



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 17 OF 2016

CHARLES ASANGO LUBIA.....CLAIMANT

VERSUS

BROOKSIDE DAIRY LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed on 27/1/2016 by the claimant praying for:-

(a) 3 months' salary in lieu of notice (63,794.17 x 3) Kshs.191,382.51.

(b) Compensation for unlawful dismissal.

(c) Payment of pension in the sum of Kshs.213,499.99.

(d) House allowance Kshs.1,637,568.

(e) Costs and interests.

2. C.W.1, the claimant testified that he was employed by the respondent as a driver from 1/11/2009 until 5/3/2015. That he worked diligently until he was summarily dismissed by the respondent without any warning nor being called to a disciplinary hearing. That C.W.1 was simply called to the respondent's office and handed a dismissal letter. That he was not given notice nor paid in lieu of notice. That the claimant suffered hardship, loss and damage as a result of the unlawful dismissal. That the claimant prays for the reliefs sought in the Statement of Claim.

3. The claimant produced a Certificate of Service dated 6/3/2015, the letter of dismissal dated 6/3/2015 which alleges that the claimant had been reporting to work under the influence of 'alcohol'. That he had on 4/3/2015 abandoned the company vehicle by the roadside and slept along the trenches due to intoxication. That the claimant had previous warning on that behavior. That his conduct amounted to gross misconduct.

4. The claimant was to be paid 5 days salary for March, 2015 in the sum of Kshs.5,896.35 and prorata leave for the year 2015 in the sum of Kshs.3,773.60.

5. The claimant also produced payslips including one for September, 2014 indicating a gross salary of Kshs.68,232.04 but in the demand letter, the claimant states that he earned a monthly salary of Kshs.63,794.17.

6. The respondent filed a statement of defence on 25/5/2017 in which it states that the claimant earned a total gross pay of Kshs.36,557.64 at the time of dismissal. This is reflected in a letter dated 30/4/2014 produced by the respondent as exhibit '2'.

7. R.W.1 Elizabeth Mwari testified that she worked for the respondent as the Human Resource Manager in charge of recruitment, discipline and other staff matters. That she joined the respondent in 2006 and knew the claimant well who was employed as a driver on 1/11/2009. She produced exhibits '1' to 'f'. R.W.1 testified that on 2/3/2015 the claimant disappeared for an hour while going to deliver products and when he came back he was drunk. That he had parked the company vehicle at a dangerous place. That the sales person reported the matter. R.W.1 issued a Show Cause letter to the claimant. That the claimant declined to respond to the Show Cause letter. That a disciplinary hearing was held at Nairobi office. The claimant attended accompanied by his daughter. The proceedings were reduced to writing but the minutes were not before court.

8. That the respondent decided to dismiss the claimant for being drunk and disorderly and unable to discharge his duties.
9. R.W.1 referred to previous warnings given to the claimant. R.W.1 stated that it was not the first time the claimant was drunk at work. R.W.1 stated that the claimant was a good driver but he used to drink and become disorderly during work time. That the claimant had failed to change.
10. Under cross-examination R.W.1 stated that the disciplinary proceedings were held and the record was before Court though the minutes were not filed. That the respondent facilitated the claimant to travel to Nairobi to attend the disciplinary hearing.
11. R.W.1 stated that the claimant was entitled to pension and had accumulated pension benefits of Kshs.209,509. That the claimant had not picked the cheque for his final benefits. That claimant was paid a consolidated salary of Kshs.36,557.64 and had served for 5 years. That Alexander Forbes was the administrator of the pension and the pension was safe with them. That claimant was a good employee except for his drinking habits at work.

Determination

12. The claimant bears the onus of proving in terms of section 47 (5) of the Employment Act, 2007 that he was wrongly dismissed. Whereas the respondent bore the onus of rebuttal under section 43 read with 47(5) of the Employment Act, by demonstrating that the respondent had a valid reason to dismiss the claimant from employment and that the respondent followed a fair procedure in dismissing the claimant.
13. The respondent has clearly demonstrated that the claimant was guilty of abandoning the company vehicle at a dangerous place and went to take alcohol in the course of duty. That the matter was reported by a sales person who had accompanied the claimant to deliver company products.
14. That the claimant was intoxicated and disorderly when he returned to work after an hour. That this was not the first time the claimant had been drunk and disorderly at work. That the claimant had previous warning but had not reformed.
15. That the claimant was given a show cause letter with the relevant charges but declined to receive and/respond to the same. That the claimant appeared with his daughter at a disciplinary hearing in Nairobi, where he defended himself.
16. That the respondent found him guilty of misconduct and summarily dismissed him.
17. The claimant has therefore failed to prove his case on a balance of probability and the Court finds that the summary dismissal of the claimant was lawful and fair and in accordance with sections 41, 43, 44 and 45 of the Employment Act, 2007. The claimant prayers for compensation and payment of notice pay are therefore dismissed.
18. The claimant is entitled to collect terminal benefits due to him in the sum of Kshs.9,270.01.
19. The respondent is directed to facilitate release of claimant's pension by Alexander Forbes, the administrator of the respondent's pension, in the sum of Kshs.209,509 plus any accrued interest due to the amount upto the date of payment to the claimant.
20. Each party to bear their own costs of the suit.

Dated and delivered at Nairobi this 28th day of January, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this Judgment has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. P.D. Onyango for the claimant

Mr. Ouma for the respondent

Chrispo: Court clerk