



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1002 OF 2017

DAVID NYAMANYA NYAUNDI.....CLAIMANT

VERSUS

PERIMETER PROTECTION LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant brought the instant suit vide a Memorandum of Claim dated 26th May, 2017 and through which he avers that he was employed by the respondent with effect from November, 2008 as a security guard. He further avers that his termination from employment came when he refused to sign a letter dated 1st March, 2017, as directed by the respondent's supervisor. That as a result, he was barred from accessing his work station on 2nd March, 2017. That when he approached his Advocates for advice as regards the contents of the letter of 1st March, 2017, he was advised that the same had the effect of declaring him redundant. Consequently, he moved the Court and now seeks several reliefs from this Court including; severance pay, compensatory damages for unfair termination, notice pay, accrued overtime, accrued off days, accrued KRA remittances that were not remitted, accrued insurance remittances and a certificate of service.

2. The claim was opposed with the respondent stating that it never issued the claimant with the document dated 1st March, 2017, which allegedly rendered him redundant. It asserts that the said letter was to be transmitted to its Advocates for legal advice, but had mysteriously disappeared from its offices.

3. The respondent avers that the claimant was summarily dismissed from employment after he absconded duty. That prior to this, he had been issued with several warnings, both verbal and written, with the last one being for 1st March, 2017. The respondent asked the Court to dismiss the claim with costs.

4. The matter proceeded for hearing on 25th October, 2021 and each side presented oral evidence.

Claimants' case

5. The claimant took the stand and testified in support of his case. He adopted his witness statement and bundle of documents as part of his evidence in chief. The said documents were also produced as exhibits before Court.

6. In his testimony, he stated that he was terminated from the respondent company on grounds that there was no work. That they were informed that those who had worked for less than three months would be terminated. He told Court that initially, he was assigned to guard Uzuri foods Ltd and that he was later transferred to a hard ware store. It was his testimony that on 1st March, 2017, the respondent's Chief Operations Manager ordered him to sign a letter dated the same day. That he declined to sign the same as he did not understand its contents. That subsequently, he was threatened with termination from employment and directed not to report to work the day after. That on 2nd March, 2017, he reported to work as usual, but was not allowed to access the respondent's premises. That he deemed this action on the part of the respondent as amounting to termination from employment. That thereafter, he took the letter dated 1st March, 2017 to his Advocates, who advised him that the letter had the effect of declaring him redundant. That he was further advised by his Advocates that the said redundancy was not in line with the provisions of the Employment Act.

7. During cross examination, the claimant informed Court that he had had some disagreements with his then manager at the time, and who had in turn used his supervisor Mr. Kirui, against him. He also denied receiving a warning letter as well as a show cause letter on 14th March, 2017. He also denied any knowledge of an insurance cover procured by the respondent for the benefit of its employees. According to the claimant, he was away from work with effect from 1st March, 2017, following instructions of the management of the respondent, to that effect.

Respondent's case

8. The respondent called two witnesses, Mr. Daniel Wamarite and Mr. Stanley Kirui, who testified on its behalf as RW1 and RW2 respectively.

9. RW1 identified himself as the Chief Operations Manager of the respondent. He adopted his witness statement and bundle of documents filed on behalf of the respondent, to constitute part of his evidence in chief. He also produced the said documents as exhibits before Court.

10. It was RW1's testimony that the claimant was cited for lateness and using abusive language towards his supervisor hence was issued with a warning letter. That he had been issued with several warnings, both verbal and written. That the written warnings were issued since the claimant failed to heed the verbal warnings and repeated the incidences cited.

11. RW1 further testified that the claimant was issued with a show cause letter which he received but refused to sign and acknowledged receipt thereof. That the said show cause letter was on account of abscondment from duty. That upon receiving the show cause letter, the claimant disappeared from work hence his dismissal from employment. RW1 further denied issuing the claimant with the **"Notice of Termination"** document dated 1st March, 2017. He told Court that the same was merely a template which was for transmission to the respondent's Advocates and that the same had mysteriously disappeared from its offices. That he only came to gain sight of the same when the claimant served the respondent with the Memorandum of Claim.

