016, on the 1st of November 2016 as its witness stated. The Claimant's testimony that whenever he was paid, he would sign a document in acknowledgement of the payment was not shaken. I am prepared to conclude that the Claimant was not paid his salary for October 2016. The court awards him Kshs. 13,000.

(iii) Unpaid leave

73. The Claimant asserted that for all that period he was in the employment of the Respondent, he was not granted any annual leave. The Respondent did not tender any evidence to disabuse this. Counsel for the respondent submitted that the Claimant was a casual labourer, and therefore not entitled to any leave. This reasoning ignores the provisions of section 37 of the Employment Act, section which Upon a casual labour employment which is for ever, hence the conversion contemplated in the provision.

74. The Respondent did not tender any record to demonstrate that the Claimant ever proceeded for leave. The Claimant was in the employment for 3 years, therefore entitled to 62 days in total as annual leave pursuant to section 28 of the Act. Considering that when his father passed on he was given a leave of 7 days and to this add the two days he spent after the appointed date without getting back to work, he is entitled to compensation for 53 (fifty-three) leave days that were not paid for. Therefore Kshs. 32,809.50.

75. In the upshot, Judgment is hereby entered for the Claimant in the following terms:

- a) A declaration that the dismissal of the Claimant from employment was neither procedurally nor substantively fair.**
- b) Compensation pursuant to the provisions of section 49 (1) (c) of the employment Act, Kshs. 65,000.**
- c) One month's salary in lieu of notice, Kshs. 13,000.**
- d) Unpaid salary for the month of October 2016, Kshs. 13,000.**
- e) Unpaid leave amount, Kshs. 32,809.50.**
- f) Interest on (b) (c) (d) and (e) above at court rates, from the date of this Judgment till full payment.**
- g) Costs of this suit.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF JANUARY, 2022.

OCHARO KEBIRA

JUDGE

In Presence of:

Claimant in person.

No appearance for the Respondent.