



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 239 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

KIOKO MUINDI.....CLAIMANT

VERSUS

UNITED ARYAN (EPZ) LIMITED... RESPONDENT

JUDGMENT

1. This claim was initiated by a statement of claim dated 31st January 2017 and filed on 3rd February 2017. The Claimant alleges that he was unfairly terminated on 14th September 2017 and prays for

- a. A declaration that the Respondent's action of dismissing the Claimant was unlawful and unfair.
- b. A declaration that the Claimant was entitled to a contract of service.
- c. The sum of Kshs.376,999.61 being one month's salary in lieu of notice and 12 months' compensation.
- d. Costs of this suit.
- e. Interest on the amount awarded at Court rates

2. The Claimant's case is pleaded as follows: That he was engaged by the Respondent as a mechanic on 18th February 2011 at a monthly salary of Kshs.15,215.00 and served at the Respondent's factory in Roysambu and discharged his duties with due diligence and his gross salary had reached a high of Kshs.28,999.97 as at the date of dismissal.

3. That on 25th August 2016, he was on night shift and clocked out at 5.00 am and as he underwent a routine check at the gate, security officers found an upper looper spare of a sewing machine in his wallet as a consequence of which he was detained till 8.00 am when the Respondent's Manager arrived when he was taken to a different room as they went to compare the spare part and found it was not similar to the Respondent's. That the Respondent summoned the police who questioned the Claimant about it.

4. That the police met the Respondent's Human Resource Manager and Union members and the Claimant was later taken to Ruaraka Police Station where Mr. Caleb Wenga, the Officer who had found the spare part recorded a statement. The Claimant spent the night in the cell until the following day when his wife secured his release but had to report back to the station on 2nd September 2016 and had been informed by the Respondent not to report to work.

5. That attempts to access the office on 5th September 2016 were unsuccessful. That on 7th September 2016 the Claimant's wife fell ill at Kiambu and he did not report to the workplace until 4th October 2016 when he was allegedly issued with a summarily dismissal letter dated 14th September 2016.

6. The Claimant further avers that the Respondent acted maliciously in that he was not given a warning letter or any warning at all, was not paid terminal dues and was not notified of a disciplinary hearing or right to defend himself contrary to Section 41 of the Employment Act, 2007.

Respondent's Case

7. The Respondent avers that it employed the Claimant on 18th February 2011 as a mechanic and the contract provided for summary dismissal. That on 25th August 2016, the Claimant was found in possession of company property namely an upper lopper spare part of a sewing machine without authority or permission of the Respondent. The item was concealed in his wallet. That his explanation was found unsatisfactory and he was handed over to the Human Resource Department.

8. It is further averred that on 25th August 2016, he was issued with a notice to show cause which he received. The letter was copied to the Chief Shop Steward.

9. That the Claimant did not respond to the notice to show cause and was dismissed on 14th September 2016 and duly received the letter. The Chief Shop steward and the Union received copies of the letter on 20th September 2016. That the Claimant breached the employment contract by attempted theft of company property by concealment of the spare part so as to remove it from the premises.

10. It is also averred that the Claimant was terminated pursuant to the Collective Bargaining Agreement between the Respondent and the Tailors and Textiles Workers' Union.

11. That the Claimant accepted the summary dismissal, confessed having attempted to steal the spare part and pleaded not be reported to the police and his terminal dues were paid, a sum of Kshs.36,554/-, through his bank account at KCB, Kariobangi Branch. That the Respondent reported the attempted theft to the police.

12. That the Claimant's dismissal was justified in the circumstances and was grounded on a valid reason and a fair procedure was followed.

Evidence

13. The Claimant adopted the witness statement and was cross examined. He admitted having been dismissed for being found in possession of the spare part of a sewing machine in his wallet.

14. On cross examination, he stated that he had not written any letter but admitted that the letter on page 28 of the Respondent's bundle of documents contained his name, identity card number and signature. That he was paid Kshs.48,181.16 as terminal dues and was taken to the police station because of the attempted theft.

15. RW1, MR. SAMMY OSALA testified that he prepared and issued a notice to show cause to the Claimant but he did not respond. That the Claimant admitted having attempted to steal the spare part and was ready to leave peacefully and apologised in the clearance form and signed the form and thumb printed it as well and was paid all his dues. He confirmed that no items were allowed into the factory.

16. On cross examination, the witness confirmed that –

- There was a spare part missing.
- The police did not charge the Claimant in court.
- The letter written by the Claimant was not a forgery.
- Show cause letter was dated 25th August 2016.
- That the incident occurred on 26th August 2016 and the date may have been wrongly typed.
- The Claimant did not respond to the notice to show cause but appeared before the disciplinary panel having been invited by word of mouth.
- The witness had no evidence of the disciplinary hearing.
- The Claimant was not paid for notice.