12. It was his further testimony that the respondent had an insurance cover with Intra Africa Insurance Co. Ltd hence deductions were effected from its employees' salary and remitted accordingly. He further stated that the respondent remitted all deductions in respect of NHIF and NSSF in favour of the claimant. He concluded his testimony by stating that the claimant had never returned to collect his terminal dues.

13. RW2 identified himself as an employee of the respondent and the claimant's former supervisor. He also adopted his witness statement to constitute part of his evidence in chief. It was his testimony that part of his duties entails checking physical reporting of employees and presence of security guards at various establishments. That on 9th August, 2016, he went to check on the respondent's security guards at Uzuri foods Ltd, where the claimant was stationed at the time, and noted that he was yet to report to work. That when he called him to enquire as to the reason why he had not reported to work, the claimant responded rudely and in abusive manner. That the matter was resolved the following day at the respondent's offices and the claimant was issued with a warning letter.

14. It was his further testimony that the claimant was later transferred to Nipsur Hard ware and while there, he was once again cited for lateness to duty, hence was issued with another warning letter on 1st March, 2017, but he refused to sign for the same. RW2 stated that from 1st March, 2017, he never saw the claimant at the respondent's office.

Submissions

15. The claimant submitted that the respondent was unfairly rendered redundant as the respondent did not comply with the provisions of the Employment Act in so doing. He added that the respondent did not have a valid reason for declaring him redundant. He buttressed his submissions on the case of **Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR**. The claimant further submitted that having worked for the respondent for a period of 9 years, he was entitled to severance pay.

16. On its part, the respondent submitted that it had sufficient and reasonable grounds to summarily dismiss the claimant from employment under section 44 of the Employment Act and that it accorded him a fair hearing. The respondent placed reliance on the case of **George Okello Munyolo vs Unilever Kenya Limited (2019) eKLR**. The respondent further submitted that the claimant was not entitled to the reliefs prayed for.

Analysis and determination

17. Flowing from the pleadings on record as well as the evidence placed before me, this Court is being called to determine the following issues;

- a) Was the claimant declared redundant or summarily dismissed?
- b) Was the claimant's exit from employment unfair and unlawful?
- c) Is the claimant entitled to the reliefs sought?

Redundancy or summarily dismissal?

18. The claimant has alleged that he was declared redundant vide the respondent's letter dated 1st March, 2017. The preamble of the said letter which has no addressee, is in the following manner: -

"01—03-2017

Name:.....

PF No.....

“NOTICE OF TERMINATION”

.....”

19. As can be discerned, the letter is not addressed to the claimant nor any person for that matter. It neither makes mention of the claimant in its body. One therefore wonders how the claimant can confidently assert that he was declared redundant on the strength of a letter that was not addressed to him. What made him conclude that the notice was meant for him, when his name does not appear in the said document?

20. Coupled with the foregoing, the claimant did not state how he obtained the said letter. It bears to note that the claimant merely stated that he was forced to sign the letter. He did not make any mention of the fact that he was issued with the letter by the respondent. The respondent denied issuing the claimant with the said letter and contended that the same was meant for its own administrative purposes and was to be transmitted to its Advocates for legal advice but mysteriously disappeared from its offices.

21. Indeed, the demand letter issued to the respondent by the claimant’s Advocates did not make any mention or reference to him being declared redundant. If it is indeed true that he had been issued with the said letter, then it logically follows that his Advocates would have addressed that issue in the demand letter. It is therefore difficult to comprehend how the claimant can claim redundancy without a notice to that effect addressed to him.

22. The foregoing serves to confirm the respondent’s assertions that it never issued the claimant with the said letter purportedly declaring him redundant.

23. On the other hand, the respondent produced a letter dated 29th March, 2017, titled “**Dismissal from Service**” addressed to the claimant and which refers to a show cause issued on 14th March, 2014.

