



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 1603 OF 2017

EVANS ACHWEYA.....CLAIMANT

VERSUS

IMPALA GLASS INDUSTRIES LTD.....RESPONDENT

JUDGMENT

1. This claim arises from an alleged unfair termination of the contract of service between the Claimant and the Respondent. The Claimant, who was summarily relieved of his duties by the Respondent, contends that the termination was unfair. The Respondent contends otherwise.
2. The Claimant filed a Statement of Claim. In the statement, the Claimant asserts that he was employed by the Respondent in November 2010 as a general worker. That he rose through the ranks to the position of a machine operator.
3. The Claimant asserts that on 27th June 2017 he was assigned the work of polishing glasses. However, since he was not very sure of his capacity to execute the work, he asked his supervisor, one Thomas Opelle, to assign him some other work.
4. According to the Claimant, although he had polished glasses before, it had been sometime since he did this work. He therefore required some refresher lessons before he could competently execute it.
5. The Claimant asserts that the supervisor declined his request. This prompted him to ask to see the human resource (HR) personnel in order to pursue his request.
6. When he went to the HR, the Claimant asserts that he was issued with a notice to show cause why his services should not be terminated for alleged insubordination. He was invited to a disciplinary session the following day.
7. The Claimant asserts that on the 28th June 2017, he was run through a predetermined disciplinary process before being handed a dismissal letter. That he was not given a fair chance to defend himself.
8. As a consequence, the Claimant prays that the court grants him the following reliefs:-
 - a) Payment of salary in lieu of one month notice.
 - b) Payment for accrued leave.
 - c) Payment of compensatory damages equivalent to the Claimant's 12 months gross salary.
 - d) Issuance of a Certificate of Service.
 - e) Costs and interest.
9. The Respondent filed a response to the claim. In the response, the Respondent asserts that the Claimant defied lawful orders to work when he refused to take the instructions by his supervisor. That this constituted misconduct on the part of the Claimant. That the Claimant was therefore issued with a notice to show cause why disciplinary action should not be taken against him for disobeying a lawful command.
10. That the Claimant was heard on 28th June 2017 before the decision to terminate his contract of service was arrived at. That in the

disciplinary session, the Claimant was accompanied by an employee of his choice and a shop steward.

11. That the Respondent found the Claimant's explanation for declining to work unsatisfactory since all employees, the Claimant included, had been trained to use all machines at the work place. That to the Respondent, the Claimant's actions were merely acts of defiance which constituted gross misconduct. And hence the decision to terminate him.

12. At the trial, the parties adopted their respective statements. They also produced copies of the documents attached to their respective lists of documents as exhibits. This was in addition to their oral testimonies. I should say that their testimonies reiterate their standpoints in the pleadings.

13. At the close of their respective cases, the parties filed their written submissions. The submissions reiterate their respective positions on the matter.

14. Having looked at the pleadings on record, listened to the parties and read their submissions I find that certain issues are not in dispute. These are:-

a) That the Claimant was employed by the Respondent at the time that is material to this cause.

b) That the Respondent terminated the Claimant's services on 28th June 2017.

15. What is disputed is the following:-

a) Whether the termination of the Claimant's contract of service was fair and just.

b) Whether the Claimant is entitled to the reliefs sought in the Statement of Claim.

16. I have carefully gone through the evidence on record. It is clear to me that on 27th June 2017 the Claimant was issued with work instructions by his supervisor to polish glass. That he declined these instructions and asked to be assigned some other work.

17. While the Claimant contends that his decision was prompted by his fear that he may fail to properly execute the works as he had not worked with the glass polishing machine for long, the Respondent states that the Claimant was trained to operate this machine and was familiar with it. Therefore, his actions were basically acts of defiance.

18. When the Claimant was asked whether he had received training on how to run the polishing machine and whether he had in fact used it before, he answered in the affirmative. RW1 also testified that the Claimant, just like all other employees, had been trained on how to operate all the machines at the workplace. This was not contested by the Claimant.

19. From his own evidence, the Claimant indicates that on 27th June 2017, his department's supervisor called a work allocation meeting with members of the Claimant's department. Roles were allocated to employees at this meeting.

20. In his own words, the Claimant did not request to be reassigned during the meeting. Rather, he waited until the meeting was done. This is when he asked to be given some other assignment.

21. This is rather baffling. It would have been easier and logical to have the request processed at the meeting instead of waiting until after the meeting when roles had already been allocated. This should probably explain the supervisor's reaction to the Claimant's request when he referred him to the HR.

22. To my mind therefore, the Claimant declined to take up work assignment he had been trained to execute. He knowingly declined to take a lawful command from his supervisor.

23. Refusal to take lawful commands from one's employer is a ground for gross misconduct within the meaning of section 44 of the Employment Act. And the law does not suggest that for such act to qualify as an act of gross misconduct, it must comprise of more than one incident.

24. From the evidence on record, I find that the Respondent had reasonable grounds to believe that the Claimant had declined to take lawful instructions from his supervisor. This is in agreement with the edict of section 43(2) of the Employment Act. That this ought to be the position has been restated by this court in *Evans Kamadi Misango v Barclays Bank of Kenya Limited [2015] eKLR* when the learned judge observed as follows:-

“To my mind, the burden placed on the employer by Section 43 is to demonstrate a valid reason which would cause a reasonable employer to terminate the employment of an employee.”

25. There is also evidence on record that the Respondent issued the Claimant with a charge sheet on 27th June 2017. This is contained in the notice to show cause letter dated 27th June 2017 and produced in evidence by the Claimant.

26. The letter clearly sets out the accusations the Respondent had leveled against the Claimant. It also clearly indicates that the Respondent intended to accord the Claimant a chance to respond to those accusations.

27. The notice also informs the Claimant of his right to appear at a disciplinary session the following day accompanied by an employee of his choice. Finally, it indicates that the session was to be held at 2 pm in the HR office.

28. On 28th June 2017, there is evidence that the Claimant attended the disciplinary session accompanied by shop stewards, Mr. Julius Omenda and Mr. Cosmas Mwambu. The record of the proceedings was produced by the Respondent in the form of minutes. This was not contested by the Claimant.

29. From the record of the disciplinary proceedings, there is an employee called Evans Anyanje (Review 3 pay// 675) who corroborates the Respondent's assertion that the Claimant declined to take up the assignment he was given on 27th June 2017. This evidence again was not contested by the Claimant.

30. From the record, the Claimant was then issued with the termination letter later on the afternoon of 28th June 2017. It is this termination that he now challenges.

31. In the Claimant's view, he was not given a fair chance to defend himself. In his submissions, the Claimant states that by this, he meant that the time between the commission of the alleged offense and disciplinary hearing was so short as not to afford him an opportunity to defend himself.

32. I have considered the evidence on record. It is clear that the disciplinary session was called for 28th June 2017 at 2pm. This information was communicated to the Claimant on 27th June 2017.

33. It may be that the process was speedily executed this does not of itself suggest impropriety. For me, a day was not unreasonable for the Claimant to answer to charges relating to events that had occurred the previous day. In any event, the record shows that he attended the session with trade union representatives who did not raise the issue of inadequacy of time to prepare their case. And neither did the Claimant.

34. The record shows that the Respondent complied with the procedural requirements of section 41 of the Employment Act in processing the Claimant's case. I may as well have wished that the proceedings should have been delayed for a while but those would be my feelings. They cannot be the basis for me to substitute the employer's right to discipline workers with my own views.

35. The law does not fix timelines for convening and conducting disciplinary sessions after commission by an employee of an act entitling an employer to terminate a contract of service. To my mind, this must be governed by what is reasonable in the eyes of the ordinary man on the street. And I don't think that what the employer did in the cause fails to meet the test of reasonableness.

36. On this Linnet Ndolo J had this to say in *Evans Kamadi Misango v Barclays Bank of Kenya Limited [2015] eKLR*:-

“It is not the role of the Court to re-enact the internal disciplinary process already undertaken at the workplace. The responsibility of the Court is to examine the legality and reasonableness of the action taken by an employer against an employee and if the set standards are satisfied, then the Court will not interfere.”

I think that the above observation is apt. I fully adopt it.

37. Determination

For the above reason, I find that the claim herein is unmerited. Accordingly I dismiss it with costs to the Respondent.

Dated, signed and delivered on the 10th day of September 2021

B O M MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

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.

B O M MANANI

JUDGE