



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1606 OF 2016

PATRICK MUTHAMI KYALO.....CLAIMANT

VERSUS

REDLANDS ROSES LIMITEDRESPONDENT

J U D G E M E N T

1. The claim before me was instituted by the Claimant vide a Memorandum of Claim dated 21/6/2016 and filed in Court on 12/8/2016.
2. The Claimant pleaded that he was on 17/3/2010 employed by the Respondent as a driver and deployed within the Respondent's premises in Ruiru and that his duties involved hauling flowers from the Respondent's said premises to Jomo Kenyatta International Airport or as directed by the Respondent.
3. The Claimant further pleaded that on 24/4/2015, while on the way from the Airport in the company of his assistant, one Samuel Kabi, the official cell phone rang, and on being handed the same by his said assistant, the Claimant pulled over in order to answer the call. That a police officer immediately came and arrested the Claimant for obstruction and directed him to drive the truck to Embakasi Police Station. That on arrival at the police station, the Claimant called the Respondent's Administration Director (Mr. Kimani), informed him of the arrest and requested him to wire ksh.10,200 to the Claimant for bail on condition that the Respondent would recover the same from the Claimant's emoluments; a condition that the Respondent agreed to and sent the said amount to the Claimant. The Claimant then addressed the problem of the arrest.
4. It was the Claimant's further pleading that on reporting to work on 26/4/2015 after his weekly rest day which fell on 25/4/2015, he met the Respondent's Human Resource Manager (Ms. Ann Waithiru) on the corridors of the Respondent's premises and upon her enquiry on the happenings of 24/4/2015 regarding the Claimant's arrest, the Claimant explained to her what had happened and that he (the Claimant) had a balance of ksh.4,200 out of the Ksh.10,200 sent to him and that he would be surrendering the same to the Respondent. The Claimant then went on with his duties as usual.
5. The Claimant further pleaded that on 27/4/2015, he surrendered to the Respondent's accounts department a sum of ksh.4,200 being the balance of the ksh.10,200 wired to him by the Respondent on 24/4/2015, and that the surrender was duly acknowledged by the Respondent by issuing a receipt thereon. That he was directed to the accounts department by Mr. Kimani.
6. That on returning to the Respondent's premises on 28/4/2015 at around 6.30 PM after that days work, the Claimant was handed a summary dismissal letter and a show cause letter, both dated 28/4/2015. That the Claimant wrote an appeal against the summary dismissal on 1/5/2015, but the Respondent declined to revise its decision.
7. The Claimant pleaded that his dismissal was wrongful, unlawful and unfair for both substantive and procedural reasons as he did no fraud against the Respondent, was not afforded an opportunity to defend himself and was not informed of his wrongdoing before dismissal.
8. Along with the Memorandum of Claim, the Claimant filed witness statements by himself and one Jeremy Makau Nzioka and a list of documents listing some seven (7) documents.
9. The Claim was defended by the Respondent which on 29/9/2016 filed a defence dated the same date (29/9/2016). The Respondent pleaded *inter- alia* :-
 - a) that the Claimant's employment was terminated on grounds of fraud against the Respondent.
 - b) that the Claimant's termination was lawful, warranted and justified in the circumstances.

c) that the Claimant's termination was carried out in accordance with the applicable provisions of the law.

d) that on 24/4/2015, the Claimant was arrested for a traffic offence and needed money for cash bail and called the Respondent upon which the Respondent sent ksh.10,200 to the Claimant to post bail for the Claimant's release on agreement that the money would eventually be deducted from the Claimant's emoluments.

e) that on reporting back to work, the Claimant gave an account of what had transpired leading to the Claimant's arrest to the Respondent's Human Resource Manager and repeated the same account to the Respondent's Administration Director, but was unable to provide the police cash bail receipt. That it turned out that the Claimant had not paid cash bail but had instead used the money to buy the police man "lunch" so as to procure his release.

