



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 919 OF 2017

HARUN MUSEE PAUL.....CLAIMANT

VERSUS

BIASHARA SELECTION LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant commenced the instant suit vide a statement of claim dated 16th May, 2017 through which he avers that he was employed by the respondent sometimes in December, 2012 as a salesman. He averred that he served in the said position with loyalty, devotion and dedication until on 20th March, 2017 when he was unlawfully terminated by the respondent. The claimant seeks several reliefs including a declaration that his termination was wrongful and unfair, terminal benefits and certificate of service.

2. The claim was disputed through the respondent's response dated 5th June, 2017 and through which it averred that the claimant was terminated procedurally on account of negligence, misconduct and using insulting language towards his supervisor. The respondent further averred that the claimant was offered an opportunity to explain his misconduct but instead, he demanded for his terminal dues and stormed out of his work place, never to return. The respondent thus prayed that the claim be dismissed with costs as it had no outstanding liability with the claimant.

Claimant's case

3. The matter proceeded for hearing on 6th August, 2021 and both sides tendered oral evidence.

4. During the hearing, the claimant adopted his witness statement as part of his evidence in chief. He also sought to rely on his bundle of documents which he produced as exhibits before court. It was the testimony of the claimant that he was employed by the respondent sometimes in 2012 but he could not recall the exact date. That at the time he was terminated, he was earning a monthly gross salary of Kshs 25,000/=.

5. The claimant informed court that on 20th March, 2017, at around 10 am, he was summoned by the respondent's director, one Mr. Anil, who informed him that he had received information that he had been on his mobile phone since morning. That Mr. Anil asked him to leave the respondent's premises immediately and report back the following day.

6. He denied the allegations levelled against him and stated that in any event, the respondent had not prohibited use mobile phones at the workplace. The claimant also denied using abusive language towards his supervisor.

7. It was the testimony of the claimant that he was later called by his supervisor that same afternoon and asked to go and collect his terminal dues which had already been worked out. He averred that he was not given a show cause letter nor a hearing, hence his termination was unprocedural. He also stated that he had never proceeded on leave the entire period of 2017 and that he was not allowed to proceed on paternity leave when he became a father in February, 2017. He prayed that his claim be allowed as prayed.

Respondent's case

8. The respondent called two witnesses to testify on its behalf. Mr. Savita Vishram testified as RW1. He stated that he was the claimant's supervisor. He averred that the claimant was not terminated. He told court that the claimant was on his mobile phone while there were many customers in the shop who waiting to be attended. That when he was told by his supervisor to get off his mobile phone, he became very rude and abusive towards him. That all attempts to cool down the claimant failed and that he kept insisting for immediate payment of his terminal dues.

9. In cross examination, RW1 admitted that the claimant was a good employee and that he had not been involved in any disciplinary issue before. He also stated that the claimant triggered his own termination as he left on his own volition.

10. Mr. Kritul Dave testified as RW2. He adopted his written statement as part of his testimony in chief. He also produced the documents filed on behalf of the respondent, as exhibits before court.

11. He testified that on 20th March, 2017, he was called to the main shop and was informed that the claimant had been on his mobile phone the whole morning. That when asked, the claimant became rude and used abusive language towards him. He denied that the claimant was terminated and that instead, he was the one who demanded for his terminal dues and left his workplace in a huff. RW2 also admitted that the claimant was a good employee hence he was surprised by his behavior on that particular day.

Submissions

12. Both parties filed written submissions. On his part, the claimant submitted that the respondent terminated him for no reason at all and that in doing so, did not comply with the provisions of section 41 of the Employment Act. In support of his submissions, he cited the cases of **Kabenge Mugo vs Syngenta East Africa limited, Industrial Cause No. 1476 of 2011** and **Nicholas Otinyu Muruka vs Equity bank Limited (2013) eKLR**.

13. The respondent in its submissions, maintained that the claimant was not terminated and that he left employment on his own volition though there were good reasons to terminate him and which reasons he was aware of.

Analysis and determination

14. The issues arising from the pleadings, the evidence on record and rival submissions by parties, can be distilled as follows;

a) **Whether the claimant's termination was unfair and unlawful?**

b) **Whether the claimant is entitled to the reliefs sought?**

Whether the claimant's termination was unfair and unlawful?