17. On re-examination, the witness stated that employees were not supposed to bring any items from the outside and if they did, the same were left at the gate. That the Claimant received the notice to show cause letter in the presence of a shop steward and all shop stewards witnessed when he was handed over to the police. That the notice to show cause required him to respond.

Claimant's Submissions

18. The Claimant identifies three issues for determination namely, whether termination of the Claimant was lawful and fair, entitlement to reliefs and costs.

19. As to whether the dismissal was lawful and fair, reliance was made on the decision in **David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR** where Radido J. cited the essence of Section 43 and 45 of the Employment Act on termination of employment contracts.

20. It is submitted that the Respondent had no valid reasons to terminate the Claimant's employment because the Respondent did not establish that the spare part belonged to it, the Claimant was not charged in a court of law and had no history of indiscipline at the workplace for the five years he worked for the Respondent.

21. It is submitted that the termination was substantively unfair.

22. On procedural fairness, it submitted that the Respondent had to demonstrate compliance with the requirements of Section 41 of the Employment Act. Further reliance was made on the words of Radido J. in **David Gichana Omuya v Mombasa Maize Millers Limited (supra)** on the requirements of Section 41 of the Employment Act. That the Claimant was not accorded a fair hearing on 4th October 2016. That the Respondent's witness attempted to deceive the Court in that –

- The notice to show cause is dated 25th August 2016 yet the event happened on 26th August 2016 and had no timeline for response.
- He testified that the Claimant had been invited to hearing a disciplinary hearing by word of mouth.
- The Claimant was issued with a clearance form before termination.

23. That the show cause letter and the clearance forms produced by the Respondent were not genuine. The decision in **Shankar Saklani v DHL Global Forwarding (K) Ltd [2013] eKLR** was relied upon to reinforce the submission. It was submitted that the Respondent did not employ a fair procedure to dismiss the Claimant. It is further submitted that the Claimant's termination was procedurally unfair.

24. On reliefs, it is submitted that the Claimant is entitled to one (1) month pay in lieu of notice by virtual of Section 36 of the Employment Act, 12 months compensation for the unlawful and unfair termination and costs of the suit.

Respondent's Submissions

25. The Respondent identifies two (2) issues for determination:

- i. Effect of the clearance form annexed as Appendix F and
- ii. Whether the Respondent had a valid reason and employed a fair procedure in summarily dismissing the Claimant.

26. As regards the effect of the clearance form, it is submitted that the clearance form was in fact a discharge voucher by the Claimant executed with full knowledge of the circumstances and waiving his right to future claims against the Respondent. That the Claimant was paid his terminal dues in full including leave pay and had confirmed having signed the clearance form.

27. The decision in **Damondar Jhabhai & Co Ltd & Another v Eustace Sisal Estates Ltd 1967 EA 153** is relied upon for the proposition that courts have no power to rewrite contracts but to give them effect. That the clearance form was an agreement between the Claimant and the Respondent since it was not avoided on any ground or evidence.

28. Further reliance is made on the decision in **Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR** where the Court of Appeal found a discharge voucher valid. The decision in **Magdalene Kamene Nziuko v Standard Chartered Bank Limited [2019] eKLR** is also relied upon to buttress the submission. The Court is urged to make a similar decision as the Court of Appeal.

29. It is submitted that clearance form was a discharge voucher in that –

- It is duly executed by the Claimant.
- It contains the ID card number of the Claimant and was aware it was binding.
- The Claimant led no evidence that it was signed under duress.
- It contains factual accuracies in the matter and corroborate the facts.

30. That the suit be dismissed on account of the discharge voucher.

31. As regards the reason(s) and procedure employed in the termination, the Respondent reiterates the contents of Section 43(2) of the Employment Act on the reasons for termination to submit that since the Claimant admitted having been found with the spare part, which the Respondent genuinely believed was a theft incident, it had a valid reason to dismiss the Claimant and the belief led to the attempted theft reported to the police.

32. It is further submitted that the spare part was concealed in the wallet which raised suspicion of theft. Reliance is made on the decision in **Bamburi Cement Limited v Farid Aboud Mohammed [2016] eKLR** to reinforce the submission of the validity and fairness of the reason for termination. The Canadian decision in **Michael Dowling v Workplace Safety & Insurance Board [2004] CAN LII 436 92** is relied upon on the reasonable employer test in the determination of the reason(s) of termination of employment.

33. It is submitted that in the circumstances of this case, the Respondent had a valid reason to terminate the Claimant.

34. On procedure, it is submitted that the Claimant was given an opportunity to respond and acknowledged receipt of the notice to show cause but neither responded nor sought time to respond to the notice.

