



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1170 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

HARRISON MWENDA NJIRU.....CLAIMANT

VERSUS

NAKUMATT HOLDINGS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant initiated this action by a statement of claim dated 31st May 2017 and filed on 22nd June 2017 claiming that the Respondent terminated his contract of employment unprocedurally, illegally and unconstitutionally.

2. The Claimant prays for –

- (a) General damages for illegal and unlawful dismissal
- (b) One month's salary in lieu of notice
- (c) Salary arrears
- (d) 2016 salary bonus
- (e) Unclaimed leave
- (f) Interest and cost

3. The Claimant's case is pleaded as follows:

4. It is averred that on or about 23rd March 2010, the Respondent employed the Claimant as a Shop Assistant and was later promoted to a Driver of light vehicles on 29th July 2010 and was based at the Respondent's Nairobi Office. He was then promoted to a driver of heavy commercial vehicles on 13th May 2012 and was allocated motor vehicle Registration No. KAS 585V by the Respondent.

5. It is further averred that on 30th December 2016, the Claimant received a letter to show cause why disciplinary action should not be taken against him for allegations of fuel pilferage of about 145 litres allegedly committed on 13th November 2016. That the Claimant responded to the notice by a letter dated 6th January 2017.

6. It is the Claimant's case that although the alleged fuel pilferage allegedly took place on 13th November 2016, he was only notified on 30th December 2016 yet he was using the motor vehicle. That the motor vehicle KAS 585V had 345 litres and if 145 litres were pilferaged, 200 litres of fuel were insufficient for the journey to and from Mombasa.

7. Finally, it is averred that attempts to have the decision reviewed were unsuccessful.

8. The Respondent neither entered appearance nor filed a response to the statement of claim.

9. The suit was certified ready for formal proof on 22nd February 2018 and hearing took place on 26th January 2022.

Evidence

10. The Claimant adopted the written statement and produced the documents on record as exhibits. The Claimant testified that he had not been issued with a warning letter.

11. The written statement rehashes the contents of the statement of claim and only added that his monthly gross salary was Kshs.104,596/-.

Submissions

12. The Claimant identifies three issues for determination:

- (i) Whether there were valid reasons for the Respondent to terminate the Claimant's employment;
- (ii) Whether the Claimant is entitled to terminal dues;
- (iii) Who should bear costs?

13. As to whether the Respondent had valid reason to terminate the Claimant's employment contract, the Claimant relies on the provisions of Section 43 of the Employment Act, 2007 to underscore the duty of the employer to prove the reason or reasons for the termination failing which the termination is deemed to have been unfair.

14. The provisions of Section 45 of the Act are produced to highlight the specific facts to be proved by the employer. The decision of Radido J. in **Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers v Mombasa Sports Club Cause No. 440 of 2013** is relied upon to reinforce the submission.

15. It is submitted that the Claimant has discharged the burden of proof that the Respondent had no valid reason to terminate his employment and as a consequence the summary dismissal was unlawful.

16. As regards the prayers sought, it is submitted that the procedure employed by the Respondent did not meet the requirements of Section 41 of the Employment Act, that it was executed with haste. Reliance is made on the Court of Appeal and Supreme Court decisions in **Kenfreight (E.A) Limited v Benson K. Nguti [2016] eKLR** and **Kenfreight (EA) Limited v Benson K. Nguti [2019] eKLR** respectively on the requirements of Section 41 of the Employment Act.

17. It is submitted that since the Respondent neither entered appearance or file a response nor tender any evidence the Claimant had proved his case on a balance of probabilities and is thus entitled to the reliefs sought namely 12 months' salary (Kshs.106,592 x 12) Kshs.1,255,104/-, one month's salary Kshs.104,593/-. The Court is urged to award the sum of Kshs.1,359,696/-.

Analysis and Determination

18. The issues for determination are whether:

- i) Termination of the Claimant's employment was unfair;
- ii) The Claimant is entitled to the reliefs sought.

19. As regards termination of employment the provisions of Sections 41, 43, 45 and 47(5) of the Employment Act clearly set out the basic infrastructure.

20. Section 45(2) of Act provides that –

A termination of employment by an employer 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 employees conduct capacity or compatibility; or**
 - (ii) Based on the operational requirements of the employer and**
- (c) that the employment was terminated in accordance with fair procedure.**

21. Relatedly Section 43(1) provides that:

In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

22. Finally, and as explained by the Court of Appeal in **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR**

“A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

23. In **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR** the Court of Appeal explained Section 41 of the Act as follows:

“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.”

24. The Court is in agreement with these sentiments.

25. The provisions and principles of law cited above demonstrate beyond peradventure that for termination of employment to be considered fair, the employer must have had a substantive justification and the procedures employed must have been fair.

26. It is in the instant case, the letter of termination dated 24th January 2017 states as follows:

“The disciplinary committee at its meeting on January 11th 2017 deliberated on your defence both oral and written submission and found you guilty of fuel pilferage approximately 145 litres on November 13th 2016 while driving company vehicle registration no. KAS 585V which was in your custody and trust, leading to the loss of company property and recommended your dismissal from the services of Nakumatt Holdings Limited.

Therefore, we regrettably communicate to you that you have been dismissed from the services of Nakumatt Holdings Limited with effect from January 24th 2017 due to fuel pilferage approximately 145 litres on November 13th 2016 while driving company vehicle registration number KAS 585V ...”

