



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 144 OF 2016

TITUS MUMO MUNINI.....CLAIMANT

VERSUS

ADIX PLASTICS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued his erstwhile employer Adix Plastics Limited alleging unfair termination. Through his Memorandum of Claim dated 4th February 2016 he avers that he was employed by the Respondent as Machine Attendant from 8th January 2015 to October 2015 earning a monthly salary of Kshs. 12,425/-. The Claimant averred that he at all times discharged his duties effectively, diligently and satisfactorily during the period of his employment and that he sustained injuries on or around 5th October 2015 while working for the Respondent. He averred that as soon as it was reasonably practicable, he informed the Supervisor of his absence and the reasons for it. The Claimant averred that the Respondent later purported to call for a disciplinary committee wherein he was not given a chance to articulate his case and that he was thereafter dismissed from work without any notice. He claims that the termination was unfair and the Respondent did not follow the laid down procedure and that the Respondent's actions have subjected him to loss and harm. He sought damages equal to 12 months wages, service pay, salary in lieu of notice and leave and prays that judgment be entered against the Respondent further for salary for 2 night shifts and 2 day shifts and for costs of the suit with interest thereon.

2. The Claimant filed a witness in which he stated that on 5th October 2015 he had been assigned to work on the pet blow machine which emitted a loud blast while he was placing products in the cask and that he consequently sustained injuries to his right ear. That when he informed his Supervisor, he was given ear muffs and instructed to continue working but that since he was experiencing excruciating pain and headaches, he went to a medical clinic and was given 3 days' sick off. That he returned to work on 9th October 2015 and was advised to report on Monday of the following week and that when he reported as instructed, he was issued with a Notice to Show Cause Letter for gross misconduct. He further stated that he was summarily dismissed from work without being paid all his benefits which he now claims.

3. The Respondent was opposed to the suit and filed its Response to Claim dated 5th April 2016. It admitted that it had employed the Claimant but denies occurrence of the accident causing injuries as alleged by the Claimant. It avers that the Claimant was summarily dismissed following repeated acts of misconduct and that he was adequately paid for all the days worked. At paragraph 6 of its Response, it enumerates the alleged acts of misconduct and negligence by the Claimant that culminated to him being previously suspended for one week and further annexed the first disciplinary committee report on the Claimant's hearing. The Respondent averred that after walking out during the first hearing, the Claimant was given a second chance in a 2nd disciplinary meeting on 13th October 2015 wherein he produced medical reports alleging that his ears had been affected by the pet blow machine. The Respondent further avers that the Claimant had never complained of the ear problem and that following the Claimant's undisciplined behaviour during the disciplinary meetings, his unsatisfactory explanation and previous misconduct, it decided to summarily dismiss him from the company. It averred that the dismissal of the Claimant was lawful and it denies liability to compensate the Claimant as alleged in the Memorandum of Claim. It further avers that the Claim herein is misplaced and ought to be struck out with costs.

4. The Respondent also filed two Witness Statements made on 5th May 2016. The first was by its Human Resources Manager, Anna Maragia Nyanganyi and the second by the Claimant's Supervisor, Geoffrey Kyele. The HR Manager reiterated the Respondent's averments in the Response to Claim and further stated that apart from recommending the summary dismissal of the Claimant, the disciplinary committee also reported the death threats he had made to the Industrial Police Station under Reference Number – OB/75/14/10/2015. Mr. Geoffrey stated that having supervised the Claimant for the whole period he worked for the Respondent. He stated that he was aware that the Claimant had previously absconded duty in June 2015 after threatening and abusing the Quality Controller after being given work instructions. He stated that the Claimant again went off duty in October 2015 without seeking permission from him and that when he sought a written explanation the Claimant became arrogant. He confirmed that the Claimant never reported any injury sustained at the work place to him.

5. The parties adduced oral evidence and the Claimant testified that the 3 months contract he had with the Respondent as Machine Operator

was to end in March and that he had previously had 3 contracts before he was a Machine Operator. He stated that he worked as Machine Operator but his contract was for general work and that he was the only person who had the experience to operate the PET machine. He stated that he wrote an apology letter on the issue of issuing threats to the Quality Controller because he did not want problems and asserted that he worked well with the Quality Controller. He said that he was later called by the HR without notice for an abrupt meeting with 6 others about the letter from hospital and that the Stores Manager said the only thing to do was to dismiss the Claimant. The Claimant confirmed that he was asked to bring a colleague or come alone and that he went alone since there was no time to call anyone.

6. In cross-examination the Claimant confirmed he had been issued with a first warning in June for absconding duty and given a one-week suspension. He stated that he never took days off and only went for off when he got a sick off for 2 days and then reported back to the company on 9th October 2015. He stated in re-examination that he called the Respondent on the second day of his sick-off and was told it was okay. He testified that he was given notice to show cause on 30th June and that no disciplinary proceeding took place.

7. The Respondent's first witness Anna Maragia adopted and relied on her statement and documents as their evidence and was handed over for cross-examination. In cross-examination she stated that they allowed the Claimant back after his suspension and shelved the disciplinary issues and that they gave him a new contract on 1st July. She testified that the Claimant did not give valid reasons for absconding work in October 2015 and only asked how others went away for one week and are not questioned. She stated that during the disciplinary meeting on 9th October 2015 the Claimant was unruly, called people names and even told her she is a woman and should not talk to him. She further stated that the Claimant only brought the letter on his ear when he realised things were serious and that the same was thus an afterthought. She said that he had never complained about the noises and that he only requested for ear muffs which is required as protective equipment in the factory. She confirmed that the Claimant was employed on 1st January 2015 and on re-examination she stated that the Claimant's indiscipline was so high.

8. The Respondent's second witness Geoffrey Kyele relied on his filed Witness Statement as his evidence in chief and testified that the procedure after injury at work is that a report has to be made but the Claimant did not report any incident. He also reiterated that the Claimant misbehaved during the 9th October disciplinary meeting and was not ready to listen.

9. Parties were to file submissions and the Claimant's submissions were to the effect that Section 44(3) of the Employment Act allows an employer to dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service and that Subsection (4) then sets out various acts that may amount to gross misconduct so as to justify summary dismissal including use of abusive or insulting language, or behaving in a manner insulting, to the employer or to a person placed in authority by the employer as per Section 44(4)(d). The Claimant submitted that Section 41 of the Act further lays out the procedure to be followed in terminating employment which courts have now construed to be a mandatory procedure. He submitted that Section 41 makes the following provision:

41. (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

The Claimant also cited the case of **CMC Aviation Limited v Mohammed Noor [2015] eKLR** in support of his arguments. He submitted that Section 47(5) of the Act further provides that the burden of proving wrongful dismissal shall rest on the employee while the burden of justifying the grounds of the wrongful dismissal shall rest on the employer. The Claimant submitted that from the face of the first meeting's Minutes as attached by the Respondent it is clear he was already adjudged a culprit and he further questioned the constitution of the disciplinary committee. He submitted that he could not properly defend his case in front of people who had occasioned grave injustice and embarrassment to him. The Claimant submitted that he was therefore not afforded a hearing as required by Section 41 of the Act. The Claimant submitted that the reasons relied on by the Respondent were unsubstantiated, unfair and maliciously orchestrated to ensure that his employment was terminated at any cost. The Claimant cited the case of **Simon Mbithi Mbane v Inter Security Services Limited [2018] eKLR** where Abuodha J. stated that the allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success. The Claimant submitted that Section 30(2) of the Employment Act further provides that communication to the employer on account of sickness should be made within a reasonable time. The Claimant submitted that in his case he reported within three (3) days after his illness which he submits is reasonable time considering his illness affected his ears and head and that on 9th October 2015 he had also carried along with him a letter explaining his whereabouts and a medical report. The Claimant submitted that however, instead of the Respondent verifying the information, it bundled him hurriedly to a disciplinary meeting and he submitted that the Respondent did not even get in touch with him when he was away.

10. The Respondent submits that the Claimant's absence from work is portrayed in the login register listed as Document No. 3 in the Respondent's List of Further Documents. The Respondent submitted that it invoked Section 41 of the Employment Act and its first witness also confirmed in examination in chief that due process was followed before the Claimant was dismissed and that further, she stated in cross-examination that the Claimant had been issued with a warning letter due to his indiscipline and for which he wrote an apology letter. The Respondent submitted that this Court is legally bound to consider whether or not any previous warning letters were issued to the Claimant in determining whether the termination was just and equitable, as under Section 45(5)(e) of the Employment Act. The Respondent submitted that the Notice to Show Cause and minutes of the disciplinary committee listed in its documents before court demonstrate that the Claimant was given an opportunity to defend himself before he was summarily dismissed. The Respondent submitted that the Claimant's assertion that he was unfairly dismissed is therefore unsubstantiated as a result of the unequivocal evidence demonstrating that due process was followed as required under Section 41 of the Act. It was further submitted that Section 43 of the Employment Act requires an employer to prove the reasons for the termination of an employee for the same to be considered fair in the circumstances. The Respondent submitted that the reasons advanced in the Claimant's letter of dismissal are sufficient and satisfactory the Respondent cited the case of **Evans Kamadi**

Misango v Barclays Bank of Kenya Limited [2015] eKLR where the Court analysed Section 43 of the Act as follows:

*“To my mind the burden placed on the employer by Section 43 is to demonstrate that there was a valid reason which would cause a reasonable employer to terminate the employment of an employee. The **HALSBURY’S LAWS OF ENGLAND (4th EDITION VOLUME 16)** at page 482 expounds this principle as follows:*

“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”

11. The Respondent submitted that the Court should find that the Claimant’s action was fundamentally in breach of his obligations under his contract of employment and that the same warranted a summary dismissal. The Respondent further submitted that the statutory burden to prove unfair termination from employment is on the Claimant pursuant to Section 47(5) of the Employment Act and that this position was upheld by the Court of Appeal in **Bamburi Cement Limited v William Kilonzi [2016] eKLR**. The Respondent submitted that since the Claimant herein has not discharged that burden, the claim should be dismissed with costs to the Respondent. The Respondent submits that the Claimant’s prayer for payment in lieu of one month’s notice should fail since its first witness had demonstrated that the Claimant was issued with ample notice to be heard and attended the disciplinary hearing which the Claimant affirmed in his testimony that he had been paid salary for October 2015 per the payslip listed in the Respondent’s documents. It submitted that his prayer for payment of 2 night shifts and 2 day shifts cannot hold and submitted that since the Claimant was afforded due process in line with the law, he is not entitled to damages for unfair termination.

12. The Claimant was dismissed pursuant to a disciplinary hearing which was called in the wake of his unapproved absence from work. He denied being afforded a hearing. He was recorded at the meeting as being rude and he insulted the panel and took leave of the meeting. He therefore was afforded an opportunity to defend himself but declined to avail of the opportunity instead taking an undignified stance spewing vitriol and disrespect for the very process which ought to have been his chance at vindication. If indeed he was not entitled to the dismissal he would have proved this at the meeting. His attempt to backtrack in his testimony and assert that he was a model employee thus does not have support in his conduct at the end of his service. The burden of proving wrongful dismissal fell on the Claimant and he woefully failed to do so. The Claimant’s suit is devoid of merit and the claim was thus unproved. It is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Nairobi this 12th day of March 2021

Nzioki wa Makau

JUDGE