



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 42 OF 2019

EVANZ MUNGASIA ANNOH.....CLAIMANT

VERSUS

SIERRA FLORA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 1st July, 2019 on the 5th July, 2019 through the firm of Kamoing and company advocates claiming unfair termination and unpaid terminal dues. He therefore sought for the following reliefs;

- a) A declaration be made to the effect that the claimant's termination was unfair as the same was not within the ambits of the Employment Ac.**
- b) The claimant be awarded 12 months compensation for the unfair termination as provided for under section 49 of the Employment Act.**
- c) The Respondent pay the claimant one month salary in lieu of notice.**
- d) The Respondent herein pay the claimant house allowance for the period worked.**
- e) The Respondent pay the claimant for working overtime.**
- f) The Respondent to issue the claimant with a certificate of service.**
- g) The Respondent to pay for damages and interest on all claims.**
- h) The claimant be awarded cost of the case.**
- i) The Court to grant any other order as it may deem necessary to grant.**

2. The Claimant avers that he was employed by the Respondent as a packhouse manager in grading department earning a basic salary of Kshs. 60,000/- which was gradually increased to Kshs 90,000/- by October, 2018.

3. He stated on 13th October, 2018, he was served with a termination letter and informed that his services were no longer required.

4. He averred that the termination of his employment was not conducted in accordance with the provisions of section 40 of the Employment Act.

5. The Respondent entered Appearance and filed a reply to memorandum of claim and counter-claim on the 25th September, 2019 admitting that the claimant was its employee who was employed on 2nd July, 2014 and on termination he was earning a salary of Kshs. 90,750/-.

6. The Respondent averred that prior to the summary dismissal the claimant was issued with a show cause letter dated 9th October, 2018 why disciplinary action should not be taken against him for market complains on poor head levels, damaged flowers, poor defoliation. Wrong labels on boxes, poor follow up on documentation, lack of follow up within department and lack of performance of bunchers in packhouse.

7. That the Claimant responded to the show cause letter on the 12th October, 2018, however a day later the directors of the company visited the company and noted all the complains were still existing leading to the suspension of the claimant on 13th October, 2018. Subsequently a disciplinary hearing was scheduled for 26th October, 2018 where the claimant was invited but failed to attend and the hearing was adjourned to 29th October, 2018 which hearing proceeded and the claimant defended himself.

8. That the outcome of the disciplinary hearing was to the effect that the claimant's services were terminated and the termination letter dated 2nd November, 2019 was served upon the claimant on the 5th November, 2019. the main reason for dismissal being failure by the claimant to perform the duties he was tasked with.

9. The Respondent stated that the Claimant's position was never replaced rather that they retained services of an assistant packhouse manager on 1st November, 2018.

10. That the Respondent received a claim from the labour office which was drawn by the claimant demanding for severance pay, overtime pay and house allowance which was denied by the Respondent and they were invited for a meeting at the county labour office on 27th February, 2019 to deliberate on the issues including house allowance which the Respondent called a witness who confirmed the claimant had been housed by the Respondent but left the house and gave to a supervisor and the only issue to be adjudicated upon was for payment of dues during suspension which the Respondent issued a cheque of Kshs. 48, 937/- being payments for the days between 13th October, 2018 to 2nd November, 2018. further that the Claimant terminal due of Kshs. 42,972/- was calculated less loans advanced.

11. He stated that on 4th April, 2019 the claimant account was erroneously credited with Kshs 48, 937 which amount was further paid by issuing a cheque to him which he encashed without disclosing that he had received similar sums of money in his account.

12. The Respondent thus counterclaimed for a refund of Kshs. 48,937/- erroneously paid to the claimant together with costs of this suit

13. The Claimant filed a response to the counter-claim and basically denied the contents of the defence and counterclaim and invited the Respondent to strict proof thereof.

14. The Claimant, Evans Mungasai, (CW-1) testified that when he was suspended, no investigations were carried out as alleged as no report was produced in Court. He stated that in the disciplinary hearing the gate keeper instructed him not to take anything with him to the hearing which act caused him his witness who could not adhere to the restrictions. He indicated that he was a good performer that earned him salary increase. On the house allowance he stated that they had offered to give him a single room when he is a married man with a wife and children and the one room was not convenient for them causing him to live outside the Respondent's premises. He testified that the respondent replaced him when he was in suspension. He agreed that he was given Kshs. 48,000/- at the labour office.

15. On cross examination he testified that the Respondent was to provide a house and in the alternative house allowance was to be paid. He stated that he was not given any job description and that the duties he was expected to perform were as per his C.V. he stated that he didn't disclose to court that the matter had been taken to the labour office as they did not agree. He admitted receiving Kshs. 48,000/-.

16. The Respondent called one witness, **Tom Walikhe (RW-1)**, the Human Resource manager at the Respondent, who sought to adopt his witness statement of 13th September, 2019 which basically reiterated the Response to the claim.

17. On cross examination, he testified that at dismissal the claimant was earning a salary of Kshs. 90,000 and that the pay slips do not indicate that the salary includes a house allowance. He affirmed that the claimant was paid during suspension but indicated that there was no evidence to affirm the same. He maintained that they carried out investigations and disciplinary hearing where the claimant was given an opportunity to defend himself and was allowed to come with a witness. He testified that the Claimant was given a room but did not take it or inform them that he could not stay in the house. He stated also that the Claimant was paid and he signed a settlement and contended that the Claimant erroneously received Kshs. 48,937 which has not been refunded to the Respondent which they are now counter-claiming.

Claimant's submissions.

18. The Claimant submitted that he was dissatisfied with the decision by the Labour office causing him to file this Suit and argued that the Court is the Final arbiter in labour dispute resolution and cited the case of **Kenya Plantation and agricultural workers Union –v- Mununga leaf base [2013] eklr.**

19. The claimant submitted that the Respondent did not provide him with a house and or house allowance during his tenure as an employee of the Respondent and therefore urged this Court to allow that prayer for house allowance from July, 2014 till his termination in October, 2018.

20. The Claimant submitted that from the circumstances he was unfairly terminated from employment and prayed to be given one month salary in lieu of Notice as per section 35(1)(c) and 49(1)(a) of the Employment Act.

21. The Claimant submitted further that the disciplinary hearing was not properly conducted as notices were not issued to him on time and the Respondent placed so many restriction causing him not to enter with his witness. He argued that the hearing failed to conform to the employment Act and cited the case of **Kenfreight (E.A) Ltd –v- Benson K Nguti [2019] eklr.**

22. The claimant also submitted that he was not paid for overtime worked and prayed that the court allowed the said prayer.

23. He concluded by submitting that he has made out a case against the respondent and prayed for the claim to be allowed as prayed.

Respondent's Submissions.

24. The Respondent submitted that the claimant was employed as a packhouse manager whose duties were indicated in the job description form which was attached to the letter of Appointment. He argued that the claimant failed to perform his duties causing it to issue him with a warning letter sometimes in 2016 which he confirmed during hearing having received the said warning letter and he improved his performance and introduced a system of labeling flowers as per the employee who parked to enable the Respondent easily identifying the employee who err.

25. He submitted that in the warning letter, the Respondent reiterated the Claimants duties which the claimant did not challenge then. Further that as per his C.V which claimant testified indicated his duties, is a replica of the duties the Respondent had listed in the job discretion form.

26. The Respondent therefore argued that the claimant failed to perform his duties as expected of him causing the Respondent to receive several complaints and rejection of flowers from customers that caused the Respondent to incur huge losses. That to remedy the situation the Respondent issue a show cause letter and conducted a disciplinary hearing which they found the Claimant guilty and the Respondent resolved to dismiss him from employment.in accordance with section 44(4)(c) and (g) of the Employment Act and cited the case of **Miriam Siwa –v- Kenya Post office savings Bank Limited [2014] eklr.**

27. It was submitted that the Claimant had earlier been warned against poor performance by the letter of 2nd February, 2016 for the same concerns which he changed and relapsed causing him to be dismissed from employment.

28. The Respondent Therefore submitted that it followed due procedure in the dismissal of the Claimants and prayed that the claim be dismissed and it's Counterclaim be allowed.

29. I have examined the evidence and submissions of the parties herein. The issue for this court's determination are as follows;

1. Whether there were valid reasons for the claimant's dismissal.

2. Whether due process was taken before the claimant was dismissed.

3. Whether the claimant is entitled to the remedies sought.

ISSUE NO. 1

30. The claimant was dismissed vide a letter dated 2/11/2018 which indicated that;-

“From the hearing findings, you are hereby summarily dismissed from employment for being in violation of Section 44 (4) (c) & (g) of the Employment Act 2007. The clause respectively states;-

“an employee willfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which from its nature it was his duty under his contract to have performed carefully and properly....

An employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property....”

31. Before this summary dismissal the claimant had been issued with a notice to show cause letter dated 9/10/2018 to explain why disciplinary action should not be taken against him. The issues raised against complainant were that there were market complains against bunching up to dispatch, mixed cut stages, poor head levels, very bad damages, rubber band levels, poor defoliating, wrong labels on boxes, other complaints were in relation to poor follow up, wrong documentation, wrong pack list, etc.

32. The claimant responded to this show cause letter vide a letter dated 12/10/2018 explaining himself and denying responsibility for the issues raised.

33. On 13/10/2018 the claimant was placed on suspension pending a disciplinary hearing. Subsequently a disciplinary hearing was scheduled for 26th October, 2018 but was adjourned to 29th October, 2018.

34. The respondent produced minutes of the hearing held on 29/10/2018. First and foremost the minutes are poorly done and do not explain what the issues that were put to the claimant were and his responses thereto. The minutes are not clear.

35. It is however true that the claimant was taken through a formal disciplinary hearing but whether the issues complained against herein were proved or not is not clear.

36. The claimant indicated in his evidence that he was not accorded a proper disciplinary hearing as he was not allowed to carry his documents.

37. This his however does not appear in the minutes because he presented himself and was heard. Having considered the exchange between the claimant and respondent, this court finds that the claimant was the respondent's packhouse manager. His duties and responsibilities were included in his appointment letter which were produced by the respondents.

38. It is also true that the complaints raised against the claimant are part of what was expected of him as per his job description.

39. In his response to the show cause issued to him, the claimant seemed to run away from these duties indicating that they were not his responsibilities. Section 43 of the Employment Act 2007 states as follows;

**“43. Proof of reason for termination
(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

40. Given that the reason for dismissal relate to the claimant's duties and which the respondents believed had not been performed, I find that the respondent had valid reason to dismiss the claimant from employment.

ISSUE NO. 2

41. On due process, I find the claimant was taken through a disciplinary process which he has not denied. He avers that he was not given enough time to respond to complaints raised against him and that he was denied an opportunity to present his documents and witnesses.

42. This is also not true as there are no complaints raised about this during the disciplinary hearing. I therefore find that the claimant was accorded a fair disciplinary process.

REMEDIES

1. Having found as above, I find that the claimant is not entitled to compensation as sought. It however emerged that the claimant was not housed by the respondents.

2. The respondents admitted that he had a house which he gave to his junior and this in essence means that he was not housed and neither was he paid house allowance.

3. I therefore find that the claimant is entitled to payment of house allowance as prayed from 2015 to 2018 as tabulated = 459,000/=.

4. As for the counter claim, the claimant admitted that he was paid 48,937 which he didn't refund to the respondent.

5. I therefore find the counter claim proved. I find in total the claimant is entitled to 459,000/= less the 48,937 awarded in the counter claim which totals now kshs.410,063/= less statutory deduction.

6. The respondent will pay costs of the claim.

DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF SEPTEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wachira for respondent – present

Maingi holding brief Owino for claimant – present

Court Assistant - Fred