f) that the Claimant's admission of having fraudulently informed the Respondent that he needed money to post bail while in essence the Claimant had requested for the money to bribe the police officer was in contravention of the Respondent's Human Resource Manual and Code of Conduct which the Claimant was under an obligation to adhere to pursuant to his contract. That this constituted a ground for summary dismissal.

g) that the Claimant had sufficient opportunity to state his case before the Respondent's Human Resource Manager and the Administration Director and was further requested to show cause why disciplinary action should not be taken against him before he was dismissed.

h) that at the close of the appeal, the Claimant failed to explain and to justify his gross misconduct and dismissal was upheld. That the Respondent gave the Claimant an ex-gratia payment of ksh.20,000.

i) that the Claimant had been paid all his terminal dues calculated according to the law for days worked but not paid, any leave days earned but not taken, and was not entitled to any claim in that respect.

j) that the Claimant was not entitled to notice pay given that he had been summarily dismissed and was not entitled to compensation as his dismissal was based on lawful grounds.

k) that the Claimant's Certificate of Service was ready for collection.

l) that the Claimant's claim against the Respondent was without basis in law and fact.

10. On 13/7/2018, the Respondent filed a witness statement by its Finance and Administration Manager, one George Kimani Njoka (dated 10/7/2018); and on 25/6/2019, the Respondent filed a second statement by Samuel Kabi, dated 21/6/2019.

11. The Respondent also filed three (3) lists of documents as follows:-

(i) Respondent's list of documents dated 29/9/2016 and filed on the same date, on listing four (4) documents.

(ii) Respondent's supplementary list of documents dated 24/6/2019 listing three(3) documents

(iii) Respondent's further list of documents dated 7/12/2020.

12. It turned out during the hearing on 26/7/2021, that two of the documents listed and named on the Respondent's said list of documents dated 29/9/2016, the Claimant's letter of dismissal and the Respondent's Human Resource Manual and Code of Conduct, had not been filed with the said list and were not before the Court.

13. At the hearing, the Claimant adopted his aforesaid witness statement (filed in Court on 12/8/2016) as his evidence in chief but not before correcting the date appearing at paragraph 7 of page 1 thereof to read 27/4/2015 instead of 28/4/2015. The Claimant further produced as exhibits the documents listed on his list of documents already mentioned in paragraph 8 of this judgment as exhibit nos.1-7. Documents produced by the Claimant included his contract of employment signed on 22/3/2010, a receipt issued to the Claimant by the Respondent on 27/4/2015 on surrender of ksh.4,200 by the Claimant, summary dismissal letter dated 28/4/2015, show cause letter (Investigative and Correction Action Form) issued by the Respondent on 28/4/2015 at 4.46:43pm. Appeal Letter by the Claimant dated 1/5/2015, Claimant's payslips for the months of April and May 2010, Claimant's letter to the Respondent dated 1/5/2015 demanding payment of salary for nine days worked in March 2010 and not paid, and payslips for January, February and March 2015.

14. The Claimant's aforesaid witness statement basically replicates the averments made in the Memorandum of Claim, and which have been reproduced in paragraphs 2 to 7 of this judgment. The Claimant further testified:

a) that he did not commit any fraud as alleged, and that he has never seen the Respondent's Human Resource Manual, though he signed the employment contract.

b) that the documents listed in the Respondent's further list of documents were prepared/drawn after the Claimant had left.

c) that he (the Claimant) was terminated wrongfully, and was not informed of any wrongs before termination.

d) that the letter of termination and the show cause letter were both given to him on 28/4/2015, and he was not given any opportunity

to defend himself as he had already been dismissed.

e) that his appeal was done on 14/5/2015 and by then the Claimant had long been dismissed.

f) that he had paid the cash bail in issue and he was released and the motor vehicle's keys, which had been taken by the police, were released to him. That he did not, however, have the cash bail receipt and had not given the same to the respondent. That before the ksh.10,200 was sent to the Claimant, it had been agreed between the Claimant and the Respondent that the money would be deducted by the Respondent from the Claimant's emoluments, and therefore became the Claimant's money.

15. The Respondent called two witnesses, George Kimani Njoka (the Respondent's Finance and Administration Manager) and Samuel Kabi, the Respondent's Airport Clerk who had witnessed the Claimant's arrest on 24/4/2015, and had accompanied the Claimant to Embakasi Police Station as he drove the Respondent's truck to the said Police Station on orders of a police officer.

16. George Kimani Njoka (*herein after referred to as DW1*) adopted his witness statement dated 10/7/2018 as his evidence in chief, and produced the Respondent's documents listed in the Respondent's list of documents dated 29/9/2016, a supplementary list of documents dated 24/6/2019 and a further list of documents dated 7/12/2020, save for the two unavailed documents mentioned in paragraph 12 of this judgement.

17. Documents produced by DW1 included the Claimant's letter of summary dismissal dated 28/4/2015, proceedings/record of hearing of Claimant's appeal on 14/5/2015, email correspondence between the Respondent and NIC bank, account statement dated 2/5/2015 and the Respondent's clock-in Reports for April 2015. Also produced by DW1 are various documents on bail and Court fines, the Claimant's payslip for April 2015 and contract of employment for one Jeremy Makau Nzioka.

18. DW1's said witness statement basically restates what is stated in the Respondent's Memorandum of Defence and reproduced in paragraph 9 of this judgment. The witness further told the Court (under cross examination):

a) that he send ksh.10,200 to the Claimant upon understanding that the money would be recovered from the Claimant if he failed to avail a receipt for it, though his (DW1's) witness statement did not specifically state so.

b) that the amount send would only become part of the Claimant's salary if the Claimant did not avail a receipt for it.

c) that he (DW1) confirmed (verified) that the Claimant had indeed been arrested.

d) that the Claimant had been dismissed on ground of fraud but not on account of bribery. That he (DW1) had not presented to Court the Respondent's policy on bribery.

e) that the Claimant was dismissed because he could not account for the money send to him.

f) that out of the ksh.10,200 given to the Claimant, the Respondent had received ksh.4,200.

g) that both the dismissal letter and show cause letter were issued on 28/4/2015, with the show cause letter issuing at 4.46 pm on the said date.

h) that the Respondent did not have minutes on any disciplinary proceedings.

i) that the appeal process was initiated by the Claimant.

j) that notice period under the contract of employment was three (3) months.

k) that the Claimant did not have any record of indiscipline.

l) that the Respondent did not pay the Claimant for six (6) holidays worked, and was entitled to ksh.6,247.

19. Samuel Kabi (*hereinafter referred to as DW2*) adopted his witness statement dated 21/6/2019 as his evidence in chief. DW2's said statement simply corroborates the Claimant's account of events on 24/4/2015 regarding the Claimant's arrest. DW2 told the Court that although he accompanied the Claimant to Embakasi Police Station, he (DW2) remained outside as the Claimant negotiated the matter with the police at the police station.

20. Parties did not agree on the issues for determination but the Claimant filed (separate) issues for determination, dated 15/1/2020 and filed in Court on 24/1/2020. Issues for determination as framed by the Claimant are as follows:-

a) whether termination of the Claimant's employment was fair and lawful.

b) whether the Claimant is entitled to reliefs sought.

21. On its part, the Respondent framed issues for determination in its submissions as follows:

a) whether the Respondent had valid reasons to warrant the Claimant's summary dismissal and whether the dismissal was carried out in accordance with the applicable provisions of the law.

b) whether the Claimant has proved his claim against the Respondent.

c) whether the Claimant is entitled to the reliefs.

22. From the foregoing, and upon considering the pleadings filed and evidence adduced by both parties, as well as separate issues framed by both parties, issues for determination appear to me to be as follows:-

a. whether termination of the Claimant's employment was based on valid reasons.

b. whether termination of the Claimant's employment was fair and lawful.

c. whether the Claimant is entitled to the reliefs sought.

23. On the first issue, Section 45(1) of the Employment Act 2007 provides as follows:-

“ no employer shall terminate the employment of an employee unfairly.

Section 45 (2) (a) states:-

“ a termination of employment by an employer is unfair if the employer fails to prove:-

(a) That the reason for the termination is valid.

(b) That the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.”

24. Section 43 provides as follows:

(1) “In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the service of the employee.”

25. The Respondent has not disputed the fact that the Claimant was on 24/4/2015 arrested on a traffic offence and that both himself and the Respondent's truck that the claimant was driving were taken to Embakasi Police Station, a situation that required payment of a cash bail before both the Claimant and the Respondent's truck could be released. Indeed, Samuel Kabi, one of the Respondent's witnesses (DW2) accompanied the Claimant to the said Police Station upon arrest of the Claimant.

26. It was not disputed that the Claimant called the Respondent's office and requested for ksh.10,200 to enable him to post bail, upon which the said sum was sent to him upon agreement between the Claimant and the Respondent that the said sum would be recovered by the Respondent from the Claimant's salary. This fact is clearly pleaded in the Respondent's Memorandum of Defence at paragraph 5 thereof, where it is pleaded:-

“ the Claimant called the Respondent and was sent Ksh. 10,200 to enable him post bail for his release. It was agreed that the money would eventually be subtracted from his salary.”

27. The foregoing averment was repeated by the Respondent's Finance and Administration Manager, George Kimani Njoka, in his recorded and filed witness statement which he adopted as his testimony at the hearing of the claim. The said witness testified as the Respondent's first witness (DW1).

28. Under cross examination, the said witness (DW1) told the Court that he had confirmed that the Claimant had been arrested.

29. Both the Claimant and the Respondent produced copies of the Claimant's summary dismissal letter dated 28th April 2015. The same reads in part:-

“...the company send you ksh.10,200 to enable you process the cash bail and to date you have not provided the receipts for the same. Regrettably, this is fraud against your employer and is a justifiable ground for your dismissal...”

30. One of the documents produced by the Claimant is a receipt dated 27/4/2015 for ksh.4,200 issued to the Claimant by the Respondent upon surrender by the Claimant to the Respondent of the aforesaid sum of ksh.4,200 being a balance of the aforesaid ksh.10,200, which the Respondent received as:-

“Amount advanced to sort out traffic officer”

I found the foregoing quite interesting in view of the evidence given in Court by DW1. The Respondent never disputed or disowned the aforesaid receipt. I will leave the issue at that point.

31. Although the Respondent summarily dismissed the Claimant on allegations of fraud, I find and hold that the Respondent failed to prove fraud or its existence on the part of the Claimant. It was held by the Court of Appeal in the case of **Janet Nyandiko –vs- Kenya Commercial Bank Limited (2017) eKLR** as follows:-

“Section 45 of the Act makes provision *inter-alia* that no employer shall terminate the employment of an employee unfairly. In the terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid: that the reason for the termination was fair reason and that the same was related to the employee’s conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equitythe parameters for determining whether the employer acted in accordance with justice and equity in determining employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision...The extent to which the employer has complied with the procedural requirements of Section 41...and the existence of any warning letters issued by employer to the employee.”

32. On the first issue, and in view of the foregoing, I find and hold that termination of the Claimant’s employment was not based on any valid reason.

33. On the second issue, the Claimant testified that he was, on 28/4/2015 at 6.30pm, handed both the summary dismissal letter and a show cause letter by his employer. That the show cause letter indicated that it was issued by the Respondent on 28/4/2015 at 4.46pm. That he appealed to the Respondent against his dismissal but his appeal was declined.

34. Section 41 of the Employment Act 2007 provides as follows:-

“subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the 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.”