15. The claimant alleges that he was ordered to leave the respondent's premises on 20th March, 2017 upon being accused of misconduct. The respondent through its witnesses, averred that the claimant was indeed guilty of the allegations levelled against him and that he left the respondent's premises on his own volition.

16. The particulars of the claimant's alleged misconduct were that, he was on his mobile phone during the entire morning of 20th March, 2017 and upon being told to get off the phone, he used abusive language and was rude to his supervisor.

17. On its part, the respondent has denied terminating the services of the claimant. This notwithstanding, it has annexed a document dated 20th March, 2017 titled "*termination of services*" which contains the computation of the claimant's dues. The said document is addressed to the claimant. It also contains the following words at the bottom "*The above-named person has no further claims whatsoever from the employer and the firm*".

18. Essentially, though not stating in explicit terms, the employment relationship was severed at that juncture.

19. **Section 43(1)** of the Employment Act requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair. **Section 45 (2)** of the Act further provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.

20. There are numerous authorities from this court and the Court of Appeal restating the above statutory provision hence I will not belabor the issue. For instance, the Court of Appeal in the case of **Chairman Board of Directors (National Water Conservation and Pipeline Corporation) v Meshack M. Saboke & 2 others, Nairobi Civil Appeal No. 241 of 2015**, the Learned Judges rendered themselves thus;

"In light of the above provision, termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair. Section 43 of the Employment Act deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45. The reason for termination of contract is the matter 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..."

21. Accordingly, the respondent bore the legal burden to prove that there were reasons to terminate the services of the claimant and that such reasons were fair and valid. Such reasons constitute matters the respondent genuinely believed to exist at the time of the termination.

22. Though RW1 and RW2 advanced reasons constituting the circumstances leading to the claimant's exit from its employment, there was no documentary proof to the effect that such reasons existed at the time and that the claimant had been notified of the same. Besides, the "*termination of services*" letter did not provide any reason for the termination, it merely provided a computation of the claimant's dues but its effect was to completely sever the employment relationship.

23. Besides, the allegations levelled against the claimant if proved, constitute gross misconduct under **section 44(4) (d)** of the Employment

Act and is indeed, a ground for summary dismissal. The respondent as an employer therefore had all the right to commence disciplinary action against the claimant on account of the alleged misconduct. Its hands were not tied. Instead, it elected to compute the claimant's terminal dues and let him go.

24. Over and beyond proving reasons for termination, the respondent was by law required to accord the claimant fair hearing. Indeed, section 45(2) of the Employment Act provide that a termination will be deemed unfair if the employer fails to prove that the same is in line with fair procedure.

25. The process towards fulfilling the requirements of fair hearing is stipulated under section 41 of the Employment Act. It requires an employer to notify an employee of the reasons it is considering terminating his services. Such reasons ought to be communicated in a language the employee understands and in the presence of another employee or a shop floor union representative.

26. In the instant case, the respondent has admitted that no such process was undertaken since the claimant left his workplace in a huff. These assertions notwithstanding, the respondent was obliged by law to act prudently and comply with the requirements of fair hearing.

27. In this regard, it should have notified the claimant of the reasons it was considering terminating his services and accorded him an opportunity to respond to the allegations. Instead, it prepared the "*termination of services*" document, computed his benefits and severed all ties with him.

28. Needless to say, the respondent is at fault for want of compliance with the laid down procedure.

29. The totality of the foregoing is that the respondent has not proved that the claimant's termination was within the threshold set by law, hence I find that the same was unfair and unlawful.

30. Having found that the claimant's termination was unfair, I now proceed to consider the reliefs available him in the circumstances.

Reliefs

31. The claimant has sought various reliefs against the respondent including salary in lieu of notice, prorated leave pay for 2017, salary for days worked in March, 2017, service pay for 4 years, paternity leave and compensatory damages for unlawful termination.

One month's salary in lieu of notice

32. Under Section 44(2) of the Employment Act, an employer is prohibited from summarily dismissing an employee without notice or with less notice. Further, section 35 (1) (c) of the Act provides for a mandatory one month notice where an employee is on a monthly salary as the claimant herein.

33. It is not contested that the claimant left the respondent's employment on 20th March, 2017 and on the same date, it prepared the "*termination of services*" document which was addressed him. It is therefore apparent that the claimant was terminated without notice as by law required. Further, there is no prove that the claimant was paid salary in lieu of notice hence I find that he is entitled to the same.

Unpaid leave

34. The claimant has prayed for compensation of untaken leave days for the year 2017. His contract of employment provides that he was eligible to 21 leave days per year. Taking that into account and upon proration, the claimant had earned 5.25 days as leave as at 20th March, 2017. The leave schedule which was produced as part of the respondent's documents indicate that the claimant took 21 days leave in the month of February, 2017. The respondent conceded in its submissions that this leave was in respect of the year 2016, meaning that the claimant was yet to take any leave in the year 2017. Therefore, I find that the claimant is entitled to unpaid leave in respect of the period worked in 2017.

Paternity leave

35. The claimant has averred that he was not allowed to proceed on paternity leave in February, 2017 when he became a father. He attached a copy of a birth notification to that effect. The respondent has contended that the claimant did not apply for the requisite leave as required under the Employment Act. The claimant stated that he notified his immediate supervisor of the same whereafter he took leave for 6 days which were later deducted from his terminal dues. The claimant did adduce any evidence to prove that he notified the respondent of his intention to proceed on paternity leave. In the case of **Hamisi Madzungu v Pride Inn Hotels & Investment Limited [2017] eKLR**, the court held as follows;

"The Claimant was not able to show that he made an application for paternity leave, and provided the Respondent with evidence that he was a new Father...The existence of a notification of the birth of a Child, without evidence that such notice has been availed to the Employer, is not sufficient to warrant an order for paternity leave pay."

36. I fully adopt the above finding. The claimant ought to have produced in court some form of evidence to prove that he notified the respondent of the fact that he had just become a father, hence needed to proceed on paternity leave. In absence of such proof, this prayer cannot succeed.

Salary for 20 days worked in March, 2017

37. The respondent has conceded this prayer hence the same is awarded.

Service Pay

38. The claimant has prayed for service pay in the sum of Kshs 50,000/= in respect of the period he worked for the respondent. **Section 35(6)** of the Employment Act provides that service pay is only payable to employees who are not members of any pension scheme, provident fund or the National Social Security Fund (NSSF). The Income Tax Deductions Card from the Kenya Revenue Authority (KRA) which was produced as part of the claimant's exhibits indicate that a monthly deduction of Kshs 200/= was being made from his salary towards "retirement contribution". This proves that the respondent was remitting contribution towards the claimant's retirement benefits.

39. The claimant submitted that the respondent did not produce the appropriate NSSF statements to prove that it indeed remitted the NSSF deductions. Be that as it may, nothing prevented the claimant from producing his NSSF statements to justify his claim. After all, it is his claim before Court and it was in his best interest to provide all the necessary evidence to prove that he is entitled to service pay as claimed. This he failed to provide, hence the claim under this head falls.

Compensatory damages

40. The claimant has prayed for compensatory damages in the sum of Kshs 300,000/= which is equivalent to 12 months gross salary. Having found that the claimant's dismissal was unfair, I will award him compensatory damages equivalent to two months' gross salary. This award has considered the length of the employment relationship.

Certificate of service

41. The claim under this head is not contested hence I find that the claimant is entitled to a certificate of service pursuant to the provisions of section 51(1) of the Employment Act.

Orders

42. In the final analysis, I enter Judgment in favour of the claimant against the respondent in the following terms;

One month's salary in lieu of notice	24,428.00
Salary for 20 days worked in March, 2017	16,285.00
Compensation equivalent to 2 months' gross salary	48,856.00
Unpaid leave for 2017	<u>4,274.90</u>
Total	<u>93,843.90</u>

43. The award shall attract interest at court rates from the date of Judgment until payment in full.

44. The respondent shall also bear the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF OCTOBER 2021.

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STELLA RUTTO

JUDGE

APPEARANCE:

FOR THE CLAIMANT MR. NJURU

FOR THE RESPONDENT MR. S.N NG'ANG'A

COURT ASSISTANT BARILLE SORA

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)

(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE