



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1427 OF 2016

BENJAMIN KIOKO MUTISYA.....CLAIMANT

VERSUS

UZURI FOODS LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant avers that he was employed by the respondent in its production department and was assigned to the depanning section with effect from February, 2013 till 18th February, 2015 when his employment was terminated. He has termed the termination as unfair, illegal and unlawful and thus seeks several remedies including notice pay, severance pay, salary for January, 2015, leave days not taken and compensatory damages.

2. The claim was opposed with the respondent denying that it dismissed the claimant from employment. It averred that the claimant absconded duty upon refusing to write a report in regards to damage of 120 pieces of 400g loaves of bread, occasioned while he was on duty. The respondent asked the court to dismiss the claim with costs.

Claimant's case

3. At the hearing which proceeded on 2nd November, 2021, the claimant testified as CW1 and at the outset, sought to rely on his witness statement together with his bundle of documents, which he produced as exhibits before court. He asked the court to adopt the same as part of his evidence in chief.

4. The claimant told court that on 7th January, 2015, while he was at work, approximately 10 loaves of bread were burnt in the process of being baked. That at the material time, he was working at the depanning section of the respondent company. That depanning entailed removing bread from the baking tins and was the 6th out of 7 stages of bread making and was before the slicing stage. That the damage occasioned to the loaves of bread was due to the fact that the tins were poorly oiled by the team that was specialized to do so. Therefore, he denied responsibility for the damage. That nonetheless, his then supervisor, Mr. Mugweru told him and his colleagues to admit the mistake but they refused to do so. That they were also instructed not to report to work until the bosses arrived. That he reported to work two days thereafter and met with the General Manager, but he was tossed back and forth and eventually asked to apply for employment afresh. That nonetheless, he kept reporting to work consistently for two weeks until he had no option but to start looking for alternative employment. It was his further testimony that he was never called for a hearing nor issued with a notice to show cause. He denied absconding duty and averred that the dismissal letter produced by the respondent was pursuant to the demand letter issued by his advocates.

Respondent's case

5. The respondent called one witness, Ms. Quinter Ouma, who testified as RW1. She identified herself as as the respondent's Human Resource Manager.

6. She also adopted her witness statement as well as the bundle of documents filed on behalf of the respondent. She asked the court to adopt the same as part of her evidence in chief.

7. RW1 averred that she was well versed with the case at hand as the company records were accessible to her by virtue of her position. Her testimony was that, while the claimant was on duty on 7th January, 2015, in the depanning section, 120 pieces of 400g white bread were damaged. That the claimant failed to bring the same to the attention of the respondent hence the damage was only ascertained by the production supervisor when he was in the process of signing employees' attendances just before they left work. That subsequently, the production supervisor asked the employees who were assigned to the depanning section to write a report explaining what had transpired but the claimant refused to comply. It was her testimony that the claimant opted to leave the company without giving any explanation and never reported back to work the following day and in the subsequent days.

Submissions

8. In his submissions, the claimant argued that he was a permanent employee in terms of the provisions of section 37 of the Employment Act. He placed reliance on the case of **Abigael Jepkosgei Yator & another vs China Hanan International Co. Ltd (2018) eKLR** and **Joash Ogara Mainga & Christopher Munyoki Munnene vs Dhl Exel Supply Chain (K) Limited (2021) eKLR**. He further submitted that the respondent had failed to prove that there was a valid reason to warrant his termination and that the same was not undertaken procedurally.

9. On its part, the respondent, submitted that the claimant was a piece rate employee and did not work continuously. The respondent further submitted that the claimant absconded work. The respondent invited the court to consider the findings in the following cases **Kenneth Kamau Kaigua vs Giloil Company Limited, ELRC (Nairobi) Cause No 225 of 2016** and **Amos Manoa Erastus vs BOC Kenya Limited ELRC (Nairobi) No. 509 of 2014**.

Analysis and determination

10. I have considered the issues raised in the pleadings, the rival submissions as well as the evidence on record and to my mind the court is being called to resolve the following questions;

- a) **The nature of the employment relationship between the parties**
- b) **Whether the claimant was unfairly and unlawfully terminated?**
- c) **Is the claimant entitled to the reliefs sought?**

The nature of the employment relationship between the parties

11. The claimant has termed his employment as having been converted from casual to permanent basis by virtue of section 37 of the Employment Act. The respondent disagrees and asserts that the claimant was a piece rate employee. The question then is, was the claimant a piece rate employee?

12. Section 2 of the Employment Act defines “**piece work**” to mean “**any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance.**”

13. The Court of Appeal extensively analyzed piece rate as a form of employment in the case of **Krystalline Salt Limited vs Kwekwe Mwakele & 67 others [2017] eKLR**, as follows;

“In a piece work or, as it is sometimes called, piece rate arrangement, the emphasis is on the amount of work and not the time expended in doing it.... From the pleadings and the evidence, we reiterate that the respondents were engaged in a piece work form of employment. On a daily basis they packed salt and were paid in accordance with the amount of salt packed. As a general rule, where a contract of service relates to piece work and the work is not completed at the end of the day, the employee, at the option of the employer can either be paid for the task which has been performed at the end of that day, or be permitted to complete the task on the following day. The other alternative is for the employee to be paid at the end of each month in proportion to the amount of work which he will have performed during the month or on completion of the work, whichever date is the earlier.”

14. In the case herein, the claimant’s pay slips for June, 2014 and January, 2015, both of which were produced before court, indicate that he was earning a basic salary plus house allowance. He was also being paid overtime over and above the basic salary. There is no indication in the said pay slip to suggest that he was being paid as per the amount of work performed. If anything, the pay slip has actually provided for the hours worked overtime during the month and the same taken into account in the computation of the total pay for overtime.

15. This is an indication that the claimant’s payment was based on the time spent to perform the work he was assigned to do, as opposed to the amount of work performed. Evidently, this is not in tandem with the definition of the term “piece rate”. Therefore, the claim by the respondent that the claimant was a piece rate employee cannot stand. It is therefore my finding that the claimant was not a piece rate employee.

16. Having determined that the claimant was not a piece rate employee, can it then be said that he was a casual employee?

17. A casual employee is defined under Section 2 of the Employment Act, 2007 to mean “**a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.**”

18. As indicated hereinabove, the claimant’s pay slips had a component of basic salary, house allowance, normal overtime and overtime rate. Further, the following deductions have been from the claimant’s salary; PAYE, NSSF, NHIF and salary advance.

19. Ideally, a casual employee is paid at the end of the day or at times at the end of the week. In this case, it is apparent that the claimant was paid on a monthly basis and even given an advance salary. The payment of the advance salary suggest that the claimant was expected to work consistently in the subsequent months hence pay off the same. This therefore confirms that the claimant’s engagement by the respondent was consistent and not intermittent.

20. Further to the foregoing, the respondent terminated the employment of the claimant on grounds of abscondment of duty? **Section 35** of

the Employment Act provides as follows: -

“A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be?

where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;”

21. This infers that a casual employee’s contract of service is terminable without notice. How then do you terminate an employee serving on casual basis? A casual employee works intermittently hence if he or she fails to show up for work, an employer need not terminate his or her work formally but rather, proceed to engage another employee. The issue of abscondment of duty does not arise at all. The context of the employment relationship herein does not seem to have been casual at all since the respondent actually issued a letter terminating the claimant’s employment.

22. In light of the foregoing, it is apparent that the parties were in an employment relationship that was so structured and devoid of the ingredients that would ordinarily exist in a casual employment.

23. It is therefore the court’s finding that the employment relationship was neither piece rate nor casual, but was by all indication a term employment.

Was the claimant’s termination unfair and unlawful?

24. The claimant has alleged that he was unfairly terminated from employment. Pursuant to **sections 43, 45 and 41 of the Employment Act (Act)**, an employer is required to prove that there was substantive justification to warrant an employee’s termination and that such an employee was accorded procedural fairness. Essentially, this is the standard for determining whether a termination was fair or not.

25. Substantive justification entails proof of reasons which lead to an employee’s termination. The same is addressed under **Section 43(1)** of the Act, which also places the burden of proof on an employer. Further, failure on the part of an employer to prove reasons for termination, renders such termination as unfair. In this regard, section **45 (2)** of the Act goes ahead to provide that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee’s conduct, capacity or compatibility; or based on the operational requirements of the employer.

26. As regards, procedural fairness, **Section 45(2) (c)** of the Act provides that for termination to be fair, it ought to be in line with fair procedure. **Section 41(1)** of the Act requires an employer to accord an employee a hearing prior to termination. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.

27. In the case herein, the main reason advanced for the claimant’s termination appears to be abscondment of duty. The claimant’s letter of dismissal reads as follows;

“RE: DISMISSAL-ABSCONDING

You have not reported to work from 8th January, 2015 to date and no communication have been received.

In addition, 120 pieces of 400g white bread was damaged and you were asked by your supervisor to write a report and you refused.

In this case, the company has no alternative than to dismiss you for absconding work.

Yours faithfully...”

28. The dismissal letter further makes mention of the damage to 120 pieces of 400g white bread, in addition to the allegation of abscondment of duty.

29. To support its assertion that the claimant was culpable for the damage to the loaves of bread, the respondent relied on the production report which indicates that there was damage to 120 pieces of 400g bread.

30. The claimant did not deny that there was damage to bread on the material day. His only contention was that the damage was occasioned by the team that was responsible for oiling the baking tins while he was in the depanning section. That as such, his role was limited to removing the baking tins from the oven hence he could not have been responsible for the damage. RW1 confirmed in her testimony and written statement, that the claimant was indeed in the depanning section.

31. There was no evidence by the respondent to prove that the claimant was the one who occasioned damage to the bread during the baking process. Indeed, there was no assertion that the damage to the bread occurred while the bread was at the depanning section. There was therefore no compelling evidence before court to attribute the damage of the bread to the claimant. The same could not therefore constitute a valid and fair reason for the claimant’s termination as it was not proved.

32. As regards abscondment of duty, the respondent produced attendance sheets to prove that the claimant had absconded himself from duty on particular days. The claimant on the other hand claims that he was instructed not to report to work and when he did, he was taken back

and forth until he was forced to look for alternative employment.

33. Despite the respondent's assertions, it did not state nor even suggest that it attempted to reach the claimant through whatever means. In the case of **Mary Mumbi Kariuki vs Director, Pamoja Women Development Programme [2015] eKLR** the court found as follows;

“...In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.

[24]. In the instant case, the Respondent has not disclosed any action it took, if its version that the Claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal.”

34. The respondent does not seem to have made any effort in this case to trace the claimant despite citing him for abscondment of duty. Coupled with the foregoing, there is no evidence or even an indication from the respondent's end, that the claimant was required to explain his absence from duty. Therefore, in as much as the respondent had a reason to cite the claimant for abscondment of duty, it was bound to demonstrate that it had traced the claimant and asked him to explain his absence from work.

35. **Section 41(2)** of the Employment Act provides as follows;

“Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

36. It was therefore a mandatory requirement under law that despite the claimant's alleged abscondment from duty thus justifying his termination, the respondent ought to have gone an extra mile and accorded him an opportunity to present any explanation he may have wished to make.

37. The respondent has not indicated or even suggested that it accorded the claimant a hearing prior to his termination. According to the Employment Act, granting an employee a fair hearing is mandatory and not a matter of choice. The provisions of section 41 are couched in mandatory terms. This was the holding in the case of **Postal Corporation of Kenya vs Andrew K. Tanui [2019] eKLR**

38. It is evident in this case, that the claimant was not accorded procedural fairness hence his termination can be faulted.

39. In totality of the foregoing, I find that the respondent has failed to prove that the claimant's termination was not unfair and unlawful within the meaning of section 45 (2) of the Act.

Reliefs

40. Having found that the claimant's termination was unfair, the court awards him five (5) month's gross salary as compensatory damages.

41. The claimant is further awarded one month's salary in lieu of notice.

42. The rest of the claims are dismissed for lack of evidence.

Orders

43. Accordingly, I enter Judgment in favour of the claimant against the respondent as follows;

(a) A declaration that the claimant's termination by the respondent was unfair and unlawful.

(b) One month's salary in lieu of notice being the sum of Kshs 14,204/=

(c) The claimant is awarded compensatory damages in the sum of Kshs 71,020/= which sum is equivalent to 5 months gross salary as per his last pay slip.

(d) The total award is Kshs 85,224/=.

(e) Interest on the amount in (d) at court rates from the date of Judgement until payment in full.

(f) The claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Onkoba

For the Respondent Mr. Museve

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