



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2311 OF 2016

ERIC GICHURU THIGA.....CLAIMANT

VERSUS

UNGA LIMITEDRESPONDENT

JUDGMENT

I. INTRODUCTION

1. By way of a statement of claim dated 16th November, 2016 the Claimant initiated this cause seeking various remedies as set out therein including one month's salary in lieu of notice, accrued leave (16 days), house allowance, compensation for unfair termination, an order to compel the Respondent to remit statutory deductions, certificate of service, costs and interest.
2. In a statement of defence dated 26th January, 2017 the Respondent denied liability in toto and prayed that the Claimant's cause be dismissed with costs.
3. The Claimant's case is that he was employed by the Respondent vide a letter dated 26th January 2015 as a trade marketing representative; the employment took effect from 3rd February 2015. Subsequently, the Claimant was summarily dismissed on 25th August, 2016 on ground of gross misconduct based on alleged misuse of motor vehicle KBQ 693C which had been allocated to the Claimant by the Respondent as a tool of work.
4. The Claimant takes the position that the dismissal was wrongful both in substance and the procedure adopted by the Respondent in arriving at the decision of summary dismissal.
5. On the other hand, the Respondent takes the position that it took all the appropriate legal steps in arriving at the decision to summarily dismiss the Claimant based on law both in substance and procedure, also known as due process.

II. THE HEARING

6. On 23rd September 2020 the cause was certified ready for hearing and the hearing proceeded on 28th July 2021 before this Court when the Claimant (CW1) testified alone in support of his cause and the Respondent called one witness (RW1) in support of the Respondent's position.
7. The Claimant relied on his filed witness statement and documents filed, and the same for the Respondent, each witness supporting their case as pleaded in the memorandum of claim and the statement of response respectively. Upon conclusion of the oral testimonies, counsel for both parties addressed the Court via written submissions.

III. ISSUES FOR DETERMINATION

8. Counsel for both parties in their written submissions are to a large extent in agreement on the issues for determination and the Court frames the issues for determination as follows:-

- a) Was the dismissal of the Claimant from the employment of the Respondent substantially and procedurally lawful and fair?
- b) If the dismissal was wrongful, what relief is the Claimant entitled to?

c) Who bears the costs of this cause?

IV. THE DISMISSAL

9. There are two important facets in assessing the fairness and lawfulness of termination or dismissal. The two aspects are on substantive and procedural fairness. On substance, the reasons for dismissal have to be tested as to whether they are valid, fair and reasonable based on law. On procedure the test is whether the employer afforded and accorded the employee a fair hearing leading to making of the decision to dismiss; see the decisions in Walter Ogal Anuro Vs. Teachers Service Commission [2017]eKLR and Peter Matata Vs. Midland Energy Limited [2017]eKLR, among other cases.

10. In this cause, the Claimant's case is that he was wrongfully dismissed for the reason that the reason for the dismissal lacked merit in law and that the procedure adopted was not in accordance with the law. Simply put, the Claimant is attacking the substance of the charges against him by the Respondent as well as the procedure that was applied in arriving at the decision to summarily dismiss him.

V. SUBSTANTIVE FAIRNESS

11. Section 44(3) of the Employment Act (the Act) provides that an employer may summarily dismiss an employee who "has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service." Section 44(4)(g) of the Act provides that one of the circumstances that may amount to gross misconduct is if "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."

12. Section 45 of the Act provides on what constitutes unfair termination, both in substance and procedure. In summary, this section provides that the reasons for termination or dismissal for that matter should be valid, fair, just and equitable. The procedure adopted must be fair based on principles of fair hearing and natural justice. Section 41 of the Act further reinforces the requirements on fair procedural steps that an employer should adopt before dismissing or terminating an employee.

13. Sections 43 and 47 of the Act place burden on both the employer and the employee to discharge their respective burdens in causes of an alleged unlawful termination or wrongful dismissal. In Bamburi Cement Limited Vs. William Kilonzi [2016] ekLR, the Court of Appeal described section 47(5) as providing for "shared burden, which strictly speaking amounts to the same thing." In other words, each of the parties has to plead and prove their respective positions if the Court is to rule in their favour.

14. Applying the foregoing provisions and principles to this cause, the Respondent asserts that the Claimant was summarily dismissed for the misuse of the motor vehicle allocated to him and fuel by making unauthorised trips outside his allocated jurisdiction without official permission. The Respondent also alleges that the said motor vehicle was used in ferrying unauthorised goods and even passengers.

15. From the pleadings filed, the oral testimony, and the written submissions the Respondent is relying on section 44(4)(g) as the substantive basis for the summary dismissal of the Claimant. While there is no evidence that any criminal charges or complaints were filed against the Claimant for the alleged misconduct, the Respondent alleges that the misconduct was to the substantial detriment of the Respondent and the subject property.

16. In the statement of response to the claim, the Respondent alleges that the Claimant was in gross violation of the contract of service and therefore in gross misconduct for the reason of, *inter alia*, driving the allocated motor vehicle out of jurisdiction without permission, allowing the said motor vehicle to be driven by an unauthorised person, allowing the said motor vehicle to carry unauthorised persons and goods. In their pleadings, the Respondent alleges that the above misconduct occurred between 30th June 2016 and 20th August 2016.

17. The Respondent posits that the alleged misconduct on the part of the Claimant amounted to gross misconduct that warranted the disciplinary proceedings leading to the summary dismissal. When the said misconduct is weighed against the provisions of section 44(4)(g) of the Act, prima facie, the said misconduct discloses serious violations on the part of the Claimant against the property of the employer, the Respondent. This is so because if true, the Claimant placed the property of the Respondent in grave danger of damage and or deterioration for self-enrichment. This could amount to the offence of stealing by agent if proved or unjust enrichment. Certainly, the said motor vehicle used was paid for by the Respondent and as such the Claimant occasioned needless losses to the Respondent.

18. But did the Claimant engage in the gross misconduct as alleged by the Respondent? The Claimant testified to the effect that on all the alleged instances, except for the trip to Naivasha on 30th June 2016, the said motor vehicle was driven by a workmate. He also stated that even for the Naivasha trip he explained the circumstances under which he drove the motor vehicle to Naivasha when there was poor transport on offer. He alleged that his explanation was accepted by the Respondent.

19. However, the Claimant did not offer an explanation in his testimony as to how the motor vehicle was allocated to him by the Respondent ended up in the hands of a co-worker who allegedly drove it out of jurisdiction ferrying unauthorised goods and passengers. The Claimant failed to produce any document, or policy, authorising him to release the motor vehicle to a co-worker. The Respondent further alleges that the motor vehicle was driven outside the official hours hence placing the property in the said motor vehicle under threat of theft or even damage. The Respondent produced photographs of the said motor vehicle ferrying oranges to unknown destination and driven by unauthorised person.

20. Part 7 of the letter of appointment dated 26th January, 2015 clearly indicates that the said motor vehicle was allocated to the Claimant as a working tool. This clearly informed the Claimant that the motor vehicle was only to be used for official purposes and that he was solely responsible for the use and operations of the said motor vehicle. While it has not been agreed as to whether the Claimant received a copy of the company motor vehicle usage guidelines or not, it was equally the responsibility of the Claimant to read and understand the said guidelines the same having been mentioned as one of the guiding policies in paragraph 7 of the letter of appointment.

21. Other than stating that the motor vehicle was driven, except to Naivasha, by a co-worker the Claimant has not proved that such release of the motor vehicle was approved by the Respondent. In any event the Claimant duly executed the letter of appointment on 2nd February, 2015.

22. Further, would it be reasonable for the Claimant to submit that it was okay to let unauthorised person drive Respondent's vehicle allocated to him for official use? Would it be reasonable for the Claimant to allow unauthorised person to use his official car to ferry unauthorised goods and passengers? No reasonable person would consider such conduct to be right and employees ought to be reasonable in their conduct and execution of their duties.

23. Section 44 of the Act provides that the matters listed therein are not conclusive and or exclusive of any other matters that an employer may consider to constitute gross misconduct leading up to summary dismissal. The Claimant apologised for his conduct, acknowledging that he did not measure up to the expected standards as far as the use of the motor vehicle was concerned.

24. This Court finds and holds that the Claimant's handling and usage of the official motor vehicle, as enumerated above amounted to gross misconduct and that the Respondent had substantive legal basis upon which to mount disciplinary proceedings. The Claimant had, prima facie, conducted himself in a manner that gave the Respondent reasonable and sufficient grounds to suspect that the Claimant had either committed an offence against the Respondent or acted in a manner detrimental to the property of the Respondent. This Court holds that the standard set in Postal Corporation of Kenya Vs. Andrew K. Tamu [2019]eKLR and Pius Machafu Isindu Vs. Lavington Security Guards Limited[2017]eKLR have been met by the Respondent.

VI. PROCEDURAL FAIRNESS – DUE PROCESS

25. Having found that the Respondent had reasonably sufficient grounds to subject the Claimant to disciplinary proceedings for gross misconduct, the next fundamental issue is whether the Claimant was taken through a fair and just hearing in accordance with all applicable laws. The starting point as far as labour relations and rights are concerned is article 41 of the Constitution on fair labour practices. Article 47 further expounds on right to fair administrative action, which is the basis for right to fair hearing and due process. This is the constitutional foundation of the Fair Administrative Actions Act. The right to a fair hearing and due process in employment is further affirmed by sections 41 and 45 of the Employment Act.

26. What then amounts to procedural fairness or due process in matters employment? The following ingredients, though not exhaustive, spell out the items for consideration in determining whether an employee has been subjected to due process:-

- (i) The employee must be informed, in a language that he understands, the reason(s) for which the employer is considering termination or dismissal.
- (ii) The employee must be informed of his right to come along with a co-worker or a representative from his union during the hearing;
- (iii) The employee must be informed of his right to make written and or oral dispositions before and during the hearing;
- (iv) The employee must be informed of his right to call witnesses in support of his case;
- (v) The employee must be informed of the procedure to be adopted during the hearing;
- (vi) The employee must be informed of his right of appeal once the decision is made and any other avenue for his recourse;
- (vii) The employee must be given and accorded adequate notice and time to prepare for the hearing.
- (viii) For avoidance of ambiguity and for clarity of issues, all the foregoing information should be in writing, in a language that the employee understands and served upon the employee personally.

27. While the above list is not exhaustive, the same illustrates the burden that the law and best practice places on the employer to ensure that an employee is properly heard and handled before a decision is made on whether to dismiss or not. In an economy such as ours, jobs are not easy to come by at whatever level and as such the legislature deliberately made sure that before dismissal an employee is subjected to the most fair procedure based on the constitutional and legal provisions alluded to above.

28. The procedure adopted by the Respondent in this cause must and now be weighed against the above scales to determine if the Claimant was subjected to procedural fairness or due process. In the Walter Ogal Anuro Vs. Teachers Service Commission [2013]eKLR; Kenfreight [E.A] Limited Vs. Benson K. Nguti [2016] eKLR; and Loice Otieno Vs. Kenya Commercial Bank Limited [2013]eKLR, and many other decisions, courts have emphasised on the mandatory need of employers to subject employees to procedural fairness before arriving at dismissal or any other decision affecting the status of an employee and the employment relationship.

29. Procedural fairness is a mandatory requirement in the employer arriving at the right decision no matter how gross the employer considers the misconduct to be. This position again has been erucidated by courts in decisions including Jared Ainiba Vs. Fina Bank Limited [2016]eKLR and Donald Odeke Vs. Fidelity Security Limited [2012]eKLR that the Claimant's counsel has relied on.

30. The disciplinary proceedings against the Claimant by the Respondent commenced by way of a "show cause form" dated 22nd August 2016, produced as exhibit 3 by the Respondent. In section A of the said form, where the offence/accusation and the timeline required for the

response is to be indicated, the supervisor to the Claimant wrote as follows:-

“Explain in detail the usage of vehicle KBQ 693 C (under your custody) on 20th August 2016 in line with all the provisions in Unga Limited vehicle use policy by 22nd August 2016 C.O.B.”

31. Essentially, this is the notice that was issued to the Claimant by the Respondent. The Claimant had been called upon to explain the usage of the motor vehicle allocated for a particular date, 20th August 2016. There is no mention that the Respondent intended to take action based on the expected explanation and there is no allegation of an offence or accusation. Again, the “show cause form” was issued on 22nd August 2016 and the Claimant was expected to respond thereto on the same day by close of business. Surely, can this be taken to be a fair process? The Court returns that the notice was not proper and the same was defective on several counts, that is lack of clarity in terms of the offences or accusations, lack of adequate notice to enable the Claimant to respond appropriately, and more fundamentally the notice does not bring to the attention of the Claimant that this would form the basis for disciplinary proceedings and the likely consequences including dismissal.

32. What followed the show cause notice is an email posted to the Claimant by the Respondent through Ojwando Anderson sent out on August 23rd 2016. That email invited the Claimant for a disciplinary hearing on 25th August 2016 at 7.30 a.m. It is important to note that while the show cause form only asked for an explanation on the usage of the motor vehicle, the email invited the Claimant for a disciplinary hearing. It is logically clear that by the time this email was sent out to the Claimant he had already responded to the show cause form as per section B of the same, wherein he had apologised and explained that he was not the one driving the vehicle out of jurisdiction but a co-worker.

33. The proceedings of the disciplinary hearing were produced as exhibit 5 by the Respondent (RW1). In page 2 of the proceedings, it comes out clearly that the issues deliberated on during the disciplinary hearing went far beyond what the Claimant had been invited to explain in the show cause form.

34. In the show cause for, the Claimant had been called upon to explain the usage of the subject motor vehicle on 20th August 2016. Based on the supervisor’s explanation, the Claimant was now confronted with new and specific charges concerning: -

-Driving out of territory without approval;

-Vehicle driven by unauthorised person;

-Driving out of the allowed timelines;

-Vehicle carrying unauthorised “ foreign” goods;

-Mis-use of company resources – vehicle and fuel.

35. The above rather specific allegations had not been addressed to the Claimant in the show cause form and as such the Claimant, for the first time now, was confronted and ambushed with the new charges and accusations. While it is indicated that the Claimant admitted all the charges and even apologised, this cannot be understood to be fair procedure. The Claimant was not given an opportunity and time to respond to the new specific charges. The Respondent ought to have disclosed those specific charges to the Claimant and even invited him to respond thereto in writing well ahead of the hearing. This ambush cannot be said to be and does not amount to fair hearing or due process.

36. The Claimant categorically stated that the motor vehicle was driven by a co-worker. While that by itself does not exonerate the Claimant, there is no evidence of the Respondent calling the said co-worker to the proceedings to explain his side of the story or to any other disclosed forum or proceedings.

37. Fair hearing ought to be in accordance with the rules of natural justice, besides the constitutional and statutory provisions alluded to earlier on. The disciplinary proceedings ought to be fair, just, reasonable and equitable. Such proceedings should not be undertaken to rubber-stamp an already pre-determined outcome. It is clear that during the hearing, other extraneous issues that had not been disclosed to the Claimant came up for discussion and debate including other unauthorised trips that the Claimant had made (see last page of the proceedings).

38. On the same date, 25th August 2016, the Claimant was dismissed vide a letter of same date. The letter of termination was produced as Respondent’s exhibit 6. The said letter does not address the fact that the Claimant had apologised for his actions and whether such admission was a mitigating factor. Of more concern though, is that the decision to dismiss the Claimant was made on the same day of disciplinary hearing. There are no minutes exhibited on how the decision was arrived at and what factors were considered. The letter on dismissal does not inform the Claimant of his rights on appeal, review, or any other recourse.

39. For the foregoing reasons, this Court concludes that the Respondent approached the proceedings with a pre-determined mind aimed at dismissing the Claimant no matter what was submitted during the hearing. While this Court is clear on the right of an employer to discipline employees, such disciplinary process and proceedings must be carried out strictly in accordance with the law, otherwise the Court shall intervene and declare the same unlawful and unfair.

40. It cannot be coincidental that on the same day that his disciplinary hearing took place, the Claimant was issued with a dismissal letter. It cannot also be coincidental, that the Claimant was not informed of his right to internal mechanism on appeal, review, or any other recourse.

41. This Court finds and makes the conclusion that while the Respondent had reasonably sufficient grounds to consider disciplinary action against the Claimant, including sufficient grounds for dismissal, the Respondent failed to follow the law in according the Claimant procedural fairness and due process. Therefore, this Court finds that the summary dismissal of the Claimant by the Respondent was procedurally unfair and unlawful.

42. There is also no evidence on record that the Respondent took the Claimant through the Code of Business Conduct & Ethics Policy or indeed that the Claimant was issued with a copy thereof during his employment so as for him to be guided accordingly on motor vehicle usage policy. There is no evidence of the Respondent training the employees, including the Claimant, on the motor vehicle usage policy. There is no evidence of the Claimant signing for receipt of a copy of any of the policy guidelines including Human Resources Manual.

43. It is important for an employer to clearly demonstrate that they have done all that is necessary in helping the employees to understand policies, guidelines, manuals, and other procedures, before accusing the employees of violating or abusing the same. It is one thing to write on the letter of appointment that the employee shall be supplied with copies of such important documents on one hand, and a completely different thing to prove that the employees have read and understood the same or that they have been trained on the same. The Respondent failed to discharge this responsibility.

V. RELIEFS

44. The reliefs that this Court can grant are found in section 49 as read with section 50 of the Act. Section 12 (3) of the Employment and Labour Relations Court Act No. 20 of 2011 further illuminates on the remedies.

45. Having found that the Claimant was not subjected to due and lawful procedural fairness leading to his dismissal, this Court must now deal with the issue of remedies available to the Claimant and the quantum thereof. In the memorandum of claim dated 16th November, 2016 the Claimant prays for:-

- a) One month salary in lieu of notice - Kshs.94,470.00;
- b) Accrued leave (16 days) - $Kshs.94,470.00/24 \times 16$ days – Kshs.62,980;
- c) House allowance - (for entire period), 1 year and 5 months at 15% of the basic salary ($94,470.00 \times 15\% \times 12 \times 1.5$ years/ is Kshs.255,069.00;
- d) Compensation for unfair termination equivalent to 12 months' gross pay – $Kshs.94,470.00 \times 12$ is Kshs.1,133,640.00;
- e) An order to compel the Respondent to fully remit the Claimant's statutory deductions up until the Claimant's date of termination to wit: pay as you earn (PAYE), National Hospital Insurance Fund (NHIF) contributions, National Social Security Fund (NSSF) contributions;
- f) Certificate of service;
- g) Any other relief as the Court may deem just to grant.

46. The Court now proceeds to deal with each of the reliefs sought as hereunder:

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

In paragraph 4 of the memorandum of claim the Claimant pleads that as at the time of his dismissal he was earning a gross salary of Kshs.94,470.29. This figure has not been disputed in the statement of response. There is no evidence that the Claimant was issued with a notice or payment in lieu thereof. In the circumstances the Court finds that this relief is merited and awards the same in the sum of $Kshs.94,470.29 \times 1 = Kshs.94,470.29$.

(ii) Accrued leave (16 days):-

Again, this claim is not denied by the Respondent notwithstanding that the same is clearly pleaded for in the memorandum of claim. The Respondent has not specifically disputed the same either in the oral testimony by the Respondent (RW1) or even in the written submissions. However, the question is whether the Claimant was able, on a balance of probability, to demonstrate and prove that he had 16 days of leave pending. This is because in paragraph 26 of the response to the memorandum of claim, the Respondent has put the Claimant to strict proof of the reliefs sought. This Court takes the position and finds that the Claimant has not established that he had 16 days of leave pending as at the time of dismissal. The Claimant had legal avenues of demanding that the Respondent provides records to demonstrate that he had such leave days pending. This claim is hence denied as it has not been proved to the required standard.

(iii) House allowance:-

Clause 4 of the letter of appointment, produced as exhibit 1 by the Respondent, describes the salary payable to the Claimant as consolidated. There is no evidence adduced in respect of the breakdown of the consolidated salary. No payslips were produced to confirm whether or not the house allowance component was taken care of in the so called consolidated salary. Be that as it may, section 31 of the Act provides that an employer shall provide reasonable accommodation for an employee or in the alternative pay house allowance which is calculated at 15% of the pay. This relief is awarded as hereunder:

15/100 x Kshs.94,470/= x 26 months = Kshs.368,433/=.

(iv) Compensation for unfair termination:-

Section 49(1)(c) of the Act caps the maximum compensation under this head at 12 months gross salary as at the time of dismissal. Section 49(4) outlines factors to be taken into account when making any award or relief.

The Court has already found that the Respondent had reasonably sufficient grounds to take out disciplinary proceedings against the Claimant for the gross misconduct in misuse of the allocated motor vehicle. That is certainly a factor that would affect the quantum of compensation. In fact, had the Respondent followed the law in the procedural aspect the Court would have found in favour of the Respondent. That is the essence of section 49(4)(k) as the Claimant contributed towards his dismissal due to his gross misconduct. In the circumstances the Court awards the Claimant two months gross salary as compensation as follows:-

Kshs.94,470/= x 2 Kshs.188,940/=. This amount is subject to statutory deductions:

- (v) On statutory deduction to the relevant authorities, the Respondent has no reason not to remit the same and it is ordered to do so, upto the time of dismissal.
- (vi) Certificate of service is not contested and the Respondent should have no reason not to issue the same under section 51 of the Act. The Respondent is ordered and directed to comply and issue the same within seven (7) days of this judgement.
- (vii) On costs, the Claimant is awarded costs of this cause based on the award; the same may be agreed or taxed.

VI. AWARD AND DISPOSAL

47. In disposal of this cause the Court issues the following orders:-

- a) A declaration be and is hereby made that the dismissal of the Claimant by the Respondent was wrongful and unlawful for lack of procedural fairness and due process;
- b) The Claimant is awarded the following:
 - (i) One month's salary in lieu of notice – Kshs.94,470.29;
 - (ii) Unpaid house allowance – Kshs.368,433.00;
 - (iii) Compensation for unfair termination – Kshs.188,940.00;

TOTAL - Kshs.651,843.29.

This amount shall earn interest at Court rates from the date of this Judgment till payment in full.

- c) The Respondent be and is hereby ordered to remit to the relevant bodies all statutory deductions from the Claimant upto the date of dismissal. This shall be done within thirty (30) days of this judgement.
- d) The Respondent be and is hereby ordered to issue the Claimant with a certificate of service in accordance with section 51 of the Employment Act.
- e) The Claimant is awarded costs of this cause based on the award made, the same to be agreed or taxed.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 10TH DAY OF SEPTEMBER 2021

DAVID NDERITU

JUDGE