Kilonzo v Dinamu Agencies Limited (Cause 682 of 2016)
[2022] KEELRC 14696 (KLR) (27 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 14696 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 682 OF 2016

SC RUTTO, J

MAY 27, 2022

BETWEEN

FREDRICK MUSYOKI KILONZO ..... CLAIMANT

AND

DINAMU AGENCIES LIMITED ..... RESPONDENT

JUDGMENT

1. The claimant brought the instant suit through which he avers that he was unfairly terminated by the respondent on March 24, 2016, having been employed as a loader effective February 26, 2015. Subsequently, he seeks the sum of Kshs 210,907.00 being notice pay, compensatory damages, underpayments, service pay and unpaid offdays.

2. The claim was defended, with the respondent stating that the claimant was a casual worker who left employment on March 24, 2016, never to return. That he voluntarily left employment following a disagreement with weighbridge inspectors at Mombasa Cement Limited. The respondent averred that it was not obligated to issue a notice to the claimant. To this end, the respondent urged the court to dismiss the claim with costs.

3. The matter proceeded for hearing on January 25, 2022, with both sides presenting oral evidence through one witness each.

Claimant's case

4. The claimant adopted his witness statement and bundle of documents filed together with his claim, to constitute part of his evidence in chief. He also produced the said documents as exhibits before court.

5. He informed the court that he was employed by the respondent as a loader on February 26, 2015 and was earning Kshs 10,660/= per month. That on March 24, 2016, while at work at the weighbridge, he was ordered to leave work by one Mr. Dipak and Mr. Ocampo. That the reason being that there

was excess load in the lorry. That he went back to the respondent company and reported the incident to his supervisor by the name Mr. Patrick, who instructed him to handover the Personal Protective Equipment (PPEs) in his possession and leave for good. He further told court that he was not given any notice or hearing prior to termination. He asked the court to allow his claim a as prayed.

Respondent's case

6. The respondent called oral evidence through Mr. Simon Lukulu Opicho, who testified as RW1. He introduced himself as the Assistant Human Resource Manager of the respondent. He testified that the claimant was recruited as a casual from July 5, 2015 until March 24, 2016. That he would be offered casual employment when jobs arose at a daily wage of Kshs 410/=.

7. That on March 24, 2016, in the company of a colleague, by the name Mr. Benson Musyoki, the claimant was chased away by the weighbridge inspectors, Mr. Dipak and Mr. Dilip (Ocampo) at Mombasa Cement, following several incidences of loading trucks with extra bags of cement. That on the said day, the claimant had loaded truck registration number KCE 685H with extra or less bags of cement.

8. That the respondent had nothing to do with the chasing away of the claimant by the weighbridge inspectors. That following the incident, the claimant never resumed work. That the claimant therefore deserted duty carrying with him the respondent's property including its PPEs, never to return.

Submissions

9. The claimant submitted that he was not afforded an opportunity to be heard and the reason for his termination was not a fair one. That the decision to terminate him was therefore unlawful and unfair. In support of the claimant's submissions, the case of *Mary Chemweno Kiptui v Keya Pipeline Company Limited* (2014) eKLR was cited.

10. The respond ent did not file any submissions.

Analysis and Determination

11. Arising from the pleadings, the evidence on record and the submissions on record, this court is being called to determine the following issues;

    i. Whether the claimant was unfairly and unlawfully terminated?

    ii. What reliefs if any, avail to the claimant?

Whether the claimant was unfairly and unlawfully terminated?**

12. Section 45(1) and (2) of the *Employment Act* provides as follows: -

    1. No employer shall terminate the employment of an employee unfairly.

    2. 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 employee's 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...

13. The import of the foregoing provision is that termination of employment is deemed unfair if the employer fails to prove that the reason for the same is fair and valid. This constitutes the first limb and is also known as substantive justification. It is also noteworthy that the burden of proof lies with the employer in terms of section 43 (1) of the *Employment Act*.

14. The second limb is procedural fairness, which essentially require an employer to prove that it subjected the employee to a fair process prior to effecting his or her termination. The specific requirements of what constitutes a fair hearing are set out under section 41 of the Act.

15. It is instructive to note that these two limbs must go hand in hand in order for an employer to prove that an employee's termination was fair.

16. Having set out the law, I will now proceed to apply the same against the facts and circumstances of the case herein.

17. The claimant avers that on March 24, 2016, he was chased away and ordered to leave the respondent's employment for good, following an incident relating to an excess load, at the weighbridge. On other hand, the respondent states that the claimant deserted duty following the disagreement with the weighbridge inspectors.

18. In order to prove the allegations against the claimant, the respondent exhibited an incident report which indicates that he loaded excess bags of cement on February 18, 2016,March 1, 2016, March 7, 2016 andMarch 24, 2016.

19. Specifically, the incident report of March 1, 2016, cites the claimant as follows: -

> " Fredrick Kilonzo loaded two consecutive trucks with one and two less bags. I noticed he was drunk therefore, I did not allow him to continue loading."

20. It is presumable that the incident of March 24, 2016was the tipping point and was the straw that broke the camel's back. It is on this very day that the employment relationship between the parties seemingly ended. The claimant did not dispute these incidences. As a matter of fact, he admitted during cross examination that he had loaded one excess bag of cement on 24th March, 2016.

21. The alleged repeated incidences of excess load by the claimant pointed to dishonesty and/or negligence on his part and indeed constitute grounds for summary dismissal under section 44 (4) of the *Employment Act*. At that juncture, the respondent as an employer had the right to take disciplinary action against the claimant.

22. Be that as it may, the respondent seemingly folded its hands and opted to let him go as opposed to subjecting the claimant to a disciplinary process.

23. Regardless of whether the claimant deserted duty or was chased away by the inspectors at the weighbridge, the respondent was enjoined in a mandatory manner, under section 41 and 45(2) (c) of the *Employment Act*, to subject him to a fair process.

24. This entailed notifying him of the allegations against him, which ordinarily constitute the reason it was considering terminating his employment. Thereafter, the respondent ought to have granted him an opportunity to present his defence in response to the allegations.

25. There was no proof nor even suggestion, by the respondent that it subjected the claimant to any process at all.

26. In absence any evidence that the claimant was subjected to a fair process, I am led to conclude that his termination was procedurally unfair.

Reliefs

27. Having found that the claimant was unlawfully terminated, the Court awards him compensatory damages equivalent to three (3) months of his monthly salary. This award has taken into amount the length of the employment relationship and his contribution to the termination.

28. The claimant is further awarded one month's salary in lieu notice.

29. The claimant is also awarded service pay for one year as there is no evidence that he fell under the exclusions ofsection 35(6) of the *Employment Act*.

30. The claim for accrued leave, public holidays and off days is declined for lack of evidence to prove entitlement to the same. This being a claim in the nature of specific damages ought to have been specifically pleaded and proved.

31. The claim for underpayments is also declined as the claimant was earning a monthly salary of Kshs 10,660/=. This amount is slightly above the stipulated minimum wage rate of Kshs 10,107/=, prevailing at the time.

Orders

32. In the final analysis, I enter Judgment in favour of the claimant against the respondent. To this end, the claimant is awarded: -

    (a) Compensatory damages in the sum of Kshs 31,980.00.

    (b) One month's salary in lieu of notice being the sum of Kshs 10,660.00.

    (c) Service pay for one year being the sum of Kshs 5,330/=.

    (d) The total award is Kshs 47,970.00.

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

    (f) Costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Kariuki

For the Respondent Mr. Runo

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