



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 361 OF 2017

STEPHENSON MBITHI NDONI.....CLAIMANT

VERSUS

S.C.L.P. S SAMAJ SCHOOL.....RESPONDENT

JUDGEMENT

1. The claimant avers that he was employed by the respondent as a driver, with effect from 25th May, 2007 until 25th November, 2015, when he was summarily dismissed following allegations that he had stolen property belonging to the respondent. He termed the allegations as false and malicious. He avers in his claim that he was never issued with any notice prior to dismissal and neither did the respondent follow due process. Consequently, he seeks the sum of Kshs 671,175/=being unpaid salary for 24 days in November, 2015, notice pay, untaken leave days, overtime and compensatory damages.

2. In its response to the claim, the respondent stated that the claimant performed his duties incompetently, unprofessionally, and not to par with the terms and conditions of his letter of appointment, thus contributing to his own termination.

3. The matter proceeded for trial on 4th October, 2021, with each side calling oral evidence.

Claimant's case

4. 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. He also asked the court to mark the said documents as exhibits 1-5.

5. It was his testimony that on 5th November, 2015, he was called by the respondent's accountant and asked if he had seen some missing telephone cables, to which he responded in the affirmative. That the accountant then showed him a CCTV footage where he was captured removing the cables. He informed the accountant that on 4th November, 2015, he had noted that the cables were hanging loosely and dangerously, thereby obstructing the movement of the buses hence, he had kept the same inside the school bus as it was late in the evening. Subsequently, the accountant informed him to wait for a response from the respondent's management. He maintained that he did not commit any mistake and that he only removed the cables so as to avert any accident. He further told court that he was never called for any disciplinary hearing prior to his dismissal nor paid his terminal dues.

6. In cross examination, he stated that he placed the wires on the ground where the bus was.

Respondent's case

7. Mr. Benson Mutuku testified as RW1, on behalf of the respondent. He introduced himself as the accountant of the respondent. Mr. Mutuku adopted his witness statement and bundle of documents filed on behalf of the respondent, to constitute part of his evidence in chief. The said documents were also marked as exhibits.

8. In his testimony, RW1 stated that while the school care taker was cutting some trees, some branches accidentally fell on the telephone cables, thus damaging them and leaving them hanging loosely. That later, the cables, were nowhere to be seen hence upon review of the CCTV footage, the claimant was captured taking the cables and carrying them away. That upon being asked, the claimant, admitted having taken the cables for his own domestic use. That upon hearing the claimant's explanation, he asked him to go and wait for a decision from the management. That the claimant was later given a chance to explain his conduct in writing but he never did so. That as such, on 23rd November, 2015, the respondent's management decided to terminate the claimant's employment having taken into account his previous misdeeds. That the claimant never went back to clear with the respondent.

9. In cross examination, Mr. Mutuku admitted that the claimant was not taken through a disciplinary hearing but stated that he was issued with a show cause letter.

Submissions

10. Upon close of the hearing, the parties were directed to file written submissions. On his part, the claimant submitted that the respondent had not proved that there was a valid and fair reason to terminate his employment as required under section 45 of the Employment Act. He further submitted that the fairness test was never achieved as the respondent had failed to follow due process prior to dismissing him from employment. He buttressed his submissions on the cases of **Pius Machafu Isindu vs Lavington Security Guards limited (2017) eKLR**, **Walter Ogal Anurio vs Teachers Service Commission (2013) eKLR** and **Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers SACCO limited Cause No. 74 of 2013**.

11. On its part, the respondent urged that it had justifiable grounds to summarily dismiss the claimant for breach of contract. It placed reliance on the case of **Thomas Sila Nzivo vs Bamburi Cement Limited (2104) eKLR**. The respondent further submitted that the claimant was given sufficient opportunity to give an explanation for his actions but he elected not to do so. It further urged the court to consider the determination in the case of **George Musamali vs Security Services Kenya limited (2016) eKLR**.

Analysis and determination

12. I have considered the pleadings by both parties, the evidence on record and the rival submissions, and to my mind, this court is being called to determine the following issues: -

- i. Whether the respondent had valid and fair reasons to dismiss the claimant from employment?**
- ii. Whether the claimant was given a fair hearing prior to this dismissal from employment?**
- iii. Is the claimant entitled to the reliefs sought?**

Whether the respondent had valid and fair reasons to terminate the employment of the claimant?

13. Under the Employment Act, an employer has the burden of proving that it had a valid and fair reason to terminate the employment of an employee. This constitutes substantive justification and is provided for under sections 43(1) and 45(2) (a) and (b) of the Employment Act (Act).

