



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.129 OF 2017

BONIFACE MUSYOKA KYAMBO.....CLAIMANT

VERSUS

DPL FESTIVE LIMITED.....RESPONDENT

JUDGMENT

I INTRODUCTION

1. The Claimant commenced this cause by way of a memorandum of claim dated 26th January, 2016 and filed in court on 1st February, 2016.
2. In his claim, the Claimant prays for;
 - (a) A declaration that the respondent's dismissal 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 totaling to Kshs.607,774/=.
 - (d) Interest on (c) above from date of filing suit until full payment.
 - (e) Costs of the suit.
3. Together with the memorandum of claim was filed a verifying affidavit, witness statement of the Claimant, and copies of documents that were produced as exhibits during the hearing.
4. On the other, upon being served, the Respondent entered appearance on 12th February, 2016 and subsequently filed a statement of defence dated 19th April, 2017 and filed in court on 10th May, 2017.
5. In their defence, the Respondent prayed for the dismissal of the claim with costs, stating that the dismissal of the Claimant by the Respondent was substantially and procedurally fair and that the same had been prompted by serious gross misconduct on the part of the Claimant. Together with the statement of defence the Respondent filed a list of documents, together with copies of the documents relied upon during hearing, and a witness statement.
6. After the close of the pleadings, the matter was certified ready for hearing and the same was heard virtually by this court on 9th August, 2021. Each side called one witness.
7. The gist of the cause is that the Claimant was an employee of the Respondent as a driver and was dismissed summarily on grounds of what the Respondent considered to be gross misconduct. The Respondent stated that the grounds for the dismissal were sound in law and that the proper procedure, also known as due process, was followed.
8. On the other hand, the Claimant states that the dismissal was unfair and unlawful both in substance and procedure.
9. Upon conclusion of the court hearing, counsel on both sides addressed the court by way of written submissions that were duly filed and served.

II ISSUES FOR DETERMINATION

10. This court has taken a considerable amount of time in sifting through the pleadings, oral and documentary evidence, and the arguments by counsel in written submissions.

11. In this court's view, the following issues are before court for determination;-

- (a) What period did the claimant work for the Respondent.
- (b) Was the dismissal of the claimant by the Respondent substantially and procedurally fair and lawful?
- (c) Is the Claimant entitled to the reliefs sought?
- (d) Who meets the costs?

III EMPLOYMENT

12. It is not contested that the Claimant was an employee of the Respondent. However, there is a dispute in respect of the period of employment. In paragraphs 3 and 4 of the statement of claim, the Claimant pleads that he was in the employment of the Respondent for the period from 27th June, 2014 to 29th August, 2015; a total of 14 months.

13. On the other hand, in paragraph 2 of the statements of defence, the Respondent is categorical that the Claimant was to work for the Respondent during the period between 30th October, 2014 and 30th October, 2015; but the Claimant was terminated in August, 2015.

14. Therefore, while both parties agree that the Claimant was dismissed on 29th August, 2015, they are not in agreement on the date when the employment contract commenced.

15. The answer to the question on when the Claimant commenced his employment with the Respondent is to be found in the contract of employment between the parties dated 30th October, 2014, executed by both parties and produced as exhibit 1 by the Respondent (RW1). The said contract is clear that the engagement was to be for one (1) year from 30th October, 2014 to 30th October, 2015. That position is further affirmed by the "leave and service pay form" executed by both parties and produced as exhibits 5 by the Respondent (RW1).

16. It is an established rule of evidence that oral testimony cannot reverse or contradict or rebut written evidence, unless under certain legally established exceptions, see Section 97 of the Evidence Act (Cap.80). The Claimant did not contest the contents of the said two written exhibits and did not object to their production.

17. In the circumstances, this court finds and holds that the Claimant was in employment of the Respondent as a driver for the period from 30th October, 2014 to 30th October, 2015.

18. From the evidence adduced, the contract did not run the entire period of 12 months because, as it is common ground, the Claimant was summarily dismissed on 29th August, 2015 on grounds of gross misconduct, after serving for only ten (10) months.

IV DISMISSAL – SUBSTANTIVE FAIRNESS

19. It is not contested that the Claimant was summarily dismissed on ground of alleged serious gross misconduct on 29th August, 2015 through a letter issued by the Respondent to the claimant on the same date, which was produced by the Respondent (RW1) as exhibit 4 and by the Claimant (CW1) as exhibit 3.

20. The Claimant alleges that the reason for the dismissal was false, inhumane, malicious, unfair, and illegal. The Claimant also attacks the procedure applied in arriving at the decision to dismiss him as irregular, unfair, unprocedural and unlawful. On the other hand, the Respondent maintains that it had sound legal ground for summarily dismissing the Claimant and that the procedure adopted was fair.

