



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1605 OF 2017

WALTER OMONDI.....1ST CLAIMANT

ALEXANDER MWANIA.....2ND CLAIMANT

DOMINIC USEA3RD CLAIMANT

THOMAS NYAMORA.....4TH CLAIMANT

VERSUS

ENGLISH PRESS LIMITED.....RESPONDENT

JUDGEMENT

1. The claimants aver vide the statement of claim dated 14th August, 2017, that they were employed by the respondent on diverse dates and were all stationed in the dispatch department. The claimants aver that they served the respondent with loyalty, devotion and diligence until 21st June, 2017 when they were summarily dismissed from employment on grounds that one of their former colleagues by the name Mr. Oscar Agoi, had stated that “*all employees in the dispatch department are thieves*”. Consequently, the claimants seek against the respondent notice pay and compensatory damages on account of unfair termination.

2. The claim was opposed with the respondent stating that the claimants were not terminated at all. That upon conclusion of their respective disciplinary cases, the claimants were recalled back to work but they refused to sign new contracts and continue employment with the respondent, for various reasons including victimization in future.

3. The matter proceeded for hearing on 4th October, 2021 and the claimants identified the 2nd claimant to testify on their behalf. All the witness statements and bundle of documents were admitted as evidence before court.

Claimants’ case

4. The facts as presented by the claimants in their respective witness statements are similar, save for the fact that they were employed on diverse dates in that; the 1st claimant was employed with effect from 2008, the 2nd claimant, with effect from 2011, the 3rd claimant, with effect from 2013 and the 4th claimant, with effect from 2014. That all of them were employed as general workers in the dispatch department and at the time of termination, were each earning a gross monthly salary of Kshs 14,866/=. That on 21st June, 2017, they were all suspended from duty following allegations of theft made by one Mr. Oscar Agoi against all staff at the dispatch department. That they submitted individual written explanations in answer to the allegations and thereafter appeared before a disciplinary committee for a hearing, but were never notified of the decision of the disciplinary committee. That on 1st July, 2017, they were barred from accessing their work premises and only informed verbally, that they had been dismissed from employment though the respondent failed to issue them with letters of termination. They further state that the respondent did not have just and good cause to terminate their employment.

Respondent’s case

5. The respondent called oral evidence through its Senior Human Resource Officer, Ms. Ruth Karugu who adopted her witness statement and the documents filed on behalf of the respondent, to constitute part of her evidence in chief. She admitted that at the material time, she was yet to join the respondent’s employment, hence her testimony was based on the relevant records, which were handed over to her, by her predecessor.

6. As per Ms. Karugu’s testimony, it was on 20th June, 2017, when one of the dispatch employees Mr. Oscar Agoi, was caught in possession of 6 books hidden beneath his clothes. That in his written statement concerning the incident, Mr. Oscar adversely mentioned his colleagues at the dispatch department. That as such, the respondent’s management called all members of the dispatch team and asked them to show cause

why disciplinary action should not be taken against them. That the claimants replied to the show cause letters and were suspended from work for a period of 5 days, whereafter they individually appeared before a disciplinary committee for hearing on 29th June, 2017. That on 30th June, 2017, the claimants were all present but declined to clock in to perform their duties as they deemed their resumption of duty as an admission of guilt. That in a group mentality, they all walked away and were absent from work, hence their contracts were not renewed.

Submissions

7. The claimants filed joint written submissions through which they urged that the respondent did not have valid reasons for unleashing the disciplinary mechanism against them. They placed reliance on the case of **Paul Makau Mututu vs Nasib Industrial Products (2016) eKLR**. The claimants further submitted that the disciplinary hearing was a farce and a red herring as the decision thereof, was never communicated to them.

8. The respondent did not tender any submissions, despite directions to that effect, from court. As such, the court did not have the benefit of considering the same.

Analysis and determination

9. From the pleadings on record as well as the evidence placed before me, this court is being called to determine the following issues;

a) **Were the claimants terminated from employment?**

b) **If the answer to (a) is in the affirmative, was the claimants' termination unfair and unlawful?**

c) **Are the claimants entitled to the reliefs sought?**

Were the claimants terminated from employment?

