



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 580 OF 2016**

**PETER MUNYWOKI NZIVO.....CLAIMANT**

**VERSUS**

**NGUVU CONSTRUCTION & MINING COMPANY LIMITED....RESPONDENT**

**JUDGEMENT**

1. The claimant avers that he served in the employment of the respondent with effect from 14<sup>th</sup> July, 2008 until 26<sup>th</sup> February 2016 when his employment was terminated following allegations that he was involved in the theft of gypsum materials from the respondent and that he had operated company equipment outside the stipulated working hours. He has termed his termination as wrongful, illegal and unlawful, hence seeks several reliefs to wit, compensatory damages unpaid leave, notice pay, overtime due, unpaid house allowance, certificate of service, interest and costs of the suit.

2. The claim is opposed with the respondent stating in its response that the claimant was involved in various acts of serious/gross misconduct, in that he was involved in the theft of gypsum materials and had operated company equipment outside the stipulated working hours. That as such, it had justifiable reasons to suspend the claimant and thereafter dismiss him from employment.

3. The matter proceeded for trial on 15<sup>th</sup> December, 2021, with each side calling one witness.

**Claimant's case**

4. At the commencement of the hearing, the claimant adopted his witness statement together with the bundle of documents, which were filed together with the claim, to constitute part of his evidence in chief. The documents were also produced and marked as exhibits before Court.

5. In his testimony the claimant stated that he was employed by the respondent as a plant operator. He averred that at the time of his termination, he had worked for the respondent for close to 7 years and 6 months. He further told court that on 12<sup>th</sup> February, 2016, his boss, by the name Mr. Chris Ndung'u ordered him to leave work and report back after 7 days. That upon completion of the said 7 days, he reported back to work, whereupon he was issued with a letter of termination. It was his further testimony that he was issued with the letter of suspension and termination concurrently. He further stated that he was not given any notice nor a hearing prior to his termination. That despite being accused of theft by the respondent, he was never charged with any criminal offence. He further denied receiving any terminal dues from the respondent.

**Respondent's case**

6. The respondent tendered oral evidence through its Managing Director, Mr. Christopher Ndung'u, who testified as RW1. He also adopted his witness statement and the bundle of documents filed on behalf of the respondent, to constitute part of his evidence in chief. The documents were also produced and marked as exhibits before court.

7. RW1 told court that the claimant was initially employed as a site manager on or about 14<sup>th</sup> July, 2008. That the employment relationship was terminated when the claimant resigned vide a letter dated 31<sup>st</sup> January, 2015 and all his terminal dues were paid. That after a period of two months, the claimant went back and asked to be assigned work. That his request was accepted hence he was engaged to manage the respondent's site at Mwingi. According to RW1, this constituted fresh employment which was distinct from the former one. That thereafter, the claimant worked until sometimes in February, 2016 when he was involved in the theft of gypsum materials from the respondent's site at Mwingi. That subsequently, he was suspended from work for a period of 14 days through a letter dated 12<sup>th</sup> February, 2016. That following an internal audit, it was revealed that the claimant was culpable of the theft hence he was summarily dismissed from employment vide a letter dated 26<sup>th</sup> February, 2016. That by then, he had only worked for the respondent for a period of 11 months.

## Submissions

8. Upon close of the hearing, both parties filed written submissions. In his submissions, the claimant urged that there was no valid reason advanced by the respondent to justify his termination. To support this position, the claimant referred the court to the case of **George Onyango Akuti vs Security Services Kenya Limited (2013) eKLR and James Kabengi Mugo vs Syngenta East Africa Limited Industrial Cause No. 1476 of 2011**. He further submitted that his dismissal was unfair as he was not issued with any notice nor afforded an opportunity to be heard. That despite being summarily dismissed, he was entitled to a fair hearing as per section 41 of the Employment Act. He placed reliance on the case of **Loice Otieno vs Kenya Commercial Bank Limited Cause No. 1050 of 2011 eKLR**.

9. The respondent, submitted that the claimant had not been in its continuous employment for a period of more than 13 months hence pursuant to section 45(3) of the Employment Act, he was not entitled to complain that he had been unfairly terminated. That his summary dismissal was justified and was in accordance with section 44 of the Employment Act. In support of its submissions, it cited the case of **Clouston vs Corry (1906) 3 All ER 988**.

## Analysis and determination

10. Arising from the issues raised in the pleadings, the submissions on record, as well as the documentary and oral evidence, this Court is being called to determine the following issues;

- a. Whether there was a break in the claimant's employment?
- b. Whether the claimant had a right to claim unfair termination?
- c. If the answer to (b) is in the affirmative, whether the respondent had cause to dismiss the claimant?
- d. Whether the claimant was accorded a fair hearing?
- e. Is the claimant entitled to the reliefs sought?

## Whether there was a break in the claimant's employment

11. The claimant has averred that he worked continuously for the respondent with effect from 14<sup>th</sup> July, 2008, until his termination from employment on 26<sup>th</sup> February, 2016. The respondent has disputed this claim and asserted that the claimant had two distinct contracts with the first one running from 14<sup>th</sup> July, 2008 until the end of February, 2016. That it is pursuant to the second contract that his employment was terminated.

12. To support its assertions that the claimant actually resigned under the first employment contract, the respondent produced a letter dated 31<sup>st</sup> January, 2015 titled **"Retirement from Work"** allegedly authored by the claimant. It reads as follows;

"Dear Sir, I Munywoki Nzivo wish to inform you that my doctor has advised me to retire or have a break after examining my situation due to reoccurrence of my illness, I had had nose bleeding severe headache and backache. Kindly accept my retirement from service at the end of February this 2015.

Yours faithfully,

Production manager,

Munywoki."

13. It is not clear whether the retirement request was accepted by the respondent. However, it produced a handwritten document dated 16<sup>th</sup> March, 2015, which contains a tabulation of the claimant's terminal dues. It reads as follows;

"Peter Munywoki Nzivo;

Benefits Calculation Payment

Worked for 7 years.

Entitled to 15 days per year

Gross salary per month Kshs 50,000/= hence;

25,000 x 7 years = 175,000

Bonus                      5,000

Less outstanding loan (30,000)

Payment (16/3/2015) **150,000"**

14. The respondent further produced a deposit slip from Equity Bank evidencing that the amount in the sum of Kshs 150,000/= was paid into an account in the name of Peter Munywoki Nzivo.

15. The claimant has disputed that the said amount was in respect of his terminal dues. Instead, he avers that the same was for purposes of meeting medical expenses.

16. As part of the respondent's exhibits, there is an agreement dated 16<sup>th</sup> March, 2015 apparently signed by the claimant and through which he has admitted receiving his terminal dues in the sum of Kshs 150,000/=.

17. In cross examination, the claimant admitted that while employed by the respondent, he had temporarily left for a period of 2 months whereafter he was reengaged and assigned to work at its site at Mwingi. He also admitted that from the date he rejoined, he had worked for a period of 11 months prior to his termination.

18. These admissions by the claimant, the evidence of payment of his terminal dues, as well as the agreement dated 16<sup>th</sup> March, 2015 to that effect, speak to the fact that that his initial contract of employment which had commenced in 2008, had terminated hence at the time of termination he was on his second employment contract with the respondent.

19. Accordingly, it is the Court's finding that the claimant's employment was not continuous from 14<sup>th</sup> July, 2008 as there was a break in his employment at the end of February, 2015.

#### **Whether the claimant had a right to claim unfair termination?**

20. The respondent has submitted that the claimant had only served under the second employment contract for a period of 11 months hence, by dint of the provisions of section 45(3) of the Employment Act, he is not entitled to claim unfair termination. The provisions of section 45(3) of the Employment Act are in the following terms;

**"(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated"** Underlined for emphasis

21. It bears to note that this argument is not viable for the reason that the constitutionality of the aforesaid section 45(3) was successfully challenged in the case of **Samuel Momanyi vs SDV Transami & Another (2012) eKLR** where Lenaola J (as he then was), declared it unconstitutional for being inconsistent with Articles 28, 41(1), 47, 48 and 50(1) of the Constitution. It is notable that this decision has never been challenged at the Court of Appeal. Therefore, as at 18<sup>th</sup> May 2012, when Judgement was delivered and the provision declared unconstitutional, it ceased to have any legal effect.

22. In the premises, the claimant despite serving the respondent for a period less than 13 months under his second employment contract, has a right to claim unfair termination under the Employment Act.

23. I now turn to determine the respondent had reason to terminate the claimant's employment.

#### **Whether the respondent had cause to dismiss the claimant?**

24. The claimant was dismissed on grounds of theft of gypsum material from the respondent's site. His letter of termination reads in part as follows;

**"Having established sufficient grounds of your involvement in theft of gypsum material from our yard in Mwingi-Mutindwa market and going against company policies on operating hours and misusing company equipment, your employment is hereby summarily dismissed from the date of this letter. You are therefore required to return any company property that might be in your possession with immediate effect...."**

25. Indeed, the allegations raised against the claimant are serious enough and constitute grounds for summary dismissal under section 44 of the Employment Act. Be that as it may, the allegations no matter how grave, ought to pass the test of substantive justification. The test of substantive justification is to be found within the texts of **sections 43(1) and 45(2) (a) & (b) of the Employment Act**.

26. In this regard, **Section 43(1)**, requires an employer to prove reasons for termination, and in absence thereof, such termination is deemed to be unfair. Further, **section 45 (2)** 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 is related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer. The burden of proof in this instance, lies with the employer.

