



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

CAUSE NO. 465 OF 2016

DISMAS MAENDE OSICHE.....CLAIMANT

VERSUS

DAMBUSTERS [DAMBUSTERS BAR & RESTAURANT] LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Through his memorandum of claim dated 22nd March, 2016, the Claimant has sued the Respondent herein seeking for the reliefs brought out in the memorandum, namely;

- a) **A declaration that the Respondent's aforesaid action to summarily dismiss the Claimant from employment was unlawful and unfair.**
- b) **A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.**
- c) **An order against the Respondent to pay the Claimant his due terminal benefits and compensatory damages totaling of Kshs. 727,066.**
- d) **Interest on[c] above from the date of filing suit till payment in full.**
- e) **Cost of this suit plus interest thereon.**

2. Upon being served with the Claimant's pleadings, the Respondent entered appearance and filed a memorandum of reply to the Claimant's memorandum. There was consequently a joinder of issues and therefore a path drawn for this matter to be heard on merit.

3. This matter came up for hearing on the 28th September, 2021, despite having been served with a court process to attend Court for the hearing, the Respondent was absent. This, Court got satisfied that the service had been effected and consequently directed that the matter proceeds the absence of the Respondent notwithstanding. The Claimant moved the Court to deem his, witness statement herein filed, dated 22nd March 2016 his evidence in chief, and the documents that he filed alongside the Memorandum of claim, exhibits. The documents were, a pay slip, work attendance sheet [01.03.2015-31.03.2015], application for leave forms, a hand-written letter dated 15th April 2013, a burial permit, and a demand letter.

The Claimant's Case.

4. The Claimant stated that he came into the employment of the Respondent on 2nd February 2011, as a security guard. The Respondent deployed him in this capacity at Dambusters E.A. Bar and Restaurant. The Respondent dismissed him summarily from his employment on the 1st September, 2015. At the time of the dismissal, the he was earning Kshs. 14,000.

5. The Claimant stated that on the 13th day of 2015, he reported for duty as usual when he was informed that his mother had passed on, this constrained him to seek for permission to go home to participate in the burial arrangements. He filled an application form dated 14th August, 2015, for this purpose. In exercise of due diligence and prudence, he sought for his colleague's concurrence to step in for him during his absence from duty.

6. He further stated that he proceeded home for the matter afore stated on the 15th August, 2015, and upon his return on the 1st September, 2015, the Respondent's Managing Director directed him to write a letter whose nature the Claimant was "not aware of." The Respondent's Managing Director sent him home, telling him never to report back. The Claimant states that this action was without reason as

none was given to him. The manager indicated that there was no more work for him. After this the Respondent did not bother to pay him his terminal dues.

The Claimant's Submissions.

7. The Claimant's counsel submits that this amounted to constructive summary dismissal, which was not in accord with the provisions of the law, the principles of natural justice and the tenets of fair labour practices. He cites two issues as the issues that present themselves for determination in this matter, namely, was fair procedure applied before dismissing the Claimant? and Is the Claimant entitled to the prayers sought?

8. It was submitted that Section 43 of the Employment Act requires an employer to provide reasons for the termination of an employee's employment. The duty to prove the reasons for termination lies on the employer. Further that if the employer defaults in proving the reason[s] for dismissal, the termination or dismissal shall be deemed unfair within the meaning of Section 45 of the Act.

9. Nothing has been placed before this Court to show the reasons for the termination of the Claimant's employment. The Respondent did not tender evidence before Court to support the contents of its pleadings. Finding comfort in the decision in **Stanley Mwangi Gachungu & Another vs. Barclays Bank of Kenya [2019] eKLR**, Counsel states that where no witness is called on behalf of the defence, the evidence tendered on behalf of the plaintiff remains uncontroverted.

10. It was further submitted that before termination of an employee's employment or summarily dismissing an employee, the employee must be given an opportunity to defend himself, it matters not the nature of the grounds prompting the employer's intention to terminate or dismiss. In support of this submission counsel cites Justice Ndolo's holding in **Donald Odeke vs. Fidelity Security Ltd, Cause Number 1998 of 2011**. That the procedure provided under section 41 of the Employment Act was not adhered to by the Respondent.

11. On the reliefs, it was submitted that this was a typical case of unfair termination. That there was not notice issued to the Claimant before his employment was terminated. Therefore, he is entitled to a one month's salary in lieu of notice under the provisions of section 36 as read together with section 35, of the Employment Act.