10. The claimants have alleged that following their respective disciplinary sessions, they reported back to work on 1st July, 2017 but they were barred from accessing the respondent's premises and were informed verbally, that they had been dismissed from employment.

11. The respondent has presented a different version. It avers that the claimants were to report back for duty on 30th June, 2017 and sign new contracts upon expiry of their existing ones, but they refused to do so. That effectively, they had opted not to renew their respective contracts.

12. These competing positions therefore call for evaluation of the evidence on record vis a vis the relevant law.

13. **Section 47 (5) of the Employment Act** provides thus;

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

14. The import of the above legal provision is that the claimant was bound to prove the fact of termination. The claimants have averred that they were verbally dismissed hence were not issued with letters of termination. On its part, the respondent has asserted that the claimants were asked to report back for duty and sign new contracts but refused to do so. To buttress its assertions, the respondent produced letters dated 3rd July, 2017, addressed to all the claimants and worded similarly with the reference being, **“call back to duty”**.

15. Evidently, the resolution of this question, will revolve around the said letters which read as follows: -

“REF: CALL BACK TO DUTY

The above subject refers. On 23rd June, 2017 you were suspended from your position subject to impending investigation on the disciplinary matter. Please note that this letter is our official notice of recall to your position. You are requested to return to work and sign your contract within one week of receipt of this letter. Your salary and hours of work will remain the same. Failure to return to work as stated above will be considered a refusal of recall and abandonment of your position as of that date. If you have any questions please do not hesitate to contact the Human Resource department. Yours faithfully...”

16. It is also notable that the letters though addressed to the claimants, do not contain a forwarding address, hence confirming that the same were not sent by post.

17. There was no indication on the part of the respondents as to how the letters were brought to the claimant's attention, as there was no confirmation of receipt on the face of the letters or through a delivery book. Therefore, the question that remains unanswered is whether the letters and effectively, the contents therein, were brought to the claimants' attention.

18. RW1 told court in cross examination that the claimants were called through the respondent's reception desk. However, the name of the person who placed the call to the claimants was not disclosed. In this respect, there was no affidavit or statement to that effect by such person. In this case, there was need for evidence on the part of the respondent to prove that indeed, the letters of recall were served upon the

claimants or at least, they were notified to collect the same.

19. From the record, the claimants were suspended from duty once the allegations of theft were made against them. As such, upon conclusion of the claimants' disciplinary hearing, there was no proof that their respective suspensions had been lifted and that they had been effectively advised to report back to work.

20. These apparent gaps tilt the case in favour of the claimants, as it lends credence to their assertions that they were not allowed back to work following their suspension and disciplinary action hence were dismissed impliedly or by word of mouth.

Whether the claimants' termination was unfair and unlawful?

21. The determination of this issue is hinged on the provision of **Sections 43, 45 and 41** of the Employment Act (Act). Under section 43(1), an employer has 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.

22. That is not all there is. Under **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. Specifically, 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.

23. The foregoing constitutes the requirements of fair termination and establishes the test necessary to determine whether the termination was substantively and procedurally fair.

24. From the record, the claimants were issued with similar show cause letters which read in part: -

“It has come to the attention of the management that on 20th June, 2017, one of your colleagues Mr. Oscar Agoi who is stationed at dispatch was caught in possession of the company property (six copies of the books Memories we lost) concealed in his trousers which amounts to theft. In his written statement to the management, he stated that all employees in dispatch were implicated in theft on various occasions. In view of the gravity of the alleged gross misconduct, you are suspended with full pay for a period of five days until 28th June, 2017. Accordingly, you are hereby required to submit a written explanation within 48 hours at the Human Resource Desk (by 24th June, 2017) and show cause why disciplinary action should not be taken against you. Failure to do so, will presume that you have no explanation to offer and the management will take up further disciplinary action. Please note a suspension is not a punishment. It is to facilitate management's investigation into the alleged misconduct and also to give you the opportunity to
present your case. Yours faithfully...”

25. Therefore, it is evident that the claimants' disciplinary action was on the basis of the allegations of theft made by their fellow coworker, Mr. Oscar. The respondent was required under law to prove the said allegations and moreover, the fact that the same were fair and valid. Aside from the allegations made by the said Mr. Oscar, there was no other evidence to prove the allegations against the claimants. Further the said Mr. Oscar was never called to testify either before the disciplinary panel convened by the respondents, or before court. As such the allegations against the claimants were not backed by any evidence hence not proved.