27. The Court of Appeal in the case of **Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR**, had this to say on the burden of proof;

**“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions.**

28. As such, in any case of termination, the employer bears the burden of proving that there was justification in terminating an employee’s services. Such justification entails providing the reasons and proving that the same were valid and fair.

29. The validity and fairness of the reasons can only be determined upon evaluation of the evidence presented by an employer in support of the termination.

30. In this case, there was no evidence presented by the respondent to support its allegations against the claimant. There was also no indication from the respondent’s end as to how it came to learn of the theft allegations against the claimant. Several questions arise in this regard, for instance, who reported the allegations against the claimant? Were there any witnesses to the alleged theft by the claimant and the operation of machinery beyond the stipulated working hours?

31. The respondent did not produce any statements from witnesses, whether first hand or secondary, attesting to the fact that the claimant was actually involved in the theft of the gypsum material and that he had operated its equipment beyond the stipulated working hours.

32. As stated herein, the respondent had the onus to prove and substantiate the allegations against the claimant but it failed to do so.

33. In his testimony before court, RW1 stated that the claimant’s culpability was confirmed by an audit undertaken by the respondent. Nonetheless, this assertion was not backed by any evidence implicating the claimant. No audit was presented before Court and neither did the person who undertook the same appear to testify in that regard. As such, the allegations by the respondent remained bare as the same were never proved in whatever form, shape or manner.

34. In light of the foregoing, the allegations against the claimant remained speculative and were not substantiated at all. As a result, the claimant did not discharge its burden under section 43(1) and 45(2) of the Act, hence has failed to prove that there was justifiable cause to warrant the dismissal of the claimant.

#### **Whether the claimant was accorded a fair hearing?**

35. The requirement of fair procedure is generally provided for under **section 45 (2) (c)** of the Act. **Section 41** provides the details and specific requirements that must be complied with in order for a termination to pass the fairness test. Subsection (2) is relevant in this case as it relates to summary dismissal. It provides as follows;

**“(2) 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.”** Underlined for emphasis

36. It is notable that the above stated provision is couched in mandatory terms. This position was amplified by the Court of Appeal in the case of **Janet Nyandiko vs. Kenya Commercial Bank Limited [2017] eKLR** as follows;

**“Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”**

37. I fully adopt and echo the findings in the above case, to the effect that the respondent was enjoined in mandatory terms to comply with the provisions of section 41 of the Act.

38. In as much as RW1 stated in cross examination that the claimant was taken through a disciplinary hearing, he admitted that there was no record of the proceedings before court. Further, there is no evidence that the claimant was notified of the allegations facing him. Similarly, there is no evidence that his explanation to the allegations was invited either in writing or through an oral hearing.

39. In absence of any evidence of a notification and hearing, the court is inclined to find that the claimant was not subjected to a fair process prior to termination, hence the spirit of section 41 of the Act was not fulfilled.

40. The upshot of the foregoing is that the summary dismissal of the claimant fell outside the legal parameters established under section 45 of the Employment Act hence the same was unfair and unprocedural.

41. Having found as such, is the claimant entitled to the reliefs sought?

#### **Available Reliefs**

42. The claimant is awarded three (3) month's gross salary as compensatory damages, in view of the finding that his termination was unfair and unlawful. This award has been informed by the length of the employment relationship, which lasted for close to 11 months prior to his termination.

43. The court also awards the claimant one month's salary in lieu of notice pursuant to section 35 (1) (c) of the Act.

44. The claimant has prayed for house allowance in the sum of Kshs 1,500,000/= on the basis that his salary was exclusive of house allowance. The respondent has maintained that the claimant's pay was inclusive of house allowance. The claimant's pay slip indicates that the sum of Kshs 50,000/= was "gross pay". The Black's law dictionary, 10<sup>th</sup> Edition defines gross income as the **"Total income from all sources before deductions, exemptions, or other tax reductions...Also termed as gross earnings."** From this definition, it is presumable that the claimant's gross salary had taken into account all income payable to him. Besides, it is notable that the claimant was earning the sum of Kshs 50,000 which is above the prescribed basic salary for the category of workers he belonged to, hence it is presumed that the house allowance was subsumed in the pay.

45. The claim for unpaid leave days and overtime as the for lack of supporting evidence.

46. The employment relationship having been admitted, the claimant is entitled to a Certificate of Service pursuant to section 51(1) of the Employment Act.

### **Orders**

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

- a. Compensatory damages in the sum of Kshs 150,000/= which sum is equivalent to 3 months gross salary.**
- b. One-month salary in lieu of notice being Kshs 50,000/=.**
- c. The total award is Kshs 200,000/=.**
- d. Interest on the amount in (c) at court rates from the date of Judgement until payment in full.**

48. The claimant shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH, 2022**

.....

**STELLA RUTTO**

**JUDGE**

### **Appearance:**

For the Claimant Mr. Okenyo

For the Respondent Ms. Esami

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**