12. It was further submitted that the Respondent testified that throughout his employment with the Respondent, he worked on public holidays without compensation thereof. Further that the Claimant worked daily f 4 extra hours, contrary to the 8 hours recognized by law. Faced with this allegation, it was onus upon the Respondent to counter the Claimant's evidence as required by section 10 & 74 of the Employment Act, 2007.

13. It was submitted that since the termination was not fair and lawful, the Claimant is entitled to the Compensatory relief provided for in section 49 of the Act. That this is a case whose circumstances demand for the maximum award of 12 month's gross salary. Court is urged to consider that the termination was handled in an inhumane manner, that the Claimant was a sole bread winner of his family, and that the Claimant lost his source of livelihood. Pushing for the 12 months' gross salary, the Claimant's Counsel puts reliance on the holding in **Paul Ngeno vs. Pyrethrum Board of Kenya [2013] eKLR**.

Analysis and Determination.

14. This court identifies the following broad issues as the ones that emerge for determination in this matter;

- (i) What is the impact of a party's failure to present evidence on his or her pleadings?
- (ii) Whether the Claimant's employment was terminated.
- (iii) Whether if the answer to [II] above is in the affirmative, was the termination fair.
- (iv) Who should bear the costs of this suit?

I. Of the Impact of the failure to present evidence on pleadings.

15. As stated hereinabove, though the Respondent did enter appearance and file a response to the Claimant's Memorandum of Claim, there was no evidence led on and in fortification of the contents of the response. It is trite law that pleadings cannot be a substitute for evidence, and therefore in a situation where a party has not presented evidence to support his pleadings, the pleadings will just remain such pleadings without more. They will just be seen as, and remain to be, mere statements. It is my view however that where such pleadings raise a point of law which goes to the root of the jurisdiction of Court, a court of law cannot shut its eyes to that point of law and fail to render itself on it.

16. Counsel for the Claimant submitted that since the Respondent did not present any evidence in defence when this matter came up for hearing, the Claimant's evidence stands uncontroverted and therefore a judgement as sought by him in his pleadings should ensue. In this Counsel cites **Stanley Mwangi Gachungu & Another vs. Barclays Bank of Kenya Ltd [2019] eKLR**. In this matter her Ladyship Justice Mary Kasango, based her holding on various authorities among them, **Janet Kaphiphe Ouma & Another vs. Marie Stopes International [Kenya], Kisumu Hccc No. 68 of 2007 Ali-Aroni J**, citing the decision in **Edward Muriga vs. Nathaniel D. Schulter , Civil Appeal No. 23 of 1997 held:**

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence

therefore remains mere *allegations..... section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.*”

17. My position has always been and continues to be, the fact that one of the parties has not adduced evidence in support of his case, does not mean that the Court should accept the evidence adduced by the other party to be wholly truthful without interrogating the evidence to weigh its truth, credibility and worthiness. A Court should engage a cautious approach therefore, bearing in mind that credibility and worthiness of that evidence has not been tested through cross examination. The fact that the other party has not testified in support and justification of his or her pleadings does not lessen the burden on the owner of the case to prove the same to the requisite standards. It is this approach that I shall give this matter.

II. Was the Claimant’s employment terminated?

18. Looking at the Memorandum of reply by the Respondent, and more specifically paragraph 6 thereof it emerges that the Claimant’s employment’s life was terminated by the Respondent. In the paragraph the Respondent stated;

“In response to paragraph 7 & 8, the Respondent states that it dismissed the Claimant for the reasons that he had a number of times without leave or any other lawful cause absconded work and that this amounts to a ground for summary dismissal and that the issue of payment in lieu of notice according to the Employment Act Cap 226 of 2007 does not arise.”

19. With little ado one is able to discern that the Employment was terminated and in a summary manner.

III. Whether the termination of the was fair

20. In determining whether or not a termination of an employee’s employment or a summary dismissal of an employee from employment was fair or not, it should be borne in mind that the whole unit of fairness has two components, procedural and substantive fairness. Absent of any of these components renders the termination or dismissal unfair, opening the path for the aggrieved employee to be entitled to one or more of those reliefs provided for under the Employment Act, 2007.

21. Section 41 of the said Act provides for the procedural component. The Section stipulates:

“1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2. Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 [3] or [4] hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection [1], make”.

