



REPUBLIC OF KENYA



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**Ndung'u v Roben Aberdare (K) Ltd (Cause E036 of 2021)
[2022] KEELRC 13259 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13259 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E036 OF 2021
ON MAKAU, J
NOVEMBER 23, 2022**

BETWEEN

FRANCIS NJUGUNA NDUNG'U CLAIMANT

AND

ROBEN ABERDARE (K) LIMITED RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent on April 1, 2015 as a crusher foreman earning a monthly salary of Kshs 130,000.00. He worked until February 4, 2021 when he was served with a summary dismissal letter with effect from February 5, 2021.
2. He then brought this suit on July 7, 2021 alleging that his dismissal was unfair because there was no valid reason and he was not accorded any hearing before the dismissal. The suit seeks the following reliefs:-
 - a. A declaration that claimant's termination from employment was illegal, unlawful, unfair and inhumane and that the claimant is entitled to payment of his terminal dues in full.
 - b. Compensation for unfair and illegal termination.
 - c. An order for the respondent to pay the claimant his terminal dues amounting to Kshs 3,910,833.00.
 - d. An order for the respondent to issue the claimant with a certificate of service.
 - e. Costs of the claim plus interest thereon.
3. The respondent filed defence on March 24, 2022 contending that the dismissal of the claimant was fair because he committed gross misconduct and failed to show cause why disciplinary action should not



be taken against him. It averred that the claimant neglected his duty and when he was given a chance on February 2, 2021 to explain himself he became rude to the General Manager and engaged him in verbal altercation. After failing to show cause, the claimant was dismissed summarily.

4. The respondent further averred that the claimant is not entitled to the reliefs sought. Consequently, it prayed for the suit to be dismissed with costs.
5. The suit was disposed by written submissions after the parties adopted their written witness statements and document evidence to support their pleadings.

Evidence

6. The claimant statement is dated July 25, 2021 and his supporting documents filed include the termination letter dated February 4, 2021, demand letter and NSSF statement. In brief, the claimant's case is that he was shocked to receive the summary dismissal letter without any prior notice or being accorded fair hearing. He also contended that there was no reason or lawful justification for the abrupt termination of his employment.
7. He contended that the employer had an obligation to give him one month notice before the termination. He contended that he served the respondent diligently for 5 years 10 months without any case of gross misconduct or poor performance and maintained that the dismissal was made in bad faith and contrary to labour practices.
8. The respondent relied on statement written by its General Manager Mr Ambrose Kinyua on March 15, 2022 and supported by 3 internal memos and welfare contribution schedule.
9. In brief the witness stated that the claimant was given a chance of being heard but he refused to reply to the accusations leveled against him and chose to engage in verbal exchange with the General Manager. He contended that the claimant grossly neglected his duties to the extent that he ran down the crusher machine.
10. The witness further stated that the claimant is not entitled to damages for unfair dismissal because he was 72 years at the time of the dismissal. He also stated that the claimant is not entitled to the other reliefs sought in the suit because the claimant is not entitled to the same.

Submissions

11. The claimant submitted that the respondent had no valid reason for dismissing him as required under section 43 of the *Employment Act*. He contended that although in defense the reason pleaded is neglect of a crusher machine, the termination letter suggests that the reason was altercation between him and the General Manager. He further submitted that the termination letter alleged that the respondent had conducted a comprehensive audit of the crusher which revealed there was neglect and running down of the machine but the said "damning report" has not been produced as evidence.
12. Further the claimant submitted that the allegation that he was invited to show cause on February 2, 2021 has not been substantiated since no written evidence was produced. Further, it was submitted that the alleged neglect of the crusher machine is also false because for the 5 years and 10 months he worked for the respondent, he was never served with any warning letter. Also no evidence in the form of performance appraisal was produced to show that the claimant did not meet the employer's expectation in managing the said machine.
13. As a consequence of the foregoing matters the claimant maintained that the dismissal was unfair and unlawful. For emphasis, reliance was placed on the case of *Peter Kamau Mwaura v National Bank of*



Kenya [2020] eKLR, Walter Anuro v Teachers Service Commission [2013] eKLR, Postal Corporation of Kenya v Andrew K Tanui [2019] eKLR, Alphonse Mghanga Mwachanya v Operation 680 Limited [2013] eKLR, Kenfreight (EA) Limited v Benson K Nguti [2016] eKLR and National Bank of Kenya Limited v Antony Njue John [2019] eKLR where the courts were unanimous that termination of employment is unfair unless it is grounded on valid reason and that a fair procedure is followed.

14. Finally the claimant submitted that he is entitled to the reliefs sought including salary in lieu of notice, compensation for unfair termination, accrued leave, house allowance and service pay totaling to Kshs 3,910,833.00. He also urged for issuance of a certificate of service.
15. The respondent, submitted that the claimant breached his contract of service and misconducted himself when he failed to perform his assigned duties including supervision of the crusher machine. It was further submitted that on February 2, 2021, the claimant was called to explain his actions in compliance with section 41 of the Employment Act, but instead he verbally abused the General Manager contrary to section 44(4) (d) of the Employment Act. Such conduct according to the respondent amounted to insubordination and it was valid reason for termination as it fell within the definition of the principle of incompatibility. For emphasis, reliance was placed on Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR.
16. For the foregoing reasons, the respondent maintained that the dismissal of the claimant was justified and procedurally fair, and consequently the reliefs sought are not warranted. Finally, the court was urged to dismiss the suit with costs.

Analysis and determinations

17. I have carefully considered the pleadings, evidence and the rival submissions. The facts are straight forward. The claimant was employed by the respondent until his services were terminated *vide* the letter dated February 4, 2021 citing misconduct as the reason for the termination.
18. Section 45 of the Employment Act makes the following provisions regarding termination of an employment contract –
 - “(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.”
19. Guided by the above provision, the issues for determination are;
 - a. Whether the termination was justified by valid and fair reason.
 - b. Whether termination violated the mandatory procedure set out by section 41 of the Employment Act.
 - c. Whether the claimant is entitled to the reliefs sought.



Reason for the termination

20. Section 43 of the *Employment Act* provides that in any legal proceedings challenging termination of an employee's employment the employer shall prove the reason and in default, the termination shall be deemed unfair within the meaning of section 45 of the Act. The provision is set out below:

“43(1) 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.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

21. The essence of the foregoing provision is that the employer must demonstrate to the satisfaction of the court that the reason for terminating the services of the employee was valid and it related to the employee's conduct, capacity and compatibility or based on the employer's operational requirements.

22. In the instant case, the reason cited for the termination was set out in the termination letter dated February 4, 2021 as follows: -

“Re: Termination of employment – summary dismissal

The above subject refers.

I refer you to your recent verbal altercation with the General Manager on Tuesday February 2, 2021. You knowingly and willfully engaged yourself in verbal exchange with the GM with the sole purpose of demeaning him.

That as it may, a comprehensive audit of the Terex MPS crusher by the suppliers of the crusher, Terex Engineers we have engaged for maintenance have given a damning report of the crusher machines in their words quoting “neglect” in terms of the of basic maintenance, service and operations. The crusher machines have been totally rundown under your supervision as the crusher foreman.

From this we have noted that the work of a crusher foreman especially with the state-of-the-art crushers we have, has become very dynamic and technology oriented and clearly you don't meet the needs of this demanding and diverse role at this point in time. We regret to inform you that we shall not proceed to work with you effective February 5, 2021.

You are hereby instructed to hand over all company property in your possession to the General Manager prior to release of your January pay.

Note: A summary dismissal does not require any pay on notice.

We wish you the very best in your future endeavors.

Yours faithfully

...

Managing Director”

23. My reading of the foregoing letter reveals two grounds for the claimant's dismissal, namely negligent performance of duty leading to running down of the crusher machine, and verbal altercation with



the General Manager on February 2, 2021. It was alleged that a report on the state of the machine was prepared by Terex Engineers but the same has not been produced as evidence. There is also no eye witness called to fortify the alleged altercation between the claimant and the General Manager. All what the court has received is the written statement of the General Manger against that of the claimant. The court makes the inference that the reason why the respondent has failed to call an eye witness is because there was none or there was no altercation at all. He who alleges has the burden of proof.

24. In this case no proof was tendered. Consequently, the court agrees with the claimant that the employer had no valid and fair reason to justify the summary dismissal as required by section 43, 45 and 47 of the *Employment Act*.

Procedure followed

25. The minimum procedural requirement for terminating of an employee’s contract of service is set under section 41 of the *Employment Act* which provides that: -

- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity 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 employee 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, if any, chosen by the employee within subsection (1), make.”

26. In this case the claimant has denied that he was invited to defend himself of the alleged negligence of duty. He has also denied the alleged altercation with the General Manager. The respondent has not proved that it accorded the claimant a fair opportunity to defend himself. Even if he had committed the said offences, the Managing Director was obliged to accord him a fair hearing in the presence of a fellow employee of his choice as required by section 41 of the Act. The legal duty to accord fair hearing to an employee before dismissal is mandatory and deliberate.

Reliefs

27. Having found that found that the dismissal of the claimant was not grounded on a valid and fair reason, and that fair procedure was not followed, I make declaration that the dismissal was unfair and unlawful. To fortify the foregoing declaration I follow decision by the Court of Appeal in the case of *Kenfreight (EA) Limited v Benson K Nguti* [2016] eKLR, where it held that: -

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure...”

28. The consequence of the foregoing declaration is that the claimant is entitled to compensatory damages under section 49 of the *Employment Act*. Considering his service for over 5 years and the fact that



he may not secure another employment due to his advanced age of 72 years, I award the claimant 3 months' gross salary as compensation for unfair dismissal equaling to Kshs 390,000.00. He is also awarded one month salary in lieu of notice being Kshs 130,000.00.

29. The claim for leave is also granted because going by the internal memos produced as leave records, the claimant used to go for one week leave during the Christmas holidays. The claimant was entitled to leave of 21 days. It means that he did not utilize 14 days of his annual leave every year which translates to 14 days x 5 years plus 17.5 days prorated from the extra 10 months served equaling to 87.5 accrued leave days. Calculated using a salary of Kshs 130,000 the leave is assessed at Kshs 379,166.66.
30. The claim for service pay is granted because the respondent did not remit his NSSF contributions during the said period of service. He will have 15 days pay for each completed year of service being 5/2 x Kshs 130,000 which equals to Kshs. 325,000.00.
31. The claim for house allowance is also granted at the conventional rate of 15% of the basic salary because the employer did not provide the claimant with either housing or reasonable allowance. I assess the award as Kshs 130000 x 15% x 5 years and 10 months equaling to Kshs 1,365,000.00
32. In the end I enter judgment for the claimant against the respondent in the following terms:

Compensation Kshs 390,000.00

Notice pay Kshs 130,000.00

Accrued leave Kshs 379,167.00

Service pay Kshs 325,000.00

House allowance Kshs 1,365,000.00

Total Kshs 2,589,167.00

The award is subject to statutory deductions but in addition to costs and interest at court rates from the date hereof. He will also have a certificate of service.

DATED, SIGNED AND DELIVERED AT NYERI THIS 23RD DAY OF NOVEMBER, 2022.

ONESMUS N. MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

