



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 381 OF 2017

CALEB ODHIAMBO MBORI.....CLAIMANT

VERSUS

UHURU ORGANISATION

INTERNATIONAL.....RESPONDENT

JUDGMENT

1. In submissions filed on 17 March 2021, Caleb Odhiambo Mbori (the Claimant) identified the Issues for the Court determination as:

- (i) Whether the dismissal of the Claimant was procedural and lawful?
- (ii) Whether the Claimant is entitled to payment of accrued dues and damages (reliefs)?

2. Uhuru Organisation International (the Respondent) filed its submissions on 8 April 2021, and it outlined the Issues as:

- (i) Has the Respondent proved gross misconduct on the part of the Claimant?
- (ii) Whether the Respondent followed due procedure in terminating the employment of the Claimant?

Unfair termination of employment

Procedural fairness

3. The Claimant was employed by the Respondent around 16 September 2004 as a Manager. On 9 March 2017, the Respondent suspended the Claimant after realising that the audit for 2015 had not been done *professionally*. The suspension was to facilitate investigations.

4. On 20 April 2017, the Respondent notified the Claimant of his summary dismissal backdated to 9 March 2017. 7 reasons were given for the decision.

5. The Claimant appealed on 28 April 2017, but the appeal was not successful.

6. The Claimant challenged the fairness of the dismissal on the ground that he was not afforded an opportunity to make representations before the dismissal.

7. The Respondent, however, contended that it followed a fair procedure.

8. The Respondent's witness, a Board member, reiterated the plea during her oral testimony.

9. Section 41(2) of the Employment Act, 2007 makes it mandatory that in cases of summary dismissal, the employer must afford the employee a chance to make representations during an oral hearing.

10. The Respondent did not disclose when the Claimant was afforded that oral opportunity.

11. The date of the hearing was not stated. The names of the persons who were present during the occasion were not revealed. If any minutes were kept of the session, the same was not produced in Court.

12. The Court has no hesitation in finding that the summary dismissal of the Claimant was procedurally unfair.

Substantive fairness

13. The Respondent had the burden of not only proving, but proving as valid and fair, the reasons for the dismissal of the Claimant. The burden is imposed on the employers by sections 43 and 45 of the Employment Act, 2007.

14. The Respondent gave 7 reasons for its decisions, and proof of 1 of those reasons would suffice to discharge the burden.

15. One of the reasons given by the Respondent was that the Claimant had commissioned a non-registered auditor to audit the books of the Respondent (and sign off the audit report under the name of a registered auditor).

16. The Claimant did not controvert the Respondent's witness testimony that the genuine auditor Otieno & Associates disowned having conducted the audit for 2014, 2015 and 2016.

17. On this singular ground, the Court finds that the Respondent had valid and fair reasons to dismiss the Claimant.

Compensation

18. The Respondent had a valid and fair reason to dismiss the Claimant. However, it did not comply with the statutory requirements of procedural fairness.

19. The Claimant served the Respondent for about 13 years.

20. In consideration of the length of service and that the Respondent had a valid and fair reason to dismiss the Claimant, the Court is of the view that the equivalent of 2-months salary as compensation would be appropriate.

21. The Respondent did not rebut the Claimant's oral testimony that his monthly salary was Kshs 90,000/-.

Salary in lieu of notice

22. The Respondent proved valid and fair reason to dismiss the Claimant, and by dint of section 44(3) & (4)(c) of the Employment Act, 2007, the Court will therefore decline to allow this head of the claim.

Salary for March 2017

23. The Claimant was dismissed with effect from 9 March 2017, and the Court finds that he is entitled as of right to the earned wages and not the full month's salary.

House allowance

24. The Claimant sought Kshs 2,106,000/- on account of house allowance.

25. The initial contract signed by the Claimant had provision for house allowance. The Court finds this head of the claim was not proved.

Certificate of Service

26. A certificate of service is a statutory entitlement, and the Respondent should issue one to the Claimant within 30 days.

27. Before concluding, the Court must observe that the parties prosecuted their cases casually.

28. Documents which were available and material such as bank statements, unsigned contract and audit report were not filed or produced.

Conclusion and Orders

29. The Court finds and declares that although the Respondent had valid and fair reason(s) to dismiss the Claimant, it did not follow a fair procedure.

30. The Claimant is awarded:

(i) Compensation **Kshs 180,000/-**

31. The Respondent to compute and pay the Claimant's earned wages for March 2017 with the compensation.

32. The Respondent to issue a certificate of service to the Claimant within 30 days.