22. Courts have consistently held that this provision is mandatory in matters where the termination or dismissal is for cause. None adherence to the procedure will result to a definite conclusion that the termination or summary dismissal was unfair. Section 45[2][c] provides *inter alia* that termination of employment by an employer is unfair, if an employer fails to prove that the employment was terminated in accordance with fair procedure. Imperative to state that the fair procedure is that envisioned in section 41 of the Act.

23. The procedure sets in immediately the employer conceives the contemplation to terminate the employment of, or summarily dismiss, an employee, for cause. He or she must be clear on the grounds that have stirred the contemplation, for he or she is enjoined to thereafter clearly express to the to be affected employee in a manner that the latter understands, those grounds. The employer then must invite the employee to prepare and make a representation on the specific grounds upon which the employer is considering to base his action on. Depending on the circumstances of each case the employee must be given a reasonable time to prepare for the representation. The right to make a representation goes hand in hand with the right to the employee to have present, a colleague during the representation, and the colleague shall not just be a passive participant, he or she shall also be given an opportunity to make a representation whenever the employee desires.

24. The duty to prove that due procedure was followed lay on the Respondent and in absence of any testimony from its side, the burden cannot be said to have been discharged. In the upshot I find that the dismissal lacked procedural fairness, as the Claimant asserted.

25. Section 43 of the Employment Act places upon the employer the burden of proof of the reason for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45 of the Act. It is clear that in this matter the Respondent having admitted in its pleadings that it summarily dismissed the Claimant, did not adduce any evidence to support the basis for the dismissal. What comes out in its pleadings as basis for the dismissal remain to be just allegations. The Respondent did not discharge the legal burden. It did not therefore prove the reason for termination. Consequently, I find that the alleged summary dismissal was substantively unfair.

What reliefs are available to the Claimant?

26. Having found that the summary dismissal was procedurally and substantively unfair, and having considered, the manner in which it occurred, the lengthy of time that the Claimant had been in the employment of the Respondent, and the substantial deviation from the expectations of the law by the Respondent, I am inclined to agree that this is a matter that merits an award of the compensatory relief envisioned in Section 49[1][c] of the Employment Act and to the extent hereafter. I award the Claimant 7 months’ gross salary under this head, therefore, Kshs. 98,000.

27. The Claimant has further sought for a one month's Salary in lieu of notice, stating that there was neither a notice nor a payment in lieu thereof that preceded his termination. Indeed, the Respondent in its pleadings admitted that there wasn't a notice or a payment in lieu thereof. On the basis of sections, 35[1][c], 36, and 49 [1] [a] of the Act, this Court finds that the Claimant is entitled to a one month's salary in lieu of notice. Therefore, Kshs. 14000.

28. The Claimant has sought for compensation for public holidays worked but not paid for, to an extent of Kshs. 41,000. He alleges that for the four years he worked with the Respondent, he was not allowed to be off duty during public holidays. What the Claimant has done here is to just make a global assertion and hope that the court will just award his claim under this head. It is an unfortunate practice to say the least. Which public holidays are these?

29. Were I to find the Claim under this head merited, I would only award compensation only to an extent of three [3] years compensation, for that is the period that section 90 of the Employment Act could accommodate. Otherwise, any portion of the claim for a period falling outside three years prior to filing of the suit is a time barred one.

30. Basis has not been laid for an award of the claim under this head, I consequently decline to make any award for the Claimant. One even wonders why the Claimant decided to exhibit a pay slip for September 2012, only. Why didn't he present to court pay slips for any of or all the months for 2013, 2014, or 2015, was there something he did not want the court to discern?

31. The Claimant did tender as evidence, an attendance sheet for 01/03/2015 - 31/03/2015, a keen look at the first column of the document gives a clear impression that the Respondent would reward its employees for overtime worked. I am not persuaded therefore to make an award for the Claimant under this head. The Claimant's claim for Kshs. 504,000 is declined.

32. In sum, judgement is hereby entered for the Claimant against the Respondent for;

- a) **A declaration that the termination of the Claimant's employment was procedurally and substantively unfair.**
- b) **Compensation pursuant to the provisions of section 49[1][c] of the Employment Act, to the extent of 7 months' gross salary, therefore Kshs. 98000.**
- c) **One month's salary in lieu of notice, Kshs. 14000.**
- d) **Interest on [b] and [c], above at court rates from the date of filing suit till full payment.**
- e) **Costs of this suit.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF OCTOBER, 2021

OCHARO KEBIRA

JUDGE

DELIVERED IN PRESENCE OF:

MR. UPENDO FOR THE CLAIMANT.

NO APPEARANCE FOR THE RESPONDENT.