24. This is proof that the claimant was summarily dismissed from employment as opposed to being declared redundant. Therefore, the claim for redundancy by the claimant is not substantiated and I find that he was summarily dismissed from employment.

25. The next question for determination now is whether the said dismissal was fair and lawful.

Unfair and unlawful dismissal?

26. The resolution to this question revolves around the provision of **Sections 43, 45 and 41** of the Employment Act (Act). Under section 43(1), an employer bears the burden of proving the reasons for termination and failure to do so, such termination is deemed to be unfair. Further and pursuant to subsection (2), such reasons are those it genuinely believed to exist at the time of the employee’s termination. Additionally, **section 45 (2) (a) and (b)** of the Act, provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee’s conduct, capacity or compatibility; or based on the operational requirements of the employer.

27. Further, in line with **section 45 (2) (c)** of the Act, an employer is required to prove that it complied with the requirements of fair process in terminating the services of an employee. **Section 41(1)** of the Act provides in an elaborate fashion the requirements of fair procedure. In particular, it requires an employer to notify an employee of the intended termination. Accordingly, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.

28. The foregoing constitutes the parameters of fair termination and define the test necessary to determine whether the termination was substantively and procedurally fair.

29. To prove its case, the respondent produced a warning letter dated 1st March, 2017 addressed to the claimant. It issued on account of “*refusing a lawful command and using an insubordination language to your supervisor*”

30. On the said letter there is a comment by the RW1 indicating that the claimant “*refused to sign*” on the same.

31. On the same date, there is another communication in the form of an internal memo titled “*gross misconduct*” and addressed to the claimant. It cites the claimant for lateness to duty and being rude to his supervisor. Through the said letter, the claimant was also reminded of past warnings and cautioned that the said warning would be the last one and any unbecoming behavior would not be tolerated and will attract stern action including dismissal from employment.

32. The said letter also contains a comment by RW1 to the effect that the claimant refused to sign for the same. That did not mark the end of the claimant’s tribulations as he was issued with a show cause letter dated 14th March, 2017 which reads as follows;

“*RE: SHOW CAUSE*

On 1st March 2017, you were summoned to the office to sign an official letter to which you declined. You used an abusive language to your superiors and also refused to sign a warning letter issued to you.

You left the office and were instructed not to report to the client’s assignment until you clear with the office. Since then you deserted duties until this morning when you stormed the Manager’s Office and caused a scuffle.

By the receipt of this letter, you are required to immediately Show Cause in writing why stern disciplinary measures should not be taken against you for the Gross Misconduct.

DANIEL WAMARITE

CHIEF OPERATIONS OFFICER”

33. The same letter also contains a comment by RW1, to the effect that the claimant refused to sign the same, but noted that he left with a copy.

34. The foregoing series of events is what culminated in the claimant’s dismissal from employment, and which was communicated vide a letter dated 29th March, 2017, which reads as follows: -

“RE: DISMISSAL FROM SERVICE

Since 14th March, 2017 when you received a Show Cause letter, the Office has never received any communication from you. It is therefore noted that you deserted your duties. You are hereby dismissed from service in accordance to Sec 44(4)(a) of the Employment Act 2007.

You are required to return all Company uniform in your presence before collecting your full and final dues payable as follows:-

1. Worked days (if any)

2. Leave days (prorate)

3. Uniform deduction refunds

DANIEL WAMARITE

CHIEF OPERATIONS OFFICER

CC

LABOUR OFFICE – Nairobi County”

35. From the letter of dismissal, it is apparent that the reasons for the claimant’s exit from employment was on account of desertion. The claimant has denied deserting duty and has alleged that he was denied access to the respondent’s premises on 2nd March, 2017.

36. In cross examination, the claimant admitted that he went to the respondent’s office and there was some sort of deliberations on his matter whereafter he was issued with a warning letter which he refused to receive. He further stated in cross examination, that he was not at work as he had been suspended from duty but when asked for a letter suspending him from duty, he admitted not having one.