14. **Section 43(1)** of the Act requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair, while **section 45 (2) (a) and (b)** provides that a termination of employment is unfair if the employer fails to prove-

- a) that the reason for the termination is valid;**
- b) that the reason for the termination is a fair reason-**
 - i. related to the employee's conduct, capacity or compatibility; or**
 - ii. based on the operational requirements of the employer;...**

15. The reason for the claimant's dismissal is aptly captured in his letter of summary dismissal which reads in part;

"I regret to inform you that the school management is very much perturbed by serious (sic) conduct of stealing telephone cables from the school due to which we could not have telephone connection for over a week until we replaced the cables. This very(sic) serious offence. Therefore in accordance with your terms of service and letter of appointment your services are hereby terminated with immediate effect..."

16. Evidently, the reasons for the claimant's dismissal was the alleged theft of the telephone cables. It is common ground that the claimant picked up the telephone cables on 4th November, 2015. The issue that is in contest is what he did with the telephone cables. Each party has its own version. At paragraph 3 of his written statement, the claimant states that he placed the telephone cables in the school bus for safe custody while the respondent states that according to the CCTV footage, he was seen carrying the cables. Further, RW1 stated that when he enquired from the claimant about the cables, he admitted taking the same home for his own personal use.

17. Therefore, the pertinent question is whether the claimant took the telephone cables away for his own domestic use as stated by the respondent or whether he put them inside the school bus.

18. It is notable that while the claimant stated in his written statement that he placed the telephone cables in the school bus for safe custody, in his testimony before court, he stated that he placed them on the ground next to where he had parked the school bus. Therefore, his testimony before court is a departure from his earlier version as per his written statement that he placed the cables in the school bus. This contradiction casts doubt on the claimant's testimony and version of events.

19. If indeed, the claimant placed the telephone cables in the school bus, why did he not hand over the same to RW1 the following day, upon

being asked for the same? After all, from the record, he was the only driver in charge of the said school bus. From the testimony of RW1, the telephone cables were nowhere to be seen the following day hence prompting him to review the CCTV footage. If at all, the same were in the school bus, then they would have been there as at 5th November, 2015, which was the day after. The fact that the telephone cables could not be traced the following day which was actually a few hours later, lends credence to the respondent's version, that the claimant actually carried the cables for his personal use.

20. In assessing the standard of proof on employment matters, the Court of Appeal in the case of **Kenya Revenue Authority vs Reuel Waithaka Gitahi & 2 others [2019] eKLR**, reckoned as follows; **"The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services."**

21. Indeed, this is the standard of proof stipulated under section 43(2) of the Employment Act. As such, an employer may terminate the employment of an employee based on reasons it genuinely believed to exist at the time. The test is therefore subjective hence the standard of proof is on a balance of probability.

22. The claimant has faulted the respondent for not availing the CCTV footage before court so as to substantiate the allegations against him. Be that as it may and as discussed above, the standard of proof required is on a standard of probability and not beyond reasonable doubt. The court in the case of **Kenya Revenue Authority (supra)** further determined that: -

"It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required."

23. The court arrived at a similar finding in the case of **Thomas Sila Nzivo vs Bamburi Cement Limited [2014] eKLR** as follows: - **"The Employer was not required to have conclusive proof of the Claimant's involvement; it was only expected to have reasonable and sufficient grounds."**

24. From the circumstances presented in the case herein, and moreso, the contradiction in the claimant's version, and taking into account the applicable standard of proof, the respondent had reasonable and sufficient grounds to dismiss him from employment.

25. Further, it is noteworthy that the allegations against the claimant pointed to a breach of trust and dishonesty on his part as an employee. The Court of Appeal in the case of **Bamburi Cement Limited vs William Kilonzi [2016] eKLR** cited the following passage from the Canadian Supreme Court decision in **Mc Kinley vs B.C.Tel. (2001) 2 S.C.R. 161**;

"Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."

26. In the instant case, the apparent dishonesty on the part of the claimant shook the trust within the employment relationship hence from the end of the employer, it was time to let go. In the circumstances, it is not for the Court to substitute its decision with that of the employer. On this issue, I am guided by the South African decision by the **Labour Appeal Court in Nampak Corrugated Wadeville vs Khoza (JA14/98) [1998] ZALAC 24** where it was held as follows;

"A court should, therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable"

27. Taking into totality the circumstances herein, the evidence presented and the applicable standard of proof, I am persuaded that the respondent had reasonable and sufficient grounds to dismiss the claimant.

28. I now turn to determine the next question of whether the claimant was given a fair hearing prior to his dismissal from employment.

Whether the claimant was given a fair hearing prior to this dismissal from employment?