26. It would thus seem that the respondent based its disciplinary action against the claimants on unsubstantiated allegations by the said Mr. Oscar. It did not go a step further to ascertain whether the same were valid or not.

27. In view of the foregoing, the respondent did not prove that it had valid and fair reasons to commence disciplinary action against the claimants.

28. As stated herein, fair procedure demands that an employee be notified of the allegations leveled against him or her and thereafter, he or she be afforded an opportunity to render an explanation in response to the allegations. From the record, the respondent appears to have complied with the requirements of fair hearing as stipulated under section 41 of the Act to a certain extent.

29. The record of the disciplinary hearing in respect of all the claimants do not contain any observation or recommendation. It only contains the record of what transpired and the questions and answers put forth to the claimants by the committee and their responses thereto. There are also no signatures of the participants to the said proceedings, hence the same are not owned. The last statement in the proceedings are the words of the chairman of the disciplinary committee which reads thus; *“The disciplinary committee will deliberate on the proceedings meanwhile you are expected to report to the Human Resource to sign your July contracts.”*

30. There is no evidence of communication of the deliberations and decision of the discipline committee to the claimants. The letter titled “call back to duty”, which I have reproduced elsewhere, does not contain the decision of the disciplinary panel. Further, it does not indicate whether or not the respondent had lifted the claimants' suspension. If anything, it is a confirmation that the disciplinary proceedings against the claimants were inconclusive and that the process was left in abeyance. Indeed, as stated herein, there is no evidence that the letters of recall, were brought to the claimants' attention.

31. Failure to communicate on the part of the respondent to communicate the decision of the discipline panel flawed the disciplinary process.

That even though it commenced procedurally, it never proceeded to its logical conclusion.

32. In the circumstances, the hearing cannot be said to have been fair when it was left in abeyance. The process ought to have gone full circle.

33. The total sum of the foregoing is that the claimants' termination cannot be said to have been fair and lawful within the meaning of section 45 of the Employment Act.

34. Having found as such, I now turn to the reliefs due to the claimants.

Reliefs

Compensatory damages

35. As I have found that the claimants were terminated in an unfair and unprocedural manner, I will award compensatory damages as follows; the 1st claimant is awarded six (6) month's gross salary; the 2nd claimant is awarded five (5) month's gross salary, the 3rd claimant is awarded four (4) month's gross salary and the 4th claimant is awarded four (4) month's gross salary. These awards have been informed by the claimants' respective lengths of employment.

One months' salary in lieu of notice

36. I further award each of the claimants one (1) month's salary in lieu of notice.

37. Since the claimants' employment was not disputed, they are each entitled to a Certificate of Service pursuant to section 51(1) of the Act.

Orders

38. The upshot of the foregoing is that I enter Judgment in favour of the claimants against the respondent as follows;

(a) The 1st claimant is awarded compensatory damages in the sum of Kshs 89,196.00 which sum is equivalent to 6 months gross salary and one month's salary in lieu of notice being Kshs 14,866.00 hence the total award is Kshs 104,062.00

(b) The 2nd claimant is awarded compensatory damages in the sum of Kshs 74,330.00 which sum is equivalent to 5 months gross salary and one month's salary in lieu of notice being Kshs 14,866.00 hence the total award is Kshs 89,196.00

(c) The 3rd claimant is awarded compensatory damages in the sum of Kshs 59,464.00 which sum is equivalent to 4 months gross salary and one month's salary in lieu of notice being Kshs 14,866.00 hence the total award is Kshs 74,330.00.

(d) The 4th claimant is awarded compensatory damages in the sum of Kshs 59,464.00 which sum is equivalent to 4 months gross salary and one month's salary in lieu of notice being Kshs 14,866.00 hence the total award is Kshs 74,330.00.

(e) Interest on the respective awards as contained in (a) (b) (c) and (d) at court rates from the date of Judgement until payment in full.

(f) The claimants shall also 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 Claimants Mr. Njuru

For the Respondent Ms. Obonyo

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