



IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. 2414 OF 2016

HENRY OCHIENG AMBANICLAIMANT

VERSUS

STYLE INDUSTRIES LIMITEDRESPONDENT

JUDGEMENT

1. The Claimant brought this suit on 24.11.2016 alleging that the Respondent had unfairly dismissed him from employment. He therefore sought the following reliefs:

- (a) A declaration that the Respondent's termination of the Claimant from employment was unlawful, unfair and inhumane.**
- (b) A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.**
- (c) An order for the Respondent to pay the Claimant his due terminal benefits totalling to Kshs. 206,262/-.**
- (d) Interest on (c) above from date of judgment until full payment.**
- (e) Costs of the suit plus interest thereon**

2. The Respondent filed defence on 21.2.2018 admitting that it dismissed the Claimant from service but denied that the dismissal was unfair. It contended that the Claimant was caught by security guards carrying away property from its premises and after a disciplinary hearing, the Claimant admitted the offence and he was dismissed. It further contended that it paid the Claimant his dues and averred that he is not entitled to the reliefs sought. Therefore, it prayed for the suit to be dismissed with costs.

3. The suit went to full hearing and both parties tendered evidence. Thereafter they all filed written submissions.

EVIDENCE

4. The Claimant testified as CW1 and told the court that he was employed by the Respondent as a storekeeper on 5.2.2013. His salary was Kshs. 12599 per month. His duties involved record keeping of materials delivered and received goods.

5. He testified that on 23.1.2016 he worked as usual up to 1 p.m. and left for home because it was on a Saturday. On reaching the gate, the security guards searched his bag and found hair pieces. The guards took him to the Manager's office who called police and he was arrested and locked up for 2 days. However, he was released without any charges and he was told to report to work the following day 26.1.2016.

6. He further testified that when he reported to work, the HR Manager told him to report back on 28.1.2016. On the said day, he found the Health and Safety Officer Madam Caroline who told him that he had been dismissed because he was found with hair pieces and told him to collect his pay on 5.2.2016. He confirmed that he received Kshs. 7000 on 5.2.2016.

7. He contended that he was dismissed without prior notice. He also contended that he never went for any annual leave and prayed for the reliefs sought in the claim contending that he has not secured any other job.

8. On cross-examination, he admitted that the Respondent's business involved making hairpieces and Beauty products. He admitted that hairpieces were found in his bag. He further admitted that the store had 10 other employees and they all passed through the gate but they

were not found with hairpieces.

9. He admitted that on 26.1.2016 he met the HR Manager and discussed about the hairpieces found in his bag. He contended that the HR Manager only asked him how the hairpieces were found in his bag but denied that he was given any letter.

10. He further admitted that he met Caroline (Health Safety Officer) 28.1.2016 and denied that there were other officers. He contended that Caroline asked him to explain to her how the hairpieces were found in his bag and he explained. He stated that hairpieces worth Kshs. 200 was found in his bag but contended that he did not know how it got into his bag. He denied receipt of any termination letter and maintained that he was verbally told by Caroline that his job was over. He also maintained that he was not given any hearing before the dismissal.

11. Mr. Dancan Lumat, the Respondents HR Executive testified as RW1. He told the court that he joined the Respondent in 2016 and came across the Claimant's employment file. He stated that the Claimant was a General Worker in the Hairpiece Manufacturing Section and later moved to the stores.

12. He testified that on 23.1.2016, the Claimant was caught by security officers with 2 pieces of hairpiece in his bag at lunch hour during their routine checks. Thereafter investigations were done and established that the hairpieces had been stolen.

13. He contended that the Claimant was interrogated by the HR Manager Ms. Margaret Ngeno on 26.1.2016 and she also served him with a show cause letter. Further, she told him to attend disciplinary hearing 28.1.2016. The show cause letter required him to explain why hairpieces were found in his bag but he did not respond to the letter.

14. RW1 further testified that the Claimant attended the disciplinary hearing before a committee on 28.1.2016 at 11.30 a.m. The Committee included Kiarie Kimani (GM), Caroline Busienei; Judy Ondipo, Paul Maina and Anne Gathoni. (HR Executive). He contended that the Claimant attended the hearing accompanied by Mr. Boniface Opondo who still works in the Respondent's Stores.

15. RW1 stated that the hairpieces found in the Claimant's bag were finished products ready for sale and belonged to the Respondent. He further stated that the Claimant was dismissed after the hearing and he was given an option of appealing but he did not. He stated that the dismissal letter cited the reason as being found with hairpieces in his bag without any authority. He further stated that the Claimant was paid terminal dues after the dismissal including salary for days worked plus leave earned.

16. On cross examination, he stated that he knew the Claimant through his file. He contended that the Claimant was never charged in court but instead he was taken through disciplinary process. He maintained that the Claimant was served with show cause letter on 26.1.2016 and the hearing was done on 28.1.2016. He stated that the Claimant attended the hearing with Mr. Opondo who was his colleague at the store.

17. He further explained that the disciplinary process involves service of show cause letter to the accused employee and after the response, the employee is invited to hearing in company of another employee of his choice. RW1 admitted that the show cause letter and the dismissal letter were not signed by the Claimant and contended that there was no place for him to sign. Finally, he contended that the Claimant was paid his leave every month as indicated in his payslips.

SUBMISSIONS

18. The Claimant submitted that his dismissal was unfair because the procedure provided under section 41 of the Employment Act was not followed. He reiterated that he did not know how the hairpieces entered into his bag and contended that he was not accorded any hearing or served with a show cause letter before the dismissal. He relied on **Donald Odeke v Fidelity Security Ltd [2012]eKLR** where Ndolo J held that failure to accord the employee a hearing renders termination of employment unfair.

19. In view of the foregoing submissions, the Claimant contended that he is entitled to the reliefs sought in the suit and prayed for judgment.

20. On the other hand, the Respondent submitted that the reasons for the dismissal was valid because the Claimant admitted that hairpieces were found in his bag. He relied on **Magdalene Ngea v NC & PB [2017]eKLR** where the court acknowledged that the employer must demonstrate a valid reason for dismissing his employer from employment.

21. As regards the procedure followed, the Respondent submitted that it complied with the provisions of section 41 of the Employment Act by giving the Claimant an opportunity to explain himself. It contended that after the dismissal the Claimant was paid his terminal dues. It therefore prayed for the suit to be dismissed.

ISSUES FOR DETERMINATION

22. There is no dispute that the Claimant was employed by the Respondent until 28.1.2016 when his services were terminated for gross misconduct. The issues for determination are:

- (a) **Whether the reason for the dismissal was valid and fair.**
- (b) **Whether a fair procedure was followed.**
- (c) **Whether he is entitled to the reliefs sought.**

REASON FOR DISMISSAL

23. The reason for dismissal was that pieces of Hair Piece belonging to the Respondent were found in the Claimant's bag during a routine check-up by security officer when the Claimant was leaving work on 23.1.2016 at 1 p.m. The Claimant never denied that the hairpiece was found in his bag. The hairpieces were from the Respondent's store where the Claimant was working. He did not give any satisfactory explanation as to how the hairpieces found their way into his bag. Therefore, I find that the Respondent has proved a valid and fair reason for dismissing the Claimant as required under section 43 and 45 of the Employment Act. The said offence amounts to stealing by servant, which justifies summary dismissal under section 44(4) of the Act which provides that an employer is entitled to summarily dismiss an employee who is suspected of committing a criminal offence against or to the detriment of the employer or employer's property.

PROCEDURE FOLLOWED

24. Section 41 of the Act required that before terminating employment contract of an employee, the employer shall first explain the reason to the employee in a language he understands, and in the presence of another employee of his choice. Thereafter the employee and his companion must be accorded a chance to air their representations which must be considered before the decision to dismiss is made.

25. The Claimant admitted that he was interrogated by the HR Manager and the Occupational and Health Officer about the hairpieces and how they ended up in his bag and he explained. Although he denied that he was not accorded a hearing within the meaning of section 41 of the Act, he did not object to production of the typed proceedings of the disciplinary hearing held on 28.1.2016, as exhibit. The said proceedings show that he attended the hearing in the company of his colleague Mr. Boniface Opondo who denied seeing any hairpieces on the material day although he worked with the claimant.

26. Having carefully considering the evidence and submissions presented by the parties, I am satisfied that the Respondent has proved that it accorded the claimant chance to defend himself before dismissing him and as such the dismissal was in accordance with a fair procedure as required under section 45 of the Act.

RELIEFS

27. In view of the findings that the reason for dismissing the Claimant was valid and that a fair procedure was followed, I declined to declare the dismissal as unfair and unlawful. For the same reason I find that the Claimant is not entitled to salary in lieu of notice and compensation for unfair termination.

28. As regards the claim for leave, I have considered the payslips produced as exhibits and I agree with the Respondent that the Claimant was paid in lieu of leave.

29. Finally, the claim for salary for January 2016 is declined because the Claimant admitted that he was paid Kshs. 7000 after the dismissal. I have perused the payslip for January 2016 and indeed it shows that the Claimant was paid his full salary for that month plus leave earned, less statutory deductions leaving a net pay of Kshs. 7921.42.

30. In the end, I find and hold that the suit lacks merit and it is dismissed with costs.

Dated, signed and delivered at Nairobi this 13th day of May, 2021.

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