



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 232 OF 2015

JARED OUMA GAGA.....CLAIMANT

VERSUS

EQUATOR BOTTLERS LIMITED.....RESPONDENT

JUDGMENT

1. Jared Ouma Gaga (the Claimant) sued Equator Bottlers Ltd (the Respondent) on 17 July 2015, and he stated the Issue in Dispute as:

Unfair termination of Jared Ouma Gaga and failure to pay terminal benefits.

2. The Respondent filed a Response on 2 November 2015, and this prompted the Claimant to file a Reply to Response on 24 February 2016.
3. The Cause was heard on 30 July 2018, when the Claimant testified and closed his case and on 15 November 2021, when 2 of the Respondent's Clerks testified.
4. The Claimant filed his submissions on 14 December 2021, while the Respondent filed its submissions on 12 January 2022.
5. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

6. Section 35(1) of the Employment Act, 2007 envisages written notice of termination of employment (unless it is a case of summary dismissal), while section 41 of the Act requires the employer to afford the employee an opportunity to be heard before termination of employment.
7. The Claimant testified that he was dismissed on 2 October 2013 without being afforded a chance to be heard on the allegations that he had stolen 130 crates of soda.
8. The Respondent pleaded that a disciplinary hearing was held on 1 October 2013 at 1400 hours before the Claimant was summarily dismissed.
9. However, the Respondent's witnesses stated under cross-examination that they were not present during the hearing.
10. It was incumbent upon the Respondent to demonstrate that a hearing as contemplated by section 41(2) of the Employment Act, 2007 was held.
11. The Respondent did not provide any minutes of the hearing if any. The names of the persons who heard the Claimant's case were not disclosed.
12. The said persons (from the personnel office or any other management office) were not called to testify, and the failure to call them was not explained.

13. The Court has no hesitation in finding that the summary dismissal of the Claimant was not procedurally fair.

Substantive fairness

14. The allegation which caused the Respondent to dismiss the Claimant was the theft of 130 crates of soda.

15. The Claimant's testimony was that he was assigned, and he did deliver a total of 565 crates of soda.

16. On the other hand, the Respondent contended that the Claimant had been allocated 695 and not 565 crates of soda to deliver.

17. The 2 witnesses called by the Respondent testified that the dispatch note(s) that they saw was for 565 crates of soda and that 130 crates were missing (were not received) and were therefore not recorded in the delivery book.

18. The Respondent did not bring any evidence that the Claimant, a driver, was involved in the process of processing orders, issuing of dispatches or invoices or in the loading of the truck(s).

19. The Respondent did not also produce any evidence from the security department, which was stated to have released the truck driven by the Claimant before ascertaining the crates of soda leaving the factory.

20. The Court finds that the Respondent did not discharge the burden imposed on it by sections 43 and 45 of the Employment Act, 2007.

Remedies

Salary in lieu of notice

21. The Claimant prayed for the equivalent of 3-months' salary in lieu of notice but did not provide any contractual basis for the award.

22. The Court will therefore award the equivalent of a 1-month salary in lieu of notice in terms of section 35(1)(c) of the Employment Act, 2007 (basic salary in September 2013 was Kshs 28,180/-).

Compensation

23. The Claimant was employed on 13 February 2012 and was dismissed on 2 October 2013. He served the Respondent for slightly under 2 years.

24. In consideration of the length of service, the Court is of the view that the equivalent of 2-months gross wages as compensation would be appropriate (gross salary in September 2013 was Kshs 50,014/-).

Conclusion and Orders

25. The Court finds and declares that the summary dismissal of the Claimant was unfair, and he is awarded:

(a) Pay in lieu of notice Kshs 28,180/-

(b) Compensation Kshs 100,028/-

TOTAL **Kshs 128,208/-**

26. Claimant to have costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 2ND DAY OF FEBRUARY 2022.

RADIDO STEPHEN, MCIARB

JUDGE

APPEARANCES

FOR CLAIMANT MR NYANGA INSTRUCTED BY BEN ADUOL NYANGA & CO. ADVOCATES

FOR RESPONDENT MR ODHIAMBO INSTRUCTED BY WASUNA & CO. ADVOCATES

