



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1408 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

ANTONY MUNGAI MWANGI.....CLAIMANT

VERSUS

MOUNT KENYA UNIVERSITY.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Claimant filed a claim against the Respondent dated 23rd April, 2016.

The Respondent put in a response dated 15th August, 2016.

CLAIMANT'S CASE

2. The Claimant brought his claim vide his memorandum of claim and witness statement both dated 22nd April, 2016. The same he confirmed through his affidavit sworn on 11th November, 2021.

3. The Claimant avers he was an employee of the Respondent and there is a contract dated 1st February, 2010.

His salary was Kshs.50,000/= as on 11th December, 2015 Claimant says he received communication from his supervisor that Human Resource Director had directed he should proceed on a two weeks compulsory leave.

4. He says on 15th December, 2015 he received a letter from the Respondent Human Resource Director inviting him to a disciplinary meeting scheduled for 17th December, 2015.

He says the meeting did not take place and was told it would be on 22nd December, 2015.

5. Meanwhile he says he received a termination letter and the reason for such termination was not communicated to him.

RESPONDENT'S CASE

6. The Respondent did not participate in the court proceedings. He neither did not file submissions.

7. In his response to the claim he says the Claimant acted in criminal activities and to the detriment of the Respondent and further he states that contrary to the Claimant's averment a disciplinary meeting took place on 17th December, 2015 and in the presence of the Claimant.

He says Claimant was given an opportunity to explain himself. He says that the Claimant is not being honest that disciplinary meeting did not take place.

8. The Respondent reiterates that the Claimant conducted acts of gross misconduct against the Respondent. He says that those acts of gross misconduct are within the knowledge of the Claimant and furthermore the same were communicated to him during the disciplinary hearing.

ISSUES FOR DETERMINATION

9. (i) The main issue for determination is whether the Claimant's employment termination was lawful and fair.
- (ii) Is he entitled to the reliefs sought.

DECISION

10. The Claimant in his evidence and submissions contends he was served with a termination notice by the Respondent and furthermore he was not giving any reason for the said termination. He was called to a disciplinary hearing which he contends did not take place. The Respondent says the disciplinary meeting took place and Claimant was given an opportunity to be heard.

11. In court the Respondent neither presented oral evidence or documents to support his response.

At least the court did not see any such documents like the letter inviting the Claimant to the disciplinary meeting nor the details of the minutes of the disciplinary meeting.

The Respondent in his response did not give the reason for terminating the Claimant's employment.

Instead he said the reasons were well known to the Claimant and that they had been shared with him during the disciplinary meeting.

Unfortunately no such minutes were presented to court and at this point the court is in the dark what gross misconduct the Claimant is indicted to have committed.

The letter of termination by the Respondent dated 22nd December, 2015 does not give the Claimant a reason for termination.

12. Section 45 of the Employment Act 2007 make it mandatory for the employer to give a reason for termination of employee's employment.

13. Section 45 of the said Employment Act provides;-

- (i) "No employer shall terminate the employment of an employee unfairly.
- (ii) The termination of employment by employer is unfair if the employer fails to prove;
 - (a) That the reason for termination of employment is a fair reason."

14. Further Section 41 of the said act as well provide "subject to Section 42(1) an employer shall before terminating the employment of an employee on the 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 shop floor union representation of his choice present during the explanation.

15. The court finds the Respondent apart from referring to gross misconduct by the Claimant did not give specific reason or reasons that the Claimant was accused of and needed to defend himself against.

In fact he did not even given any evidence or documents to prove his case and/or to controvert the Claimant's averments.

In **GATEWAY INSURANCE COMPANY LIMITED VS JANILLA SULEIMAN AND ANOTHER (2018) EKL**R and in referring to the case of **MOTEX KNITWEAR LIMITED VS GOPITEX KNITWEAR MILL LIMITED HCCC NO.834 OF 2002** the court appreciated that "although the Defendant has denied liability in an amended defence and counter claim no witness was called to give evidence on his behalf.

That means that not only does the defence rendered by the 1st Plaintiff stand unchallenged but also that the claims made by the Defendant in his defence and counter claim are unsubstantiated."

16. In any event the court finds the Respondent failed the fairness test set out in numerous case laws where an employer is expected in mandatory terms to give a valid reason for termination of an employee and follow a fair procedure in according a hearing to the Claimant.

If one of these is not proved then the fairness test fails on the part on the employer.

17. There are many authorities that buttress the fact that in support of Sections 41, 43 and 45 of the Employment Act the employer is mandated to give a valid reason or reasons for termination of employment and at the same time demonstrate having followed fair procedure.

In the case of **KEFREIGHT E.A. LIMITED VS BENSON K. NGUTI (2016) eKLR** the court held that it is not enough to terminate employment by notice or payment in lieu thereof. Termination should be based on valid reasons and fair procedure should be followed. The same finding was repeated in the case of **WALTER ONURO VS TEACHERS SERVICE COMMISSION NO.955 OF 2011** where the

court held that for termination to pass the fairness test it ought to be shown that there was not only substantive justification for the termination but also procedural fairness.

Furthermore that Section 43 of the Employment Act obligated an employer to prove the reasons for termination of employment and where the employer failed to do so, the termination was deemed to have been unfair.

18. In this case the Respondent failed to update the Claimant why he sent him on compulsory leave and then invited him for a disciplinary hearing.

There was no oral evidence or documentary evidence adduced to prove the reasons given for the termination and the process followed was not explained.

19. The court finds the Claimant was unfairly terminated as no tangible reason is given as to why he was terminated.

The averment of disciplinary meeting is not well proved as no notice is presented to court inviting the Claimant for the disciplinary meeting and the proceedings of the meeting were not produced.

20. The court finds that the Respondent failed the fairness test and so finds the Claimant was unfairly and unlawfully terminated from his employment.

REMEDIES

21. The Claimant is found to be deserving of the following remedies having been found to be unlawfully terminated;-

- (a) Salary for December upto 22nd December, 2015 Kshs.36,674/=.
- (b) One month salary in lieu of notice Kshs.50,000/=.
- (c) Leave pay no particulars declined.
- (d) Service pay, no particulars declined.
- (e) Compensation for unlawful termination at 3 months considering the period he served the Respondent Kshs.150,000/=.

Total award Kshs.236,674/=.

- (f) Costs are awarded to the Claimant and interest at court rates from the date of Judgment till full payment.
- (g) Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 31ST DAY OF MARCH, 2022.

ANNA NGIBUINI MWAURE

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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE