



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2279 OF 2016

(Before Hon. Justice Kebira Ocharo on 28th March 2022)

ALEXANDER MUTINDA NGILA.....CLAIMANT

-VERSUS-

PAUL ILUVYA MUTUNGA

BONIFACE MWANZA MUINDI T/A MUTUNGA

MUINDI ADVOCATES.....RESPONDENT

JUDGMENT

Introduction

1. The claim herein was instituted vide a memorandum of claim dated 22nd August 2016 wherein the claimant sought the following reliefs against the Respondent;

- a. The sum of Kshs. 2,026,275.36 the total of which includes payment for service pay, leave allowance, house allowance, medical allowances (NHIF) deductions, NSSF contributions and damages for unfair/wrongful termination.
- b. Damages for unfair dismissal.
- c. Costs of this suit.
- d. Any other or further relief that this Honourable Court may deem fit and just to grant.
- e. Interest thereon.

2. Respondents filed their response to Claim on 6th February 2016 denying all the allegations brought forth in the Claimant's statement of claim, and the Claimant's entitlement to the reliefs sought.

3. The Respondents had filed an application on 25th October 2019 seeking dismissal of the suit for want of prosecution. The court however dismissed the same through a ruling delivered on 13th June 2020. It was directed that the matter be set down for hearing on merit within 60 days of the date of the ruling.

4. Following the above directions, the plaintiff's case was heard on the 6th October 2021, while the Respondents' was heard on the 1st December 2021. At the close of the parties' respective cases, the court gave directions for the filing of written submissions, the parties complied.

Claimant's case

5. The claimant states that he was employed by the Respondents on 15th November 1999, and thereafter served them diligently and dutifully for 16 years. For the entire of the period he had no issue raised against him in the discharge of his duties.

6. He states that on 23rd May 2016, the 2nd Respondent asked him to hand over all the files that he had worked on that day, and the previous week. The 2nd Respondent had been out of office that past week. As he was in the process of handing over the files, and rendering accounts in relation thereto, the 1st Respondent, got into the 2nd Respondent's office, and asked the Claimant to hand over the office keys too. He obliged.
7. Then the Respondents handed a notice to show cause letter dated 11th May 2016, to him. He responded to the same by his letter dated 25th May 2016.
8. The Claimant further states that he received a termination letter from the Respondents on the 30th day of June 2016, delivered to him through a co-worker. He asserted that the termination was without any valid and fair reason. The Respondents just wanted to edge him out of employment to avoid paying him his terminal dues, worth the 16 years that he had put into servicing them.
9. The Claimant asserts that besides the letter dated 11th May 2016, he did not receive any other document from the Respondents.
10. He asserts that the Respondents were not making any contributions to NSSF, and did not at any time pay for his medical cover.
11. The Claimant contended that for the entire period of 16 years when he was in the employment of the Respondents, he did not proceed for leave at any time. He needs compensation for this.
12. In his evidence under cross examination, the Claimant stated that his employment was founded on a letter of employment, which letter of employment he has not presented as evidence because he lost the same.
13. The Respondents dutifully paid him his salary monthly. At no time prior to his dismissal did he raise it with the Respondents that he was being underpaid. He was only raising the issue after dismissal from employment.
14. The Respondent's letter dated 30th June 2016 was in reaction to his response to the notice to show cause.
15. He stated that he was paid his salary, however he was not paid one month's salary in lieu of notice.
16. He contended that during his tenure, the Respondents were deducting his salary for remittance to NSSF, but they were not remitting.
17. He further stated in his evidence under cross examination that at the end of each year the Respondents' staff would proceed for Christmas holidays on 21st of December, only to resume duty on 4th of January of the succeeding year. At the time of proceeding for the break, the respondents used to pay him half of his monthly salary as bonus. He used to sign for this money.
18. From the NSSF documents presented by the Respondents, the remittances were for the years 2009 to 2014.
19. Under re-examination by his counsel, the Claimant stated that all that he is claiming from the Respondents, is what he was legally entitled therefore would be availed without a demand.

Respondents' case

20. The 1st Respondent stated that the firm of Mutunga & Muindi Co. Advocates was registered on 23rd February 2000, and started its operations on the 1st September, 2000. The Claimant got employed as an office cleaner cum messenger. However, as time went by, and after training on job, he was elevated to a clerk in the law firm in the year 2006.
21. The 1st Respondent stated that as time went by, the Claimant started drinking heavily, a habit which they warned him against on a number of occasions verbally. The Claimant could be apologetic and promise to reform but that never came to be.
22. In 2015, the drinking became heavier, other unwanted behaviours such as coming to work late and failure to account for monies given to him as court filing fees, inflating of court fees and bus fare and commissioning of documents at a fee using advocates stamps when they were not in office, giving false accounts on money given to him for purchase of office necessities and working for other advocates at the expense of his duties at the Respondents' law firm, set in.
23. On the 11th January 2016, a client visited the 1st Respondent's office with already prepared documents, documents that were bearing the Respondents' firm's stamp, with signature thereon purported to be the 1st Respondent's as the person who attested the document. No doubt the signature wasn't his. He got constrained to press the client to know who signed the document, the customer disclosed that the Claimant did it. When the Claimant was called and confronted with it, he admitted that was the one who prepared the documents and signed the same. For this he got a warning.
24. The Claimant didn't reform, as days went by, it became difficult for the other employees to work with him. He could not work on assignments given to him, constraining the other employees to step in to undertake them. Matters became unbearable when the 2nd Respondent attempted to correct the Claimant on his habit of reporting to work while drunk, only for the Claimant to abuse him.
25. The Respondents could not bear any more. As such, he was issued with a notice to show cause letter dated 11th May 2016 to which he

responded to vide a letter dated 25th May 2016. The Respondents considered the response, found the same insufficient and consequently decided to terminate his employment. Instead of dismissing him summarily, the Respondents opted to pay him for the days he had worked in May 2016 and a month's pay in lieu of notice.

26. The Respondents also asserted that the claimant was a registered member of NSSF and that his contributions were duly remitted, consequently, he is not entitled to claim service pay. In addition, they asserted that they had never made any deductions from the claimant's salary for or on behalf of NHIF.

27. In addition to the above, the Respondents also clarified that the Claimant's salary was inclusive of house allowance and as for leave, he was often paid his annual leave allowance equivalent to 50% of his monthly salary every December. The respondents also stated that the office would remain closed every year from 11th December to 11th January of the succeeding year to allow all members of staff to proceed for their annual leave.

28. In his evidence under cross examination, the 1st Respondent testified that the Claimant became their employee in September, 2000, when they incorporated the law firm. Prior to this time, he was not in their employment.

29. He asserted that prior to his termination, the Claimant had had warnings from the Respondents, though the same weren't placed before the Court. The Respondent stated that he had several meetings with the claimant over his conduct, though the same was not recorded.

30. He asserted that the Claimant would use fake stamps to commission documents for other law firms. He further stated that he did not present the documents to court because they were for those law firms.

31. On the leave allowance, he stated that the 50% salary was often paid, since the Claimant would go for leave for half a month, and for the other unutilized leave days he got compensated by the half salary. It was the firm's practice that all employees could proceed for leave from 11th December to 11th January the following year.

32. Asked as to why they had not tendered any documents to demonstrate that they were making remittances NSSF for the period prior to 2009, the 1st Respondent stated that the law regarding NSSF came into being in the year 2009.

33. The 2nd Respondent's evidence as came out in his witness statement and the testimony in court, testimony both in chief and under cross examination was substantially similar to that of the 1st Respondent, it won't be for the interest of prudence in management of the scarce judicial to restate the same.

Claimant's submissions

34. The claimant submitted that the Respondents failed to discharge the burden placed on them by section 47 of the Employment Act as no evidence was brought forth to justify his termination. In addition, he argued that the drunkenness was not one of those grounds that were put forth in the Notice to show cause.

35. He submitted further that the Respondents subjected him to an unfair procedure leading up to his termination contrary to the provisions under section 41 of the Employment Act. He relied on the cases of **Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers Sacco Limited (2014) eKLR** and **Mary Chemweno Kiptui vs Kenya Pipeline Company Limited (2014) eKLR**, to support this submission.

36. The claimant submitted that the Respondents did not take the responses he had made to the Notice to show cause into consideration while arriving at the decision to terminate his employment. He argued that the Respondents conduct leading to his termination was contrary to the provisions of Section 45 of the Employment Act. He also placed reliance on the case of **Alphonse Machanga Mwachanya vs Operation 680 Limited (2013) eKLR** to bolster his argument.

37. As for the allowances, the claimant submitted that the Respondents had neither housed him nor gave him an allowance to cater for his accommodation, contrary to the provisions of the Employment Act. Consequently, he is entitled to such payments.

38. As for service pay, he argued that since he had proven that his termination was unfair, he became entitled to it. He therefore urged the court to exercise its discretion in awarding him the reliefs sought.

Respondents' Submissions

39. The Respondents submitted that the prayers sought are in the form of special damages which are supposed to be specifically pleaded and proved before they can be awarded by the court. They placed reliance on the case of **Christine Mwigina Akonya vs Samuel Kairu Chege (2017) eKLR**. They argued that the claimant failed to strictly prove his claim and that an award of the same would amount to unjust enrichment on his end.

40. Regarding the Claimant's termination the Respondents submitted that the claimant during cross examination had made admissions that he was given an opportunity to be heard and that he had been warned against his unbecoming conduct.

41. The Respondents submitted that the claimant grossly misconducted himself and deserved summary dismissal as provided for under section 44 (3) and (4) of the Employment Act. That it was not in dispute that he was paid his notice pay and the number of days he had worked.

42. Further, they submitted that the procedure provided for provided under section 41 of the Employment Act was adhered to before the termination of his employment.

43. On payment of service pay, the Respondents submitted that the claimant, by annexing his NSSF card proved that he was a registered member of NSSF and as such was not entitled to service pay as per the provisions of Section 35(6) of the Employment Act. They argued that the remittances for the same were upto date and therefore section 20 of the NSSF Act was fully complied with.

44. The Respondents submitted on damages for unfair termination and stated that the termination was indeed lawful, justified and in accordance with the law. The claimant was therefore not entitled to the any damages. They referred to the holding of Mbaru J. in **Kemunto Amina vs Milimani High School (2019) eKLR**. They urged the court to find in their favour.

45. The respondents made reference to the case of **George Okello Munyolo vs Unilever Kenya Ltd. (2019) eKLR**. They also highlighted Section 47(5) of the Employment Act and argued that the claimant had not discharged the burden of proving that his dismissal was unfair and unlawful. They urged the court to dismiss the suit.

Analysis and determination

46. From the material placed before me by the parties herein, I distil the following issues for determination:

[a]. Whether the dismissal of the Claimant's from employment was procedurally unfair.

[b]. Whether the dismissal of the Claimant's employment was substantively fair.

[c]. Whether the Claimant is entitled to the reliefs sought.

[d]. Who should bear the costs of this suit.

Whether the dismissal of the Claimant was procedurally fair.

47. Section 45 of the Employment Act dictates that no employer shall terminate the employment of an employee unfairly. Section 45[2][c] provides the foundation for insistence on engagement of fair procedure, a default thereof will automatically lead to the termination being deemed unfair.

48. Section 41 of the Act supplies the structure for procedural fairness. There is now firm jurisprudence that the provision is mandatory. In **Jane Nysandiko v Kenya Commercial Bank Limited [2017]eKLR**, the Court held and which was cited with approval by the Court of Appeal in the case of **National Bank of Kenya Ltd vs. Anthony Njue [2019] eKLR** , thus;

“Section 45 of the Employment Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employment is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; the reason for the termination was fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and handling of any appeal against the decision. Also, not to be overlooked is the conduct of culpability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41.....”

49. The mandatory procedure set out in section 41 of the Act requires notification, a hearing and consideration of the employee's representation before termination. Therefore, the process has three aspects and absence of any one of them will definitely obliterate fairness of the process leading up to the decision to terminate an employee's contract of service or summarily dismissing the employee.

50. There is no dispute that through a letter dated 11th May 2016, the Claimant was issued with a notice to show cause, why he disciplinary action against him including summary dismissal shouldn't be taken against him on account of his misconduct. I have considered the letter, the contents thereof are, clear that the Respondent's were intending to take disciplinary action against the Claimant and, very detailed on the grounds upon which the action was contemplated. I am of the view that the information aspect contemplated under section 41 was satisfied.

51. Through his letter dated 25th May 2016, the Claimant gave a lengthy response to the notice to show cause. This is not contested by any of the parties. According to the Claimant, and his Counsel's submission, he was not given a hearing. The tone of the Claimant's submissions is to the effect that there was no oral hearing and therefore the procedure was unfair. It is not a must that there be an oral hearing or that is pivotal is that the employee was able to make a representation. However, this will always be dependent on the peculiar circumstances of each matter. In this I am emboldened by the Court of Appeal decision in **Kenya Ports Authority v Fadhil Juma Kisuwa [2017] eKLR**, thus,

“..... It must however be stressed that the necessity of oral hearing will depend on the subject and nature of the dispute, the whole circumstances of the particular case.”

52. The Court takes note of the fact that the employer of the Claimant was a law firm of two partners, all of whom would be witnesses in the dispute if the matter were to proceed by way of a typical hearing. Yet, on the other hand the circumstances of the matter would demand that they be triers over his misconduct, and make a decision thereon. I have too considered the nature of the charges that were against the Claimant, and I am convinced that the most appropriate way through which the Claimant would be heard was as was here, a written response to the accusations.

53. Contrary to the Claimant's contention, the termination letter of 30th May 2016, clearly demonstrates that his representations as were made in the response to the notice to show cause were duly considered.

54. In the upshot, I conclude that the summary dismissal was procedurally fair.

Whether the dismissal was substantively unfair.

55. Section 44 of the Employment Act postulates when summary dismissal may occur, thus;

“1. Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term.

2.....

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

56. It is common cause that the Claimant's employment was brought to determination summarily. Whether or not his conduct was one that fundamentally breached his obligations arising under the contract, I shall delve into, shortly herein after.

57. Section 43 of the Employment Act places an obligation the employer to prove the reason or reasons for the termination, and where the employer fails to do so the termination shall be deemed to have been unfair within the meaning of section 45. The stipulation under section 43 therefore cannot be read in isolation from the provisions of section 45, as the two sections of the law place upon the employer burdens of proof which are closely allied.

58. Upon proving the reason[s] for dismissal, the employer must go further and establish that the reason[s] was valid and fair. As to whether, the reason was fair and valid courts have applied the “reasonable employer test” In the case of **Evans Kamadi Misango -vs- Barclays Bank of Kenya Limited [p2015] eKLR**, Court addressing the teste held:

“To my mind, the burden placed on the employer by section 43 is to demonstrate that there was a valid reason which would cause a reasonable employer to terminate the employment of an employee. The HULBURY's Laws of ENGLAND [4TH EDITION VOLUME 16] at page 482 expounds this principle as follows:

“In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those facts. It must make a wide inquiry to determine whether a reasonable employer could have decided to dismiss on the same facts. The basis of this approach [the range of reasonable test] is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take another; the function of a tribunal as an industry jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the bond of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the bond the dismissal is fair but if it falls outside the bond, it is unfair.”

56. The test that was enunciated as follows by Denning MR in **British Leyland UK Limited -vs- Swift [1981] 1RLR 91 at 93:**

“Was it reasonable for the employer to dismiss [the employee]? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, the dismissal was fair.”

57. Section 44[4] provides for actions and inactions of an employee that may amount to gross misconduct so as to justify a summary dismissal of an employee. However, it is imperative to state that the list therein is not an exhaustive list. An employer can summarily dismiss an employee on an account outside those in the catalogue for as long as the account has a characteristic as I will demonstrate hereinafter.

58. It is not enough for an employer to state that an employee committed one or more of those actions obtaining in the list provided for in section 44 [4] of the Employment Act 2007, or its Human Resource Policy. An employee's misconduct does not inherently justify a summary dismissal unless it is “so grave” that intimates the employee's abandonment of intention to remain in employment. In **Laws -vs- London Chronicle Limited [1959] 2 ALL L.R. 285** the English Court of Appeal stated the following at page – 287.

“Since a contract of service is but an example of contracts in general so that the general law of contract will be applicable, it follows that if summary dismissal is claimed to be justifiable the question must be whether the conduct complained is such as to show the servant to have disregarded the essential conditions of the contract of service.”

59. Whether an employee's misconduct warrants dismissal requires assessment of the degree and the surrounding circumstances, the contextual approach –

Darius Kiseu Mwamburi -vs- Co-operative Bank of Kenya Limited [2021] eKLR.

60. By reason of the above premises, this court is enjoined to consider the real presence of the Claimant's alleged acts of omission or commission, the context within which they occurred, and the gravity of the same.