29. The respondent has stated in its defence that the claimant was given a show cause letter through which he was required to give a written explanation on the allegations levelled against him. The claimant has denied ever being served with a show cause letter in respect of the allegations at hand.

30. During cross examination, RW1 admitted that the claimant was not taken through a disciplinary hearing.

31. **Section 45 (2) (c)** of the Act requires an employer to comply with the requirements of fair procedure prior to terminating an employee from employment. The specifics of what constitutes fair procedure is stipulated under **Section 41 of the Act**. This process was aptly summarized by the Court of Appeal in the case of **Postal Corporation of Kenya vs Andrew K. Tanui [2019] eKLR** as follows: -

"It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for:-

"Notification and hearing before termination on grounds of misconduct" in the following manner: -

“(1) Subject to Section 42 (1), an employer shall before terminating the employment of an employee, on the grounds of misconduct; poor to performance or physical in capacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

“(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employer 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, chosen by the employee within subsection (1) make.”

Section 42 (1) referred to in Sub-section (1) relates to employees on probation.

Four elements must thus be discernible for the procedure to pass muster:-

(i) an explanation of the grounds of termination in a language understood by the employee;

(ii) the reason for which the employer is considering termination;

(iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;

(iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

32. I fully adopt and reiterate the above position particularly on the mandatory nature of the provisions of section 41 and the fact that section 41 only prescribes the minimum standards of a fair procedure. Therefore, it is not open for an employer to diminish the requirements stipulated thereunder. What it can only do, is enhance the same.

33. In this case, the respondent did not prove that the claimant received the show cause letter despite stating as much. The manner in which the show cause letter was served upon the claimant was also not stated. Further, the respondent did not state whether the claimant signed for the same anywhere, as RW1 confirmed that there was a place for signing for such correspondence.

34. The respondent further confirmed that no disciplinary hearing was convened to hear and determine the claimant's case. As it would appear, the case was determined without considering his side of the story. These apparent gaps do not tilt in favour of the respondent.

35. Most of all, the manner in which the claimant's disciplinary case was handled can be inferred from his letter of summary dismissal which is referenced **“DISMISSAL WITHOUT NOTICE”**. In this case the facts speak for themselves and it is presumable that no notice was issued to the claimant. In fact, the letter of dismissal makes no reference to a notice, or the claimant's explanation to the allegations hence discounting the respondent's case to the effect that it accorded the claimant a fair hearing prior to dismissing him from employment.

36. In view of the foregoing, the claimant's dismissal fell short of the set legal parameters hence was procedurally flawed and therefore unlawful.

37. In the circumstances, despite the respondent having substantive justification to terminate the claimant's employment, it failed to apply the appropriate procedure in dismissing him, hence the same was unlawful.

38. In absence of any hearing as required under section 41 of the Act, the court arrives at a finding that the claimant's dismissal was unprocedural hence unlawful.

39. Having found as much, is the claimant therefore entitled to any of the reliefs sought?

Available Reliefs

One month's salary in lieu of notice

40. As I have found that the claimant's dismissal was unlawful for want of procedure, the court awards him one month salary in lieu of notice pursuant to section 35 (1) (c) of the Act.

Compensatory damages

41. The claimant has prayed for compensatory damages in the sum of **Kshs 342,000/=**. As I have found that the claimant's dismissal was unfair, I will award him compensatory damages equivalent to five (5) months' gross salary.

Unpaid Salary for the month of November, 2015

42. As per the claimant's letter of dismissal, he was to earn his full salary upto and including 24th November, 2015. Seemingly, the same was

not paid, going by the testimony of RW1, hence the court awards him the same.

Unpaid leave from January 2006 to January, 2007 and overtime

43. The claimant has prayed for leave not taken from January, 2006 to January, 2007. This is a claim spanning close to 10 years hence by virtue of section 90 of the Employment Act, the same is inadmissible by Court. The same case applies to the claim for overtime. Even if the same were to be construed as constituting continuous injury, the time bar would still apply given that the claim was instituted on 21st February, 2017, which date was well beyond 12 months after the claimant’s dismissal on 25th November, 2015, the effective date the continuing injury ceased.

Orders

44. Against this background, I enter Judgment in favour of the claimant against the respondent in the following terms;

One month’s salary in lieu of notice	28,500.00
Salary for 24 days in November, 2015	22, 800.00
Compensation equivalent to 5 months’ gross salary	142,500.00
Total	<u>193,800.00</u>

45. The award, shall attract interest at court rates from the date of Judgment until payment in full.

46. The respondent shall also bear 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 Ms. Omamo

For the Respondent Mr. Maina

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