27. In his response to the notice to show cause dated 6th January

2017, the Claimant admitted that he had been assigned motor vehicle Registration No. KAS 585V with 345 litres of fuel for a journey from Nairobi to Mombasa and back to Nairobi on 12th November 2016. The Claimant denied the allegation and wondered how he could have travelled to Mombasa and back to Nairobi on 200 litres of fuel, if he had in fact committed the alleged misconduct.

26. Regrettably, this defence was never countered by the Respondent.

27. Although documents submitted by the Claimant show an abrupt drop in fuel on 14th November 2016 at 01.52.19 pm, no evidence was tendered to explain the drop or how the Respondent used to ascertain whether a particular driver had been involved in fuel pilferage.

28. It is also noteworthy that in the absence of minutes of the disciplinary committee, the Court is unaware of what evidence was produced to establish the allegation and how the Claimant countered it.

29. In the circumstances, the Claimant's evidence is unconvincing.

30. Granted that the Respondent neither entered appearance, file a response nor participate in the proceedings in any way, it has not discharged the burden of proof imposed by Section 43(1) of the Employment Act, 2007 whose effect is to render the Claimant's termination unfair for want of substantive justification.

Procedure

31. Documentary evidence furnished by the Claimant shows that the Respondent issued a notice to show cause dated 30th December 2016. The notice contained the allegations made against the Claimant and had attachments. A response was required within seven days. The Claimant responded through a letter dated 6th January 2017 denying the allegations and requested for better particulars of the allegations.

32. In the statement of claim, the Claimant avers and testified that the fuel tank of the motor vehicle had a padlock and a seal which was inspected at the time of fuelling to determine whether the seal had been tampered with.

33. The Respondent invited the Claimant for disciplinary session by a letter dated 7th January 2017. The meeting was scheduled for 11th January 2017 at 10.00 am. The letter informed the Claimant that he was at liberty to bring a witness or shop steward.

34. From the contents of the letter of termination, which the Claimant did to contest, it is clear that the Claimant attended the disciplinary hearing on the appointed date in the company of a shop steward.

35. The Claimant was summarily dismissed on 24th January 2017. The Claimant appears to have sought intervention of the Kenya Union of Commercial Food and Allied Workers Union and by its letter dated 26th January 2017 the Union sought a disciplinary review of the Claimant's case.

36. The last communication is a letter by the union to the Cabinet Secretary, Ministry of Labour and East African Community Affairs intimating that its attempts to settle the matter amicably had fallen through and requesting the Cabinet Secretary to invoke the powers conferred by the Labour Relations Act, 2007 to have the dispute settled.

37. In sum, the Claimant did not puncture the procedure employed by the Respondent to terminate his contract of employment and in the Court's view, the Respondent appear to have substantially complied with procedural requirements of Section 41 of the Employment Act.

38. The Court is satisfied that on a balance of probabilities, the Claimant has failed to demonstrate that termination of his contract of employment by the Respondent on 24th January 2017 was procedurally defective.

Reliefs

39. Having found that termination of the Claimant's employment was substantively unfair for want of a justification by the employer, I will now proceed to examine the reliefs sought.

(a) General damages for illegal and unlawful dismissal

40. The remedy of general damages is not available in claims based on termination of employment under the Employment Act 2007. The only compensatory relief available is the one provided by the provisions of Section 49(1)(c) of the Act which is capped at the equivalent of 12 months' salary.

41. However, having found that termination of the Claimant's employment was unfair, the Claimant is eligible for the relief provided by Section 49(1)(c) of the Employment Act subject to compliance with the provisions of Section 49(4) of the Act. In arriving at the quantum of compensation, the Court has taken into account the following parameters:

i) The Claimant was an employee of the Respondent for about six years and 10 months and wished to continue as demonstrated by the review requested by the union letter dated 26th January 2017.

ii) The Claimant substantially contributed to the summary dismissal on 24th January 2017. The allegation of fuel pilferage is a serious indictment.

iii) The evidence on record show that the Claimant had no previous notice to show cause or disciplinary hearing.

42. For the above reasons, the equivalent of three months' salary is fair.

(b) One month's salary in lieu of notice

43. Having found that the Claimant's termination of employment was unfair for want of a valid and fair reason, the Claimant is awarded one month's salary in lieu of notice. The letter of appointment dated 23rd March 2010 provides for a month's notice or payment in lieu of notice.

(c) Salary arrears

44. The Claimant neither averred nor lead evidence of any salary arrears and for which months or how much. The prayer is **dismissed**.

(d) 2016 salary bonus

45. The Claimant neither averred nor lead evidence of his entitlement to bonus, or he had not been paid the 2016 salary bonus. Similarly, neither the letter of appointment dated 23rd March 2010 nor the subsequent letters of appointment, confirmation or transfer dated 16th July 2010, 29th July 2010, 30th July 2010, 11th June 2021, 13th May 2012, 1st February 2013, 1st February 2013 or the letter dated 27th October 2014 advert to a salary bonus.

46. In the absence of other credible evidence of entitlement to bonus, the claim is **dismissed**.

(e) Unclaimed leave

47. Neither the statement of claim nor the witness statement make reference to any unclaimed leave and no particulars of untaken leave were provided. The claim is **dismissed**.

Conclusion

48. In the final analysis judgment is entered for the Claimant against the Respondent as follows:

- a) One month's salary in lieu of notice.
- b) Equivalent of three months' salary as compensation for unfair termination.
- c) Costs of this suit.
- d) Interest at Court rates from the date of judgment till payment in full.

49. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF APRIL 2022

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE