



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC NO. 882 OF 2014

NELSON SIMIYU NYONGESA.....CLAIMANT

-VERSUS-

KENYA PIPELINE COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 27.5.2014 alleging that his employment contract had been unfairly and unlawfully terminated. The suit seeks the following reliefs:

- (a) General damages
- (b) 12 months compensation for wrongful dismissal
- (c) Reinstatement as per the law
- (d) Leave days earned but not utilized adding up to Kshs. 72,033.65/=
- (e) Retirement Benefits contributions adding up to Kshs. 126,353.3/=
- (f) Severance pay at a rate of 15 days for every year worked currently computed at (5) years 75 days adding up to Kshs. 128,632.5/= which he was entitled to as per the provisions of section 35(5) of the Employment Act 2007 of the Laws of Kenya.
- (g) Any other relief that this Honourable Court may deem it fit to grant.
- (h) Interest on all the above at Court rates.

2. The Respondent filed defence on 28.7.2014 denying the alleged unfair dismissal of the Claimant and averred that the action was justified. It averred that the Claimant's conduct of attempted theft from his employer fundamentally breached the contract of employment and it warranted summary dismissal. Therefore it prayed for the suit to be dismissed with costs.

EVIDENCE

3. The Claimant testified as CW1 and told the court that he joined the Respondent on 3.11.2006 as Technical Operator at Embakasi; that on 25.9.2011 while on night duty, he was arrested with other staff members on alleged theft of fuel; that he recorded statement at the police station and on 27.9.2011 he was charged in court with theft of petroleum product; and that on the same day he was released on bond and went to report the matter to his trade union.

4. He further testified that when he reached the union's office he was shown a copy of his dismissal letter dated 27.9.2011 citing the reason as misconduct. Thereafter he continued with the criminal case in court until 24.4.2012 when he was acquitted for lack of evidence, therefore he contended that his dismissal was unfair and unlawful because he was not served with prior notice nor was he accorded an opportunity to defend himself before the Disciplinary Committee.

5. He further testified that after the dismissal, he was only refunded part of his pension contribution. Therefore he contended that he is entitled to salary in lieu of notice, compensation for unfair termination, damages, service pay and any other relief the court may deem fit.

6. On cross-examination, he contended that he was never served with the dismissal letter but a copy was given to him at the union's office. He clarified that the reason cited for the dismissal was attempted theft. He admitted that the Respondent deals with petroleum products; the he was on night shift on 25.9.2011; and that Mr. Nyaga (RW2) was with him in the night shift that day.
7. He denied that Mr. Nyaga found him at V401 with a pipe attempting to steal petroleum products and contended that the place was guarded by police. He submitted that on 6.4.2011 he was suspended for alleged theft of petroleum product but contended that after the disciplinary hearing he was exonerated and reinstated to work.
8. Regarding the relief's sought he contended that he was entitled to 27 leave days per year and as at the date of separation he had 27 outstanding leave days. He admitted that he was a member of KPC Pension Scheme and also the NSSF.
9. On re-examination he reiterated that the disciplinary committee cleared him from the alleged theft and through the letter dated 30.6.2011, the suspension was lifted. He contended that he had no other disciplinary issue with the employer.
10. He further contended that his payslip for September 2011 indicated his outstanding leave as 42.5 days but he was not compensated for the same. As regards his pension, he contended that his pension statement dated 30.6.2010 indicated a balance of Kshs. 253,711.38 after which he continued remitting contributions till 27.9.2011 when he was dismissed.
11. The Respondent called its HR Manager, Mr. Ezekial Cheptumo as its first witness (RW1). He testified that on 25.9.2011 at 02.30 hours, the Claimant was suspected of attempting to steal from the company when he was found trying to connect pipe to the main Nairobi-Mombasa Pipeline. The action by the Claimant was first noticed electronically and Mr. Nyaga, a Supervisor went to the site and found the Claimant trying to connect the pipe from a lorry which did not belong to the Respondent.
12. He further testified that Mr. Nyaga reported to the police on patrol and the Claimant was arrested, questioned and thereafter charged in court. He went on to say that the Respondent did internal investigations and a report was prepared recommending for dismissal of the Claimant. Consequently the Claimant was dismissed vide dismissal letter dated 27.9.2011.
13. In his view, the Claimant was lawfully dismissed under section 44 of the Employment Act and the Collective Bargaining Agreement (CBA) and as such he is not entitled to the damages sought. He contended that the company lost trust in the Claimant due to the critical nature of its services and has since employed another person to replace the Claimant.
14. He further testified that the Claimant is not entitled to severance pay since he was a member of a pension scheme.
15. On cross-examination, he contended that paragraph 38 of the CBA provides for an option of either suspending an employee or dismissing him summarily. He admitted that the Claimant was not present during the internal investigations because he had been arrested and charged as at that time. He further admitted that Claimant was not invited to any disciplinary hearing before the dismissal. Again he admitted that the Claimant had been cleared from the previous disciplinary case. He also admitted that the Claimant was acquitted of the criminal charges by the court.
16. He contended that the dismissal letter acknowledged 25 leave days for the Claimant. He explained that the Claim for pension can only be pursued from the pension scheme. Finally he denied that the Claimant has been barred from accessing the office to do clearance.
17. **Mr. Samuel Nyaga testified as RW2** and told the court that he works for the Respondent as a Product Logistics Officer at Industrial Area; that in 2011 he was stationed at Embakasi as Senior Technician Operations; that on 25.9.2011 he received an alert from Controller that valve at PS9 V-401 was showing transit status; that he immediately rushed to V-401 where he found Claimant holding the valve 3 wheel and when he asked him what he was doing he responded rudely that he (RW2) was the one misbehaving. RW2 then checked around and saw a long hose pipe connected to the drain valve and leading towards the perimeter fence where it was connected to a packed white truck.
18. He went on to say that on realizing that something was wrong he feared for his life and ran to report the matter to the police at the gate house. The police arrested the Claimant and other persons and impounded the lorry. Thereafter he learned that the Claimant was dismissed. He contended that the dismissal of the Claimant was justified.
19. On cross-examination, RW2 admitted that he was a witness in the criminal case at Makadara Law Courts. He also admitted being aware that the Claimant was acquitted.

SUBMISSIONS

20. The Claimant submitted that his dismissal was done contrary to section 45 of the Employment Act and the rules of natural justice. He contended that he did not commit the alleged offence and he was not accorded a fair hearing before the dismissal. He relied on **Liz Ayany v. Leisure Lodges Ltd [2018]eKLR** where the court held that section 41 of the Act is clear minimum and mandatory provision in employment relationships which required that the employee must be given a hearing before dismissal for misconduct. He also relied on **Kenfreight (EA) Ltd v. Benson K. Nguti [2019]eKLR** where the Supreme Court emphasized on the obligation to follow the statutory procedure before dismissing an employee.
21. As regards the reliefs sought, the Claimant submitted that his dismissal was unfair and therefore he is entitled to reinstatement, compensation of 12 months salary as compensation for unfair termination, leave days not utilized, Retirement benefits and severance pay totaling to Kshs. 903,283.45.
22. On the other hand, the Respondent submitted that the dismissal of the Claimant was justified. It argued that its witnesses gave evidence

that placed the Claimant at the scene of the offence at pump station 9 and that a reasonable conclusion is that he was involved in the attempted theft. It further submitted that the 4 witnesses who testified in the criminal proceedings also placed the Claimant in the crime scene just as the independent investigations done by the Respondent.

23. The Respondent relied on **Thomas Sila Nzivu v. Bamburi Cement Limited [2014]eKLR** where the court held that the employer was not required to have conclusive proof of the employee's involvement, but just have reasonable and sufficient grounds for suspicion. According to the Respondent there existed reasonable and sufficient grounds to suspect the Claimant herein therefore warranting his dismissal since his action breach his contract of employment and the CBA.

24. The Respondent further relied on **Attorney General & Another v. Andrew Maina Githinji & Another [2016]eKLR** where the Court of Appeal held that an acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The Respondent maintained that the Claimant's action amounted to fundamental breach of obligation arising under the contract of service and that warranted summary dismissal.

25. As regards the procedure followed, the Respondent submitted that the Claimant was questioned by two investigating teams to appear before them but he failed to sufficiently explain what he was doing at the pump station 9, why valve V-401 was on, what the hose pipe connected to the drainage point was doing and who had connected it there. Consequently, according to the Respondents the Claimant was accorded an opportunity to defend himself in line with section 41(2) of the Employment Act and the principles of natural rule before his summary dismissal.

26. As regards the reliefs sought, the Respondent submitted that the Claimant is not entitled to general damages because it is not a remedy for a claim grounded on dismissal from employment.

27. Further, he submitted that the Claimant is not entitled to compensation for unfair termination contending that the dismissal was procedurally fair and the Claimant had failed to serve with integrity and loyalty. However, the Respondent urged the court to award 3 months' salary. if it finds that the dismissal was wrongfully done.

28. In addition the Respondent submitted that the prayer for reinstatement cannot issue now because three years have lapsed after the dismissal. It relied on section 12(3) (vii) of the ELRC Act for emphasis.

29. The Respondent also relied on clause 13(3) of the CBA to urge that the claimant was permitted to accumulate leave days save a maximum of 13 days with prior approval from the Managing Director. Consequently, it submitted that since the Claimant did not produce evidence of the said approval, the claim for accrued leave should fail.

30. The Respondent further opposed the claim for pension and submitted that the Claimant should purse the same with the KPC staff Retirement Benefits Scheme (KPCSRBS). As regards the claim for severance pay, the Respondent submitted that the same must fail because the Claimant was a member of the KPCSRBS and the NSSF.

ISSUES FOR DETERMINATION

31. There is no dispute that the Claimant was employed by the Respondent from 3.11.2006 to 27.9.2011 when he was summarily dismissed for gross misconduct. The main issues arising from the pleadings, evidence and submissions are:

- (a) Whether the dismissal was grounded on a valid and fair reason.
- (b) Whether the procedure was followed
- (c) Whether the Claimant is entitled to the reliefs sought.

The reason for dismissal

32. Section 45(2) of the Employment Act provides that termination of employment contract is unfair if the employer fails to prove that it was grounded on valid and fair reason related to the employee's conduct, capacity and compatibility or based on the operational requirements of the employer. Further section 43 of the Act puts the burden of proving the reason for termination on the employer in every legal proceedings challenging termination and in default, the termination is deemed unfair within the meaning of section 45 of the Act.

33. In this case the Respondent called 2 witnesses who confirmed that the Claimant was caught at Valve V – 401 at pump station 9. The valve was found open and a hose pipe connecting to a lorry packed outside the perimeter fence. The Claimant did not deny that he was caught at the said scene of crime. The Respondent contended that the circumstances led it to reasonably suspect and conclude that the Claimant was involved in the crime.

34. In **Thomas Sila Nzivo v. Bamburi Cement Ltd [supra]** the Court held that:

“The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under section 44(4) (g) of the Employment Act 2007. The Employer was not required to have conclusive proof of the Claimant's involvement; it was only expected to have reasonable and sufficient grounds.”

35. In the same way, I find that the Respondent was entitled to dismiss the Claimant after the witnesses placed him at the scene of the crime and he failed to give a satisfactory explanation to exonerate himself. Consequently, I proceed to hold that the Respondent has proved a valid and fair reason justifying the summary dismissal of the Claimant.

36. In my view the subsequent acquittal of the Claimant from the criminal charges on the related offence is immaterial because at the time of the dismissal the Respondent had a valid reason for dismissing the Claimant under section 44(4) (g) of the Employment Act. I gather support from **Attorney General & Another v. Andrew Maina Githinji & Another [2016]eKLR** where the Court of Appeal held that:

“An acquittal in criminal case does not automatically render an employee immune to disciplinary action by an employer for the reason that a criminal trial and an internal disciplinary proceedings initiated by an employer against an employee are too distinct process with different procedures and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make a decision that employer, going against the outcome does not by itself render the employer’s decision wrongful or unfair.”

The Procedure Followed

37. Section 41 of the Employment Act requires that before dismissing an employee for misconduct, the employer must explain the reason to him in a language he understands and in the presence of another employee or shopfloor union representative and then invite the two to make their representations which must be considered before the decision to dismiss is made.

38. In this case RW1 admitted that the Claimant was never invited to a disciplinary hearing before the dismissal. He further admitted that the Claimant was not present when the internal investigations were done because he had been arrested and charged in court with the criminal offence. Therefore I find that the Claimant was dismissed before being accorded a fair hearing as contemplated under section 41 of the Act.

39. It is now trite law in this country that if the employer dismissed an employee for a reason, he must accord the employee a fair hearing as required by section 45(2)(c) and 41 of the Act or else the termination is unfair within the meaning of section 45 of the Act. The foregoing view was sealed by the Supreme Court in **Kenfreight (E.A) Limited v. Benson K. Nguti[2019]eKLR** when it held that:

“Had the appellant complied with the requirements of section 41 and 45 of the Employment Act, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure the dismissal was found to be unfair, which we agree.”

40. Having found that the Respondent herein did not accord the Claimant a fair hearing before dismissing him, as required under section 41 and 45 (2)(c) of the Employment Act, I proceed to hold that the summary dismissal of the Claimant was wrongful, unfair and unlawful.

RELIEFS

41. In view of the foregoing holding I find that the Claimant is entitled to compensation for unfair dismissal under section 49 and 50 of the Employment Act. Since the Claimant contributed to the termination through misconduct, and that he had served the Respondent for only about 5 years, I award him 6 months salary as compensation for the unfair and wrongful summary dismissal.

42. In view of the foregoing award, the prayer for reinstatement is declined. In any case the same cannot be ordered now because under section 12(3)(vii) of the ELRC Act reinstatement cannot be ordered after the lapse of 3 years after the separation.

43. Likewise the prayer for general damages is declined because it has not been justified by the Claimant.

44. The prayer for leave lacks particulars and therefore, I award him the 25 days acknowledged by the employer in the dismissal letter dated 27.9.2011.

45. The claim for severance pay is dismissed because the termination was not through redundancy under section 40 of the Employment Act. In any case the Claimant admitted that he was a member of the employer’s pension scheme and the NSSF and therefore under section 35(6) of the Employment Act he is disqualified from claiming service pay.

46. Finally the claim for pension has not been contested but I agree with the Respondent that the proper forum to agitate for the same is not here.

47. In conclusion, I enter judgment for the claimant as follows:

(a) Compensation

Being Kshs. 85476.25 X 6 = 512,857.50

Leave being

Kshs. 40221 x 25/26 = 38674.04

TOTALKshs. 551,531.54

The said sum is subject to statutory deductions but the Claimant is awarded costs and interest at court rate from the date hereof.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF AUGUST, 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