37. RW1 stated in his testimony that upon receipt of the show cause letter, the claimant disappeared from work with effect from 14th March, 2017 and when he reappeared, at his office to complain about his status of employment, he was served with the show cause letter. RW1 clarified that the claimant was not terminated on 1st March, 2017 but was only asked not to report to any of its client’s premises for assignment. Indeed, the internal memo dated 1st March, 2017 and through which the claimant was warned, instructs him as follows;

“...you left the office and were instructed not to report to the client’s assignment until you clear with the office. Since then you deserted duties until this morning when you stormed the manager’s office and caused a scuffle...” Underlined for Emphasis

38. As is discernible, the claimant was not directed vide the said internal memo not to report to the respondent’s premises. What is express is that the claimant was only instructed not to report to the respondent’s client’s assignment until he was cleared from the office. He was not barred from reporting to the respondent’s premises for further direction. As a matter of fact, the claimant did not deny being absent from work between 1st March, 2017 until 14th march, 2017. His only contention was that he was instructed by the respondent’s management not to report to work.

39. Indeed, this was corroborated by RW2 who stated that he never saw the claimant again after 1st March, 2017 as he was not present when he was issued with the show cause letter on 14th March, 2017.

40. The claimant’s explanation for his absence from work does not sound plausible at all. It sounds absurd that the respondent would bar him from accessing its premises on 2nd March, 2017 as he has alleged, then require him to show cause for desertion of duty several days later when he resurfaced.

41. If the claimant’s version is to be believed, then he would not have been required to explain his absence on 14th March 2017 vide a show cause letter. The respondent would still have turned him away as on 2nd March, 2017 without further ado. The fact that he was issued with a

show cause letter to answer for desertion, proves that the respondent still considered him its employee.

42. I also find it necessary to state that the claimant's demeanor was not that of truthful witness, which observation further bolsters my conviction that his version of events is not accurate.

43. Ultimately, I am persuaded that the claimant absconded duty hence availed the respondent reasons to commence disciplinary action against him.

44. I now turn to consider the limb of procedural fairness.

45. In this regard, the respondent has demonstrated its adherence to procedural fairness by producing the show cause letter, which is addressed to the claimant. Through the said show cause, the claimant was required to explain his absence from work.

46. RW1 noted in the said show cause letter that the claimant refused to sign on it but took a copy and never appeared at the respondent's premises again.

47. From the foregoing, it is evident that the respondent had complied with the requirements of section 41 of the Act as it notified the claimant of the allegations against him. The respondent noted as follows in the claimant's letter of dismissal that; *"Since 14th March, 2017 when you received a Show Cause letter, the Office has never received any communication from you"*.

48. It therefore seems that the claimant opted not to answer to the allegations of desertion hence squandered the opportunity to give his side of the story. Having failed to respond to the show cause letter, the claimant cannot be heard to say that he was not heard on the allegations against him.

49. The claimant was aware of the impending disciplinary proceedings but opted not to participate by snubbing the show cause letter.

50. I find that by his own conduct, the claimant frustrated the disciplinary process commenced against him by the respondent. Having failed to respond to the show cause or appear at the respondent's premises, he left the employer with almost no option but to dismiss him from employment.

51. The upshot of the foregoing is that the Court finds that the claimant's termination was neither unfair nor unlawful hence he is not entitled to compensatory damages, severance pay or notice pay.

52. As regards deductions in respect of the insurance cover and the NSSF, the respondent produced evidence in the form of letters from Intra Africa Insurance Co. Ltd confirming that there was an existing insurance cover in favour of its employees. It further produced the claimant's (National Social Security Fund (NSSF) statement which indicate that his remittances as at February, 2016 were uptodate.

53. The prayers in regards to overtime are dismissed for lack of evidence.

54. In view of the fact that the claimant's employment was not disputed, he is entitled to a Certificate of Service pursuant to section 51(1) of the Act.

Orders

55. In the final analysis, the claim is dismissed in its entirety with no orders as to costs.

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

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Nyabuto

For the Respondent Mr. Kimiti

Court Assistant Barille Sora

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 had 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.

STELLA RUTTO

JUDGE