35. As already stated in this judgment, both the letter of summary dismissal and show cause letter (Investigative and Correction Action Form) were given to the Claimant by the Respondent at the same time, the evening of 28th April 2015. The Claimant testified that the documents were given to him at 6.30pm, and that the show cause letter indicated that it was issued by the Respondent on 28th April 2015 at 4.46pm. This evidence was neither controverted nor rebutted by the Respondent.

36. I find and hold that the Respondent contravened the provisions of Section 41 of the Employment Act 2007. Termination of the Claimant’s employment was not only unfair, but was unprocedural and therefore unlawful as well. I so declare.

The Court of Appeal held in the case of **National Bank of Kenya –vs- Samuel Nguru Mutonya [2019]eKLR** as follows:-

“...termination followed without notice or hearing of the Claimant on the basis that his poor performance had formed the basis of his termination. It is not sufficient that the respondent was willing to pay in lieu of notice. Before the question of notice payment became ripe, the Claimant should have been given a hearing when his performance was found to warrant a subject for his dismissal. To move and terminate without giving regard to Section 41 of the Employment Act and its provisions, giving the Claimant a hearing in the presence of his representative, the termination became procedurally unfair.where an employer fails to abide with the procedural requirements of Section 41 of the Employment Act, even where payment in lieu of notice is made immediately, such does not cure the procedural unfairness visited upon the Claimant...The Respondent failed to meet the provisions of Section 45 of the employment Act. The Claimant is therefore entitled to remedies sought.”

37. On the third issue, the Claimant prays for the following reliefs in his Memorandum of Claim

a. A declaration that dismissal of the Claimant was unlawful, wrongful and unfair.

- b. Pay in lieu of notice for (sic) termination ...ksh.114,000**
- c. Compensation equivalent to twelve(12) months salary ...kshs.456,000**
- d. Fifteen days in respect of change payroll (2010)ksh 17,000.**
- e. Pay in respect of holidays worked...ksh.6,333.3**
- f. Certificate of Service**
- g. Costs**
- h. Interest on b) to e) above at Court rates.**
- i. Any other relief that the Court may deem fit and just to grant.**

38. On the legality and fairness of the Claimants dismissal, I have already declared in paragraph 36 of this judgment that the said dismissal was unfair and unprocedural, and therefore unlawful.

39. On payment in lieu of notice, Clause 6 of the Claimant's contract of employment states:-

“after successful completion of the probationary period, either party may terminate the contract by giving the other 3-three months written notice or payment in cash lieu of such notice. In the event you give notice to the company, the management reserves the right to decide if the notice will be served or paid at its sole discretion.”

40. The Claimant is therefore entitled to payment of three months salary in lieu of notice. The Claimant exhibited his payslips for January, February, and March 2015 which show that the Claimant's gross monthly salary was ksh.38,000. The Claimant has prayed for Ksh. 114,000 as payment in lieu of notice. The same is allowed.

41. The prayer for twelve (12) months salary as compensation is declined as no special circumstances have been shown, and instead I award the Claimant ksh.304,000 being eight (8) months salary as compensation for unfair and unlawful termination.

42. The prayer for ksh.17,000 in respect of payroll change (2010) is declined as the claim thereof was not proved.

43. The claim and prayer for ksh.6,333.3 being payment for holidays worked was admitted by the Respondent in the evidence of DW1 (George Kimani Njoka) and is hereby allowed.

44. Consequently, I hereby enter judgment in favour of the Claimant against the Respondent for ksh.424,333 with interest at Court rates from the date of this judgment until payment in full.

45. As costs follow the event, the Claimant is awarded costs of the claim.

46. The Respondent is hereby ordered to issue a Certificate of Service to the Claimant within thrifty (30) days of this judgment.

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

AGNES M.K. NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the 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.

AGNES M.K. NZEI

JUDGE

Appearance:

MR. MULI FOR THE CLAIMANT

MR. OYOO FOR THE RESPONDENT