



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 570 OF 2017

DENNIS NYAMWEYA SIBOTA.....CLAIMANT

VERSUS

DEEWAY SECURITY LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant initiated the suit herein vide a memorandum of claim filed on 24th March, 2017 and through which he avers that while employed by the respondent and stationed at China Road & Bridge Corporation offices, he was arrested following the loss of a laptop from the said offices. That upon his release on bail, he was informed by the respondent that his services had been terminated. The claimant has termed his termination as wrongful and unlawful hence seeks several reliefs including salary for December, 2015, notice pay, unpaid leave days and compensatory damages.
2. The respondent neither entered appearance nor filed a defense in answer to the memorandum of claim. On record, is an Affidavit of Service sworn by one Mr. Stephen N. Njonjo on 3rd August, 2017, wherein he deponed that he served a copy of the Summons and Memorandum of Claim upon the respondent.
3. On 22nd May, 2018, the court directed that the matter proceeds by way of formal proof.
4. The matter came up for hearing on 2nd November, 2021 and the claimant testified in support of his claim
5. At the commencement of the hearing, the claimant adopted his witness statement and documents filed together with his claim, to constitute part of his evidence in chief. The said documents were also marked as exhibits before court.
6. As per the claimant's testimony, he was employed by the respondent as a security guard sometimes in March 2015 on a monthly salary of Kshs 14,000/=. That at the material time, he was stationed at the offices of China Road & Bridge Corporation offices. It was his testimony that sometimes in December, 2015, he was arrested with another co-worker on the basis that a lap top had been stolen from the said offices. That he was locked up at Athi River police station and upon his release on bail, he reported back to the respondent's offices with a view to resume duty, but was informed that he was no longer its employee, thus his employment was effectively terminated. That he was not paid his salary for December, 2015 and neither was he given an opportunity to defend himself prior to being dismissed. That thereafter, he was acquitted of the criminal charges as the respondent failed to present any witnesses at the criminal trial.

Submissions

7. Upon close of the hearing, the claimant filed written submissions through which he urged that there was no proof that he had committed any misconduct to warrant summary dismissal. That the respondent was in breach of the provisions of sections 41, 43 and 45 of the Employment Act. He cited the following authorities in support of his case; **Gibson D. Mwanjala vs Kenya Revenue Authority (2015) eKLR** and **Jaffar Mohamed vs Ready Consultancy Co. Ltd (2015) eKLR**.

Analysis and determination

8. From the pleadings on record as well as the evidence placed before court, the issues falling for the court's determination are;

a) Whether the claimant's termination was unfair and unlawful?

b) Is the claimant entitled to the reliefs sought?

Whether the claimant's termination was unfair and unlawful?

9. The claimant has alleged that his termination was wrongful and unlawful. The determination of this question will be based on the provisions of **sections 41, 43(1) and 45 (2) of the Employment Act (Act)**.
10. **Section 43(1)** of the Act, places the burden of proving reasons for termination on an employer and failure to do so, renders such termination as unfair. In addition, **section 45 (2) (a) and (b)** of the Act, qualifies a termination of employment as unfair where 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.
11. The aforesaid legal provision is what constitutes substantive justification and is the first limb towards proving that a termination was fair or otherwise.
12. The second limb of fairness is under **section 45 (2) (c)** of the Act, and requires that an employer proves that it complied with the requirements of fair process in terminating the services of an employee. **Section 41(1)** of the Act elaborates what entails fair procedure. In this regard, it requires an employer to notify an employee of the intended termination and the reasons thereof, in a language he or she understands and in the presence of another employee or a shop floor union representative.
13. In a nut shell, an employer must justify that there were fair and valid reasons to terminate the services of an employee and that such termination was undertaken in line with fair procedure.
14. In the case herein, the reasons for the claimant's termination can only be inferred from the circumstances. According to the claimant, he was verbally informed that he was no longer an employee of the respondent upon his release from police custody.
15. As stated herein, the respondent never tendered any defence nor participate in the trial hence any reasons, if any, were never proffered for evaluation by court. As such, the reasons if at all they existed, cannot be verified hence determined to be either valid or fair.
16. As required under sections 43(1) and 45 (2) (a) and (b) of the Act, the respondent was duty bound to prove that there were reasons to terminate the claimant's employment and that such reasons were fair and valid. In absence of a defence, the legal burden under the said statutory provisions remain undischarged.
17. Moreover, in absence of a defence, there is no evidence or even a suggestion that the claimant was notified of any reasons to warrant his termination. Likewise, there is no evidence or suggestion that the claimant was given an opportunity to tender his defence against the accusations levelled against him, if any.
18. Ultimately, the claimant's averments and testimony remained unchallenged by the respondent.
19. In light of the foregoing, there is a probability that there were no reasons at all, to justify the claimant's termination and no disciplinary hearing or such related process was undertaken. Accordingly, the termination of the claimant did not meet the legal threshold set out under the Act.
20. I wish to reiterate and adopt the holding of the Court of Appeal in the case of **Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR** where fairness of termination from employment was summarized as follows: -

“Section 45 of the 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 employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance 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 the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

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.”

21. In conclusion I find that that the claimant's termination was unfair and unlawful as it fell below the legal parameters stipulated under sections 41, 43(1) and 45(2) of the Employment Act.

Available Reliefs

22. Having found that the claimant's termination was unfair and unlawful, I will award him compensation equivalent to four (4) months of his gross salary noting that he had worked for the respondent for less than a year.

23. I further award the claimant one (1) month's salary in lieu of notice.

24. The claimant is also awarded salary for the month of December, 2015 as there was no contrary evidence against his claim.

Orders

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

(a) Compensatory damages in the sum of Kshs 44,188/= which sum is equivalent to 4 months gross salary.

(b) One month's salary in lieu of notice being Kshs 11,047/=.

(c) Salary for December, 2015 being Kshs 11,047/=

(d) The total award is Kshs 66,282/=.

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

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

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Calvins

For the Respondent No appearance

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