21. The alleged gross misconduct on the part of the Claimant as postulated by the Respondent in their pleadings, the oral testimony of RW1, and the written submissions, is that on 16th August, 2015 while on a route delivery to Mwiki within the County of Nairobi, that the Claimant stopped within Njiru area and siphoned out about 24 litres of diesel from motor vehicle KBP 838K that had been assigned to him.

22. Of course, the alleged conduct on the part of the Claimant amounts to theft by agent or employee, if proved in criminal proceedings. However, the Respondent did not report the matter to the police, but instead decided to deal with the same administratively as per the oral testimony of RW1.

23. The Claimant however, stated that he did not siphon fuel as alleged and that he stopped at Njiru area for about 10 minutes to ask for directions, as it was his first time making a delivery to Mwiki.

24. To support their position, the Respondent relied on computer generated readings of fuel sensor fitted in the subject motor vehicle. RW1 stated that between 14:44:19p.m and 14:45: 19p.m, on 16th August, 2015, while the vehicle was stationary at Njiru area the vehicle lost about 24 litres of fuel.

RW1 stated that the sensor was working properly and that the Claimant siphoned the fuel from the tank. RW1 stated that when the vehicle

was brought back to the yard, the pump attendants, who were not called as witnesses, noted that the motor vehicle had consumed too much fuel for a short trip of about 15km.

25. RW1 proceeded to state that the matter was subsequently investigated by a team headed by the Operations Manager, a Mr. Ngure, and that it was established that indeed fuel had been lost. Mr. Ngure was not called as a witness during the hearing.

26. The Claimant has maintained all along that he did not siphon fuel as alleged. He stated that he was not charged in court with the theft of fuel and that he only stopped at Njiru to ask for directions.

27. It is important to note that the report on the alleged investigations by the Respondent on the fuel theft was not produced in court and that the lead investigator, one Mr. Ngure, was not called as a witness. RW1 is not the fleet/Logistics Manager at the Respondent. She is not a computer engineer or a computer data analyst and as such, RW1's interpretation of the computer generated data cannot be that of an expert. And in any event, no criminal proceedings were filed in respect of the alleged theft of fuel by the Claimant which could have settled the matter on a higher standard of proof beyond reasonable doubt.

28. However, right from the time the Claimant returned the vehicle to the yard on 16th August, 2015, the Respondent held the position that the Claimant had siphoned about 24 litres of fuel from motor vehicle KBP 838K which had been assigned to the Claimant.

29. Section 44 (4)(g) of the Employment Act No. 11 of 2007 (the Act) provides that one of the situations that may amount to gross misconduct, so as to justify summary dismissal of an employee is if;

“(g) 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”.

30. It is the view of this court that the test provided to the employer in the above provision of the law is rather subjective than objective. If the employer reasonably and on sufficient grounds suspects that the employee has committed an offence against the employer or his property, then the law says that it is a good ground for summary dismissal for gross misconduct.

31. The Respondent through RW1 stated that they had reasonable grounds for suspecting that the Claimant had siphoned about 24 litres of fuel from the motor vehicle allocated to him. This is the same issue that was raised with the Claimant during the disciplinary hearing. RW1 stated that the Respondent decided to deal with the matter administratively rather than involving the police.

32. Lack of a criminal conviction is not a proof that the alleged theft did not take place. It is also noteworthy that the Claimant had other disciplinary issues with the Respondent as evidenced in a warning letter for absconding duty produced as exhibit 6 by the Respondent.

While the warning letter could cut both ways, that is to say, the Claimant may not have been the ideal employee, it could also infer an intention on the part of the Respondent to get rid of an employee who was not the most competent. Suffice to state here that the Claimant does not appear to have had a good relationship with the Respondent due to his bad disciplinary record.

33. But the issue here is whether the Respondent had reasonable grounds to suspect the Claimant of having committed an offence against the Respondent or their property. Although no investigation report was produced in court and no witness was called to adduce evidence on the findings of that investigations, the court is of the view that the Respondent had reasonable apprehension in suspecting that the Claimant had siphoned fuel as alleged. The evidence of RW1 was unshakable in that regard.

34. This court finds and holds that the Respondent had reasonable grounds in suspecting that the Claimant had committed an offence against the employer and their property, forming a good basis for disciplinary proceedings based on gross misconduct.

V. DISMISSAL – PROCEDURAL FAIRNESS

35. Having found that the Respondent had reasonable grounds to suspect that the Claimant had committed an offence against the Respondent and or their property, and hence the Respondent had legal foundation to taking disciplinary action against the Claimant, the court now turns to the issue of the procedure that the Respondent adopted in dealing with the issue or what is commonly referred to as procedural fairness or due process.

36. Section 41 of the Act provides the legal basis of due process in cases of misconduct. The provision of this law is to the effect that no matter how gross the misconduct is deemed to be the employee shall be notified in writing in a language that he understands of the particulars of the misconduct and then be given an opportunity to respond thereto.

37. Thereafter, the employee shall be invited for formal hearing where he has a right to be accompanied by another employee or a union official of his choice. The employer is under obligation to inform the employee of the above rights in the letter inviting him to the hearing. During the hearing, the employee is entitled to have the proceedings conducted in a language that he understands and any clarification sought should be provided to the employee to enable fair and just disposal of the hearing.

38. Section 41 of the Act must be read together with the relevant provisions of the Fair Administrative Actions Act and Article 47 of the Constitution of Kenya. The provisions in those Laws provides for the proper way of conducting such hearings based on the rules of natural justice and rule of law.

39. Of course a disciplinary hearing conducted by an employer against an employee is not a court trial and as such an employer does not have

to comply with the technical procedural formalities of a court trial. However, the employee must be accorded a fair and just opportunity to be heard and be presented with all evidence of his misconduct and be given an opportunity to respond thereto to the best of his ability. The employee should also be informed of his right to call witnesses, produce both oral and documentary evidence, and even present written submissions or dispositions.

40. The essence of disciplinary proceedings is to establish, with certainty, whether the employee has conducted himself in a manner that is so out of line that a disciplinary action need be taken against such an employee. It is wrong and unlawful for an employer to carry out disciplinary proceedings as a formality with a fixed mind on dismissing an employee. An employer should always leave that window that it is possible for an employee to prove his innocence during such disciplinary proceedings and be found innocent. Disciplinary proceedings are not and should not be used as a mechanical tool of dismissing employees.

41. It is now time to apply the above principles on the facts and evidence of this cause. First, there is no evidence from either party of a written notice addressed to the Claimant by the Respondent clearly stating the particulars of the alleged misconduct, inviting the Claimant to respond thereto in writing and inviting him for a hearing and informing him of his rights before, during, and after the hearing.

42. RW1 testifying for the Respondent produced as exhibits disciplinary proceedings dated 28th August 2015 (exhibit 3) and dismissal letter dated 29th August, 2015 (exhibit 4). In cross examination by counsel for the Claimant, RW1 admitted that there was no letter inviting the Claimant for the meeting and giving particulars of the alleged misconduct and giving the Claimant an opportunity to respond thereto and informing him of his legal rights as enumerated above.

43. It is by now clear that the Claimant was denied due process for the reasons that are clear. Procedural fairness is as important as substantive justice and while the Respondent may have had reasonable grounds of gross misconduct against the Claimant, the Respondent failed by not following the procedural steps that are vital in finding an employee guilty or otherwise, and which informed the Respondent to take the action that they took of summarily dismissing the Claimant. (see the holdings in the Walter Ogal Anuro Vs. Teachers Service Commission (2013) eKLR; and Loice Otieno Vs. Kenya Commercial Bank Limited (2013) eKLR)

44. In the circumstances, and in view of the multiple reasons given above, this court finds that the summary dismissal of the Claimant by the Respondent, and more so as contained in the letter of dismissal dated 29th August, 2015, was unfair, unlawful, and illegal.

VI RELIEFS

45. Prayers (b) and (c) of the memorandum of claim identify the reliefs sought by the Claimant in respect of terminal dues and damages for unlawful dismissal. The Claimant has consolidated his terminal benefits at Kshs.607,774/=. This court shall consider each of the items prayed for and assess if the same is awardable or not.

46. The copies of pay-slips attached to the memorandum of claim at page 8 thereof and which the Claimant relied on in his testimony are for the months of May and June, 2015. The gross salary reads Kshs.20,752/= and Kshs.23,617/= respectively. However, in his memorandum of claim the Claimant states that his gross salary by August, 2015 was Kshs.22,351/=. Since the Respondent has not disputed that Kshs.22,351/= was gross salary for the Claimant by August, 2015, the court shall go by that figure as the gross monthly salary.

47. The court now considers the following sub-heads:-

(i) One month's salary in lieu of notice:-

There is no evidence whatsoever that the Respondent issued a written notice to the Claimant before the dismissal or that any compensation was made therefor.

The court therefore has no difficulty in awarding this claim:-

$Kshs.22,351/= \times 1 = Kshs.22,351/=$.

(ii) Unutilized leave days:-

The Claimant stated that he did not go on leave for the entire period of ten (10) months that he was in employment of the Respondent.

However, as noted elsewhere in this judgment, the Claimant did not complete the 12 months contract that he was to work for with the Respondent. He worked for ten (10) months.

Page 2 of the contract between the parties, produced as exhibit 1 by the Respondent, indicate that the Claimant was to be paid for leave on prorata basis or take leave if the contract was to be renewed. Since the Claimant worked for only 10 of the 12 months of the contract, the court takes the view and holds that the most equitable and just way of compensating the claimant is for him to be paid on prorata basis as follows:-

$Kshs.22,351 \times 10/12 = Kshs.18,626/=$

(iii) Payment on overtime:-

The relationship between the parties is governed by the aforesaid contract, so long as the same does not contravene the Act or any other law, especially on the rights of both parties. This court has no business in re-writing the terms of the contract. In page 2 of the contract the issue of working hours is addressed.

However, in the pay-slips produced as exhibits by the Claimant, the court notes that there is no element of holiday and overtime allowances. The Claimant has not availed any documents, may it be pay-slips or any other to demonstrate that there was pending unpaid overtime or holiday allowances. No schedule of work attendance was produced to establish that there was indeed unpaid overtime allowance that is missing in corresponding pay-slips. In the circumstances, this court is unable to establish how and in what quantum the Claimant may be entitled to overtime pay. In other words the Claimant did not prove this claim and as such the court returns nil under this head.

(iv) Refund of security deposit:-

In the pay-slips produced in court by the Claimant as exhibits, it is indicated that a sum of Kshs.1,500/= was deducted as security deposit. Although it has not been explained by way of oral testimony as to what this deposit is all about, the court understands this to be some money held by the Respondent as a fallback in case an employee caused damage and or lost items belonging to the Respondent and left without compensating or being surcharged. If that be the case, then the Claimant is entitled to get back the said deposits.

As noted elsewhere in this judgment there is no proof that indeed the Claimant stole or siphoned the fuel as alleged. There was reasonable apprehension and suspicion on the part of the Respondent but the suspicion can only go as far as that. In the circumstances, the court finds that the Respondent is entitled to a refund of the said amount for the entire 10 months worked.

However, and for reasons that this court is not able to discern, the Claimant has only prayed for Kshs.1500/= and therefore the court awards that pleaded amount of Kshs.1,500/=.

(v) In paragraph 10 of the memorandum of claim, the Claimant prays for 12 months salary for the unlawful dismissal. However, this court finds this claim rather strange. While 12 months' gross salary is the maximum awardable under Section 49 of the Act, the answer to the amount awardable to the Claimant is to be found in the contractual relationship between the parties. The contract dated 30th October, 2014 was produced as exhibit 1 by the Respondent (RW1).

Under that contract, the Claimant was to work for the Respondent for 12 months and upon expiry thereof the parties would decide whether to renew the same or not. As to whether the contract would have been renewed, had the Claimant done the 12 months, this can only be a matter of speculation, but clearly the parties were not getting along well.

In the circumstances, the only constant factor is that at most, the claimant would have done two (2) more months under the contract.

Awarding the Claimant more than two months' gross salary would be unfair to the Respondent as the parties had voluntarily executed a contract for an engagement of 12 months.

The court therefore awards the Claimant two (2) months salary under this head as follows:-

Kshs.22,351/= x 2 = Kshs.44,702/=

48. This court wishes to make it clear that the "leave and service pay form" produced by the Respondent (RW1) as exhibit 5 does not discharge the Respondent from the responsibility of paying the due just because the Claimant did not complete the contract period of 12 months. No evidence was adduced to demonstrate that the same had been settled before or during the pendency of this cause.

V. AWARD AND DISPOSAL

49. In disposing this matter the court awards and orders as follows:-

(a) The court issues a declaration that the Respondent's dismissal of the Claimant and from employment was unlawful and unfair for lack of procedural fairness also known as due process.

(b) The Claimant is awarded the following against the Respondent:-

- | | |
|---|-----------------|
| (i) One (1) month's gross salary in lieu of notice | - Kshs.22,351/= |
| (ii) leave allowance on prorata basis | - Kshs.18,626/= |
| (iii) Refund of security deposit | - Kshs.1,500/= |
| (iv) Compensation for unfair and unlawful dismissal | - Kshs.44,702/= |

TOTAL Kshs.87,179/=

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This amount shall attract interest at count rates from the date of judgement till payment in full.

(c) On the issue of costs, the Claimant is awarded costs based on the orders made in this judgment and the same may be agreed or taxed.

DATED, DELIVERED, AND SIGNED AT NAIROBI THIS 17TH DAY OF SEPTEMBER 2021.

DAVID NDERITU

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by COVID-19 pandemic this Judgment has been delivered via microsoft teams online platform.

A signed copy will be availed to each party upon payment of court fees.

DAVID NDERITU

JUDGE