61. No doubt the allegations that were brought out in the notice to show cause hereinabove mentioned were in my view in nature those that fitted in the various categories of gross misconduct put forth in section 44[4] of the Act, that would justifiably attract the penalty of summary dismissal.

62. I note that in the termination letter, the Respondents expressed their dismay that even in matters that they had had a discussion over, with the Claimant, and latter had admitted his failures, for instance failure to account for finances and undertook to refund the unaccounted for sums, he had decided in the response to the show cause reneged on the same.

63. In his testimony, the Claimant didn't in any manner challenge or put forward any evidence to rebut this specific content of the termination letter. This leaves a clear impression that was alleged therein was true. Employment relationships, are by their very nature, relationships that thrive on good faith, candidness, forthrightness, and trust. Nothing more can exhibit lack of forthrightness, candidness and good faith than where an employee goes back on mistakes that he had already owned upto.

64. Section 43 [2], provides that the reason or reasons for termination of a contract, are matters that the employer at the time genuinely believed to exist, and which caused the employer to terminate the services of the employee. The Claimant just asserted that the Respondents wanted to edge him out of employment to deprive him of his entitlement for the services he had rendered them for a period of 17years. This is too vague an assertion. I have had considerable difficulty in trying to understand why an employer would want to just dismiss an employee who has worked for him for a whole 17 years to deprive him of his benefits.

65. Equally, I found a serious challenge in trying to understand, and I failed to, what benefits the Claimant had in mind, for he didn't lead any evidence to establish that.

66. Section 47[5] placed duty upon the Claimant to prove that an unfair termination of employment occurred. With the bare assertions above, I find it difficult to conclude that the Claimant did discharge this burden.

68. Looking at the evidence by the parties herein, in its totality, I do not find any reason to belief that the accusations against the Claimant were fabricated. I consider that those reasons/grounds are those that the Respondents genuinely believed to exist as at the time they were making the decision to dismiss the Claimant.

68. Having found the Respondents did establish that the Claimant misconducted himself, I now turn to consider, whether the misconduct was so grave to attract the sanction of summary dismissal. I have considered the profession in which the Respondents were engaged in, the nature of the alleged misconduct, the reputational negative impact that such a misconduct can have on a law firm and the professional standing of the partners of law firm, and conclude that the misconduct went to the root of the contract of service. In the face of it, the relationship would not subsist.

69. By reason of the foregoing premises, I find that the summary dismissal was substantively justified.

Whether the Claimant is entitled to the reliefs sought.

70. The Claimant sought for a compensatory relief for unfair termination to an extent of 12 months' gross salary. Having found that the termination was both substantively and procedurally fair, the award is not merited.

71. As regards to the Claim for a refund of NSSF contributions, I see no rational for the Claim. The Respondents, were able to demonstrate that they dutifully made remittances to the fund for the Claimant.

72. The Claimant alleged that the Respondents didn't remit N.H.I.F. contributions to the relevant body. Keenly looking at his evidence, it is difficult to see any sufficiency in it in prove of the claim. The Respondents explained and I believe them that they at no time did deduct any money from this salary for purposes of remitting the same to the scheme. I am unable to grant the Claim.

73. Considering the evidence of the Claimant under cross examination, and the evidence of the Respondents on the former's claim on untaken leave days compensation, it clear that the Respondent's law firm had a practise of allowing all its employees to proceed for annual leave at same time, on or about 11th December, to resume on or about 11th of January the succeeding month. The employees would be paid an equivalent of one-half of their gross salary to cover 15 days unutilized leave days. With the evidence I see no basis for the claim. It is declined.

74. Having found herein above that the Claimant was registered under NSSF, he falls under the category of employees who are excluded from benefiting from service pay provided for under section 35 of the Act. I note, the prayer for service pay is coached in a manner as though an alternative for the same, gratuity is sought. This court has said before that gratuity is only grantable where has been provided for in the contract of employment.

75. In the upshot, the Claimant's case is dismissed with costs.

READ AND DELIVERED THIS 28TH DAY OF MARCH, 2022

OCHARO KEBIRA

JUDGE

In presence of;

Ms Mutuku for the Claimant

Mr. Muli for the Respondent

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 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.

OCHARO KEBIRA

JUDGE