



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 2623 OF 2016

JOHANA KIPNGENO CHEBORGEI.....CLAIMANT

VERSUS

BOB MORGAN SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. Johana Kipngeno Cheborgei instituted this claim vide a Statement of Claim dated 22nd December 2016 against Bob Morgan Services Limited for the unfair termination of his employment and refusal to pay his terminal dues. He avers that the Respondent offered him employment as a Security Guard on or about 1st January 2002 on a consolidated starting salary of Kshs. 10,685.40 per month which later increased to Kshs. 18,818.90 per month. The Claimant averred that he diligently worked for the Respondent until on or about 7th January 2016 when the Respondent terminated his services on allegations of gross misconduct. The Claimant averred that he then appealed against the summary dismissal on the ground that his lateness was caused by a vehicle transport challenge on the Mai Mahiu Road. The Claimant further averred that the Respondent terminated his employment without giving him any notice or letter to show cause why he should not be terminated and without affording him a fair hearing and that the Respondent has further refused to pay him salary arrears and other dues, contrary to the law and the principles of natural justice. He avers that the Respondent has also refused and/or neglected to reply to his appeal and to the County Labour Officer's requests to settle the matter and which thus resulted to filing of the suit herein. The Claimant seeks for payment of his terminal dues which include payment in lieu of notice, service gratuity, refund of unremitted NHIF and NSSF deductions and compensation. He prays for award and/or judgment against the Respondent for:

- i. A declaration that the Claimant's termination from his employment was unfair and wrongful;
- ii. The Claimant be paid his terminal benefits as set out in paragraph 9 hereinabove amounting to Kshs. 399,731 /-.
- iii. The Respondent be ordered to compensate the Claimant for unfair termination at the equivalent of twelve (12) months gross salary.
- iv. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
- v. Interest on the above at Court rates.

2. The Claimant further states in his Witness Statement dated 22nd December 2016 that the manner in which his termination was done was unfair as there was no sufficient reason to terminate his employment. He states that the suit herein has occasioned him tremendous financial loss and appeals to this Court to find that procedure was not followed in terminating his services.

3. The Respondent filed its Reply to Claim dated 18th June 2018 wherein it avers that the Claimant was not diligent in his duties, which is demonstrated by the non-performance letters, cautionary letters, warning letters and suspension from employment by the Respondent between the period of 29th August 2012 and 6th January 2016, as pleaded in paragraph 2.1 of the Reply to Claim. It further avers that in view of the Claimant's unexplained absenteeism, a disciplinary hearing was held which recommended the Claimant be dismissed from employment after considering his representation and that the Dismissal letter was accordingly issued. The Respondent averred that the Claimant's appeal was also considered where the dismissal was confirmed and that it fairly dealt with him considering it had given him a chance to improve without success. It asserts that it has acted and responded to the letters from the Ministry of Labour, Union and Labour Office and that the Claimant obtained his terminal dues after clearing with the employer as advised in his termination letter. The Respondent further averred that the Claimant was summarily dismissed on account of gross misconduct and is thus not entitled to notice pay or compensation having been afforded a fair hearing. Further, that service pay is not payable to the Claimant since he was a member of NSSF and that his NSSF & NHIF deductions were remitted without fail. It averred that the employment of the Claimant became untenable because of the element of poor performance despite trainings and accommodation and that his termination of employment was both procedural and

substantively fair. The Respondent also filed a Witness Statement by its Human Resource Manager, Dennis Michieka dated 3rd July 2018 who stated that the Claimant was issued with several warnings and attended several disciplinary hearings and trainings but failed to improve in his performance and commitment to work assignments. He further stated that the Claimant's lack of diligence and commitment often put the Respondent in conflict with its clients who raised complaints following the Claimant's absenteeism without lawful cause and authority. He further stated that the Claimant was given a hearing where he admitted his shortcomings and that the suit before Court is in bad faith because the complaints before the Labour Office and the Union are still pending determination.

4. The case was heard and the Claimant produced his filed documents in Court and adopted his statement. He testified before Court that when he was employed on 1st January 2002, he did not get a letter of employment until 2nd July 2009 when he was given an appointment letter. He stated that payment of the first sum of Kshs. 10,685.41 was made by cash and that after he was given the appointment letter he received 18,819.90 through the bank (Co-op Bank) and used to sign to acknowledge payment of the same. That he would also sign in and out of work and that all these records were kept by the company who did not allow him to access the same. He further stated that he had gone on leave on 5th December 2015 which was to end on 5th January 2016 but that the vehicle he was using while returning back to work broke down at Mai Mahiu and he called the Respondent to inform them of the same. He testified that however, he was given a termination letter on 7th when he reported and that he wrote an appeal letter and sought to be given a last chance. He also denied getting any letter inviting him for a disciplinary hearing. In cross-examination, the Claimant denied that he was on annual contracts and asserted that he got a print-out showing non-payment of NSSF which he also showed to the Respondent. He further admitted having not availed a copy of the statement of 2002 to 2007 and stated that the NSSF payments from 2009 to 2015 are not okay. He stated that after he went for 7 days re-training to improve in 2014, he never got any other warning until his dismissal and admitted that he went for only one retraining as he was late reporting to work. He denied that he had many warnings and stated that if indeed he was making many mistakes then he would have been dismissed before going on leave. He also stated that the Respondent did not attend meetings called by the Labour Office. The Claimant stated in re-examination that he never got any letter from the employer accusing him of any wrongdoing and that there is no evidence that he got a letter of non-performance as he would have signed. That the Respondent has not produced some of the letters it says it issued to him and he denied getting any suspension.

5. The Respondent's witness, Dennis Michieka who is the Respondent's current Chief of Staff adopted his statement and relied on the exhibits by the defence. He stated that the Claimant's performance had severely deteriorated in the last years before his termination and that there is no record of him giving any reason not to be at work when he failed to report to work. He said that when the Claimant failed to explain why he had failed to go to work on 6th January, the Claimant was given a disciplinary hearing and further stated that they finished all avenues of correction. He stated that the Claimant was a member of NSSF as seen on his payslips and that the Claimant did not produce any statement from NSSF showing the non-payment alleged. He referred to the letter dated 14th January 2016 at page 16 of the Claimant's Bundle, wherein the Claimant acknowledged and by virtue thereof was sent for refresher training.

6. In cross-examination, the Respondent's witness stated that they have an internal training school for all staff with no fees charged and that the warning letter issued to the Claimant for poor performance were acknowledged by him and is what they have on record. He denied that the Claimant told them he was travelling back and noted that the Claimant had been given 6 warnings before the 7th that led to his summary dismissal and further stated that the Claimant was given an opportunity on 7th to appear and defend himself. He admitted that the Claimant's appeal had no hearing but that they wrote to him on the determination.

7. The Claimant submitted that the Respondent did not have any justifiable reason to dismiss him and has further failed to prove it had a valid reason to dismiss him from employment as under Section 43 of the Employment Act. The Claimant submitted that the Respondent did not file in Court the warning letters it alleges to have issued to him and that he accepted at the hearing and through his letter for appeal dated 14th January 2016 of having been issued with warning letters between 2013 and 2014 which led to him being sent for retraining to improve on his performance. He further submitted that he testified in Court that he called the Respondent's Control Room to explain the motor-vehicle break-down and his explanation was accepted. That he however was issued with a summary dismissal letter on the 7th January 2016, the very day he reported back to work and that the Respondent alleged to have held a disciplinary hearing on 19th January 2016 after he had already been issued with a summary dismissal letter. That the alleged disciplinary hearing does not have his signature to confirm that he was truly invited to the hearing or that he attended and there was therefore no hearing afforded to him before he was dismissed. The Claimant submitted that contrary to Section 41 of the Employment Act, he was not given notice and inviting to a disciplinary hearing before the dismissal and that due process was therefore not followed before he was dismissed. It is the Claimant's submission that he was unfairly dismissed contrary to Section 45(2) of the Employment Act. He cited the case **Vincent Nyachibwede v Bob Morgan Services Limited** where the Court found the dismissal of the Claimant to be unfair and unjustifiable as there existed no valid reasons to the dismissal and fair procedure was not followed. The Claimant submitted that he is entitled to payment of one month's salary in lieu of notice as he was not issued with any notice by the Respondent prior to his termination. He submitted that he worked for the Respondent for 14 years and no payment of service gratuity was done when he was dismissed and that there is further no document produced by the Respondent to prove the contrary. That service gratuity payable under Section 35 of the Employment Act is at 15 days' pay for each completed year of service which he prays he be awarded for the years he served the Respondent. The Claimant further submitted that the Respondent ought to be ordered to submit on his behalf the unremitted NHIF and NSSF deductions for the period between 2002 and 2007. He also submitted that Section 49 as read with Section 50 of the Employment Act is to the effect that once it is demonstrated that the dismissal was wrongful or that the termination was unfair, the Honourable Court may award compensation to a maximum of 12 months gross salary. He prays for the award of costs and interest at Court rates as Demand letters were drawn and the Respondent vehemently refused to pay him his terminal dues and submitted that had the Respondent acted upon demand then this suit would not have been necessary.

8. The Respondent submitted that under Section 44 of the Employment Act, an employer is justified to summarily dismiss an employee who absents himself from work and thus neglects to do duties as allocated to him. That it is surprising that the Claimant chose to travel on 6th when he was expected to be at his place of duty and that one would have expected a diligent employee to be near his place of work by 5th January 2016 to enable him report on time on 6th January 2016. That there was certainly an unjustified absence from work and that absconding from work without lawful cause calls for disciplinary action as was confirmed in the case of **Ann Njoroge v Topez Petroleum Ltd [2013] eKLR**. The Respondent submitted that the Claimant did not raise any queries on the disciplinary meeting held on 7th January 2016 after he received the summary dismissal letter which made reference to the said hearing and that he further did not take advantage of the appeals process to contest the disciplinary meeting process. That this confirms that the disciplinary meeting was properly constituted and held and that it found the case for summary dismissal against the Claimant after considering his response to the show cause letter, the

disciplinary meeting and his work history. The Respondent submitted that it had indulged the Claimant for a long period, giving him warning letters and refresher trainings to no avail and that its committee comprising of the Respondent's officials and Union shop stewards also considered the Claimant's appeal on merit and sustained the summary dismissal. The Respondent submitted that the claims for notice pay and compensation should fail on the basis that a case for summary dismissal was established following the Claimant's unexplained absence from work without advance notice. It cited the case of **Rodgers Titus Wasike v General Motors E.A. Limited [2017] eKLR** where the Court held that a claim for compensation when the termination of employment is justified does not arise. The Respondent submitted that the claim for refund for NHIF and NSSF has not been established as no statement has been availed in support of the claims and that the said claims are time barred under Section 90 of the Employment Act. The Respondent relied on the case of **Hassanath Wanjiku v Vanela House of Coffees [2018] eKLR** where the Court held that under Section 35(6) an employee who is a member of NSSF is not entitled to service pay and that the said Court further held that even if no remittances had been made by the respondent, the claimant would still not be entitled to a refund of the same as both NSSF and NHIF have statutory and administrative structures to collect the same from defaulting employers, backed up by powers to prosecute and charge penalties for late payment.

9. The Claimant's case is that he was unfairly and wrongfully dismissed from employment by the Respondent while it is the Respondent's case that the Claimant was summarily dismissed for gross misconduct as under company's code of conduct and the Employment Act. The Respondent has based its decision to summarily dismiss the Claimant on previous cautionary and warning letters and him reporting back to work a day later. The Respondent produced the Claimant's payslips, correspondence with the Ministry and the Union, Minutes dated 19th January 2016, response to the Claimant's Appeal and an apology letter from the Claimant dated 3rd March 2016. Section 41 of the Employment Act 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 on 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."

10. Further, under Section 45 of the Employment Act, the employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure as under Section 41 of the Employment Act. This position was affirmed in the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the court held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. Further in the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** Mbaru J. held that:

"Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7)(c) of the Employment Act. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only."

11. The Court noted that the Minutes produced by the Respondent are dated 19th January 2016, a date which is after the Claimant had already been summarily dismissed vide a letter dated 7th January 2016 and which minutes the Claimant is not indicated as being present or having signed. In my considered view, the so called disciplinary meeting did not strictly comply with a fair procedure as required under Section 41 of the Employment Act as reiterated by the Court of Appeal in **Samsung Electronics East Africa Ltd v K M [2017] eKLR** where the Court of Appeal further held that the right of an employee to be heard before being terminated even if gross misconduct is alleged is imperative. The Respondent herein has miserably failed to demonstrate that it dismissed the Claimant procedurally as it should have accorded him an opportunity to defend himself before the summary dismissal. For this reason alone, this Court finds that the Claimant was unfairly dismissed from his employment by the Respondent contrary to Sections 41 and 45 of the Employment Act. It therefore follows that the Claimant is entitled to notice pay and compensation for the unfair dismissal. Further, the Respondent is mandated to keep employment records under Section 74 of the Employment Act and having alleged that it had issued several warning letters to the Claimant, it ought to have produced the same to this Court in support of its case. He who alleges must prove and in the absence of such proof, the Court's hands are tied.

12. As regards the claim for a refund of unremitted NSSF and NHIF deductions, the Court is persuaded by the holding in the case of **Hassanath Wanjiku v Vanela House of Coffees (supra)** that the same is not payable to the Claimant as both NSSF and NHIF have the statutory and administrative structures to collect the same. In the final analysis, there is entered judgment for the Claimant against the Respondent for:-

- i. One month's salary as notice pay
- ii. 6 months salary compensation for unlawful termination
- iii. Costs of the suit
- iv. A certificate of service
- v. Interest on i) and ii) above at Court rates from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JUNE 2021

NZIOKI WA MAKAU

JUDGE