35. It is submitted that the Respondent used a fair procedure to dismiss the Claimant. That the Claimant was not entitled to pay in lieu of notice since this was summary dismissal and there was no justification for compensation since the Respondent had a valid reason and a fair procedure was employed.

Analysis and Determination

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

- a. What is the effect of the Claimant's statement/discharge or release letter at page 28 of the Respondent's bundle (Appendix F);
- b. Whether the Claimant's termination was fair;
- c. Whether the Claimant is entitled to the reliefs sought.

37. As regards the discharge letter/voucher, the starting point is invariably the law of employment applicable in Kenya in order to appreciate the context and effect of a discharge letter or voucher. In **Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] eKLR** the Court of Appeal had this to say: -

“... it is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the Employment Act and other related statutes. In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs.”

38. In **Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited [2015] eKLR**, the Court of Appeal had the following to say on the import for a discharge voucher –

“The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged.”

39. Finally, in **Coastal Bottlers Limited v Kimathi Mithika (supra)** the Court of Appeal stated that –

“Whether or not a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/agreement; and secondly, whether the same was voluntarily executed by the concerned parties.”

40. In the instant case the Respondent submits that the Claimant's statement on page 28 of the Respondent's bundle of documents is a discharge voucher by which the Claimants waived his rights to pursue future claims against the Respondent.

41. Before delving into the effects of the statement by the Claimant, it is important to determine whether it was or amounted to a discharge voucher or agreement.

42. The undated statement by the Claimant reads

“I Kioko Muindi ID. No. 10978965. I Kioko Muindi, I would like to confirm to the management that on 26th August 2016 at around 5.00 am when my shift ended and I was going home, one security personnel Mr. Caleb search me and found upper looper part of sewing machine in my wallet taking it home with me. I sincerely apologise to the management for misbehaving trying to steal this spare part which belongs to the company. I am pleading with the management to forgive me and withdraw charges against me since I have accepted the mistake and dismissal letter. Please let this matter not proceed to court. I have a family who depend on me and I am the bread winner. Also consider to pay my days worked, leave and overtime I have worked for. I promise that I will not claim for any other payment thereafter.

Please consider my request and God bless you.

Yours faithfully

Name: Kioko Muindi ID No. 10978965

Signature Signed”

43. The Court is unpersuaded that the document herein above is a discharge voucher or agreement or any form of settlement between the parties on account that: -

- i. The document contains an undated statement by the Claimant on what transpired on 26th August 2016. It is unclear whether it was made before or after dismissal.
- ii. The document has no tabulation of the Claimant's entitlements after dismissal nor does it set out the relevant particulars such as leave, overtime, or notice pay.
- iii. The document has not input by the Respondent. It is the Claimant's admission of wrongdoing and request for forgiveness among other requests as well as an apology. It is an unilateral promise not an agreement.

iv. The document has no indication whether the Claimant has received any monies from the Respondent in full and final settlement before promising not to make other claims.

44. It does not appear to the Court that that Claimant had the necessary information and fully appreciated the effect of the statement that “*I promise that I will not claim for any other payment thereafter*”.

45. In the circumstances, it is the finding of the Court that the documents is neither a discharge letter or voucher no a settlement agreement. The Claimant did not waive his right to make further claims in his relationship with the Respondent.

46. I now proceed to determine whether the Claimant’s summary dismissal was fair.

47. The principles that govern the fairness of a termination of employment or summary dismissal are embodied in the Employment Act, 2007 and have been elaborately explained and reformed in legions of decisions by this Court, Court of Appeal and the Supreme Court.

48. Sections 35, 41, 43, 44, 45 and 47 of the Employment Act constitute the statutory bulwark on fair termination of employment. These provisions set out the substantive and procedural requirements for a fair termination or summary dismissal.

49. Under Section 45(2) of the Employment Act:

(2) A termination of employment by an employer 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; and

c. that the employment was terminated in accordance with fair procedure.

50. This Section encapsulates the precepts of substantive and procedural fairness in termination of employment contracts. In **Kenafriic Industries Limited v John Gitonga Njeru [2016] eKLR** the Court of Appeal stated that –

“Three things must therefore be satisfied; there must be reason(s) given for the termination, the reason(s) must be fair and the procedure followed too must be fair. These three conditions are designed to cater for all cases in which an employer instigates the termination of employment.”

Reason(s) for termination

51. In the instant case, the summary dismissal letter dated 14th September 2016 stated that

“It is with regret for the management to communicate to you its decision to summarily dismiss your services on grounds of theft which happened on 25th August 2016, refer CBA Section 19(g).

This takes effect immediately ...”

52. The Claimant admitted in his evidence in chief and on cross examination that he was in possession of a spare part of a sewing machine, concealed in his wallet. He also admitted that the alleged theft was the ground for dismissal. The undated statement “*Appendix F*” which the Claimant attempted to disown, but miserably failed is explicit that he attempted to sneak out the employer’s spare part with no intention of returning it. The allegation that after comparison it was found not to belong to the Respondent or that the police told the management that he had no case is a cock and bull story with no probative value.

53. The Claimant’s submission that it was not proved that the spare part belonged to the Respondent is unsupported by evidence. Relatedly, the fact that the Claimant was not charged in a court of law does not exculpate him from other forms of liability for his act.

54. Section 43(2) of the Employment Act is explicit 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.”

55. As submitted by the Respondent the Claimant’s admission of possession and concealment of the spare part convinced the employer that this was an attempted theft.

56. For the above reasons, it is the finding of the Court that the Respondent had a valid and fair reason to dismiss the Claimant from

employment.

57. The Respondent has on balance of probabilities established that the Claimant's summary dismissal was substantively justifiable.

58. In **CMC Aviation Limited v Mohammed Noor [2013] eKLR**, the Court of Appeal expressed itself as follows –

“Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination.

59. In **Naima Khamis v Oxford University Press (EA) Limited [2017] eKLR**, the Court of Appeal expressed itself as follows –

“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.”

60. The gamut of the law on the procedural tenets of fair termination of employment is Section 43 of the Employment Act. The Section enumerates the steps to be complied with in effecting a fair termination.

61. The steps were elaborately explained Radido J. **Loice Otieno v Kenya Commercial Bank Ltd [2013] eKLR**, 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 ...”

62. It is important to note that the Respondent's Disciplinary Code and Procedure sets out an elaborate procedure of how an employee should be taken through the disciplinary process, such as adequate written notice of the time, date and venue of the hearing. Essential elements of the alleged misconduct must be spelt out, right to be represented by another person, composition of the panel and decision making by the Chairman of the panel.

63. I now proceed to apply the above principles to the instant case. The Claimant testified that he was not taken through any form of disciplinary hearing.

64. RW1 confirmed on cross examination that he prepared and issued the notice to show cause letter to the Claimant who acknowledged receipt by signing and thumb printing. Although the letter is wrongly dated, the Claimant did not deny having received the notice to show cause.

65. The notice required the Claimant to show cause why disciplinary action should not be taken against him. The letter had no timeline for a response. The Claimant did not respond to the notice to show cause. RW1 also confirmed that the Respondent formed a panel to hear the Claimant but he did not appear before it. According to RW1, the Claimant was invited for the hearing by word of mouth and appeared on 14th September 2016 and informed the panel that he stood by what he had written.

66. Intriguingly, the witness provided no minutes or other record of the meeting. He could neither remember who the members of the panel were, nor who invited the Claimant for the meeting yet he was in the Human Resource Department. In the absence of credible evidence that the Claimant was taken through a disciplinary hearing, the Claimant's assertion remains uncontroverted.

67. The Respondent has not established on balance of probabilities that the Claimant's summary dismissal was procedurally fair.

68. The Court is in agreement with the Claimant's submission as well as the decision in **Shankar Saklani v DHL Global Forwarding (K) Ltd (supra)** that the Claimant's summary dismissal on 4th September 2016 was unfair for want of procedural propriety. The Respondent complied with neither the law nor its disciplinary code and procedure.

Reliefs

69. The Claimant prays for the following –

a. Declaration that the Claimant's dismissal was unlawful and unfair

70. It is hereby declared that the Claimant's dismissal from employment was unlawful and unfair.

b. One month's salary in lieu of notice

71. Paragraph 14 of the letter of appointment dated 18th February 2011 provided that either party could terminate the contract of employment by one month's notice in writing or otherwise by payment in lieu of notice, of one month's wages.

72. Relatedly Section 36 of the Employment Act provides for payment in lieu of notice. The Claimant is entitled to the one (1) month's salary of **Kshs.28,999.97/-** as prayed for.

c. 12 months' salary compensation

73. Having found that the Claimant's summary dismissal was unfair, the Claimant is eligible for the discretionary remedy under Section 49(1)(c) of the Employment Act subject to compliance with the requirements of Section 49(4) of the Act.

74. The Court has considered the following –

- i. The Claimant was an employee of the Respondent for slightly over five years.
- ii. The Claimant substantively contributed to the termination of the employment contract.
- iii. The Claimant did not respond to the notice to show cause even after having received the letter.

75. In light of the foregoing, the equivalent of two (2) months' salary is fair, **Kshs.57,999.94**.

Conclusion

76. Judgment is entered for the Claimant against the Respondent for the sum of Kshs.86,999.91 with costs.

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

78. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF FEBRUARY, 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