



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR REALATIONS COURT

AT NAIROBI

CAUSE NO 414 OF 2017

PAUL KYALO MUMINA.....CLAIMANT

VERSUS

MASAA NEWSPAPER DISTRIBUTORS LIMITED.....RESPONDENT

J U D G M E N T

1. The claim herein was instituted by the Claimant vide a Memorandum of Claim dated 1st March 2017, wherein the Claimant pleaded *inter alia*:-

a) that from 3rd June 2013 to 10th October 2016, he (the Claimant) was employed by the Respondent as a sales Executive at a monthly salary of kshs.13,700.

b) that on or about 10th October 2016, the Respondent unlawfully terminated the Claimant's services for no lawful reasons and failed to pay him his full and final terminal dues.

c) that the dismissal was without lawful cause, without notice, and was based on non-existent reasons.

d) that while lawfully on duty on 10th June 2016, the Claimant was threatened by the Respondent's director (Jackson Kamau Mugugu) with serious dire consequences if he did not leave the Respondent's premises immediately.

e) that the Claimant took the threat to his personal safety seriously and obliged, and that as he walked out, the Respondent's said director informed him that his services had been terminated and that he would be physically harmed should he be spotted in the company's premises.

f) that the Respondent refused to issue the Claimant with a Certificate of Service, thereby reducing the Claimant's chances of getting employment elsewhere, thus rendering the Claimant destitute.

g) that the Respondent's actions amounted to unlawful, wrongful, unfair and inhumane termination of employment, aggravated further by the Respondent's refusal to pay the Claimant's full terminal benefits due to him and damages, which the Claimant claims.

2. The Claimant pleaded that he is entitled to ksh.1,525,414.55 made up of payment for holidays worked in three years, payment in lieu of leave for three years, overtime pay for weekdays for three years, overtime pay for 156 Saturdays worked, overtime pay for 156 Sundays worked, gratuity for three years, payment in lieu of one month notice, severance pay based on three months pay for every year of complete service and twelve month's salary being compensatory damages. The Claimant prayed for judgment against the Respondent for the aforesaid sum, costs of the suit and interest.

3. The Claimant also filed a witness statement recorded by himself and dated 25/1/2017, a list of documents dated 1/3/2017 listing two evidential documents; a job identification card issued by the Respondent and a demand notice dated 25th October 2016. These were filed together with the Memorandum of Claim.

4. On 21st April 2017, the Respondent filed a Response to Memorandum of Claim and Counter Claim dated 18th April 2017, and *inter-alia*:-

a) admitted having employed the Claimant on 3rd June 2013, at a monthly salary of ksh.12,700 from the date of employment upto February 2015, and ksh.13,700 from March 2015 upto 5th October 2016.

b) pleaded that the Claimant was summarily dismissed for immense violation of the employment contract including failure to leave office at the required time (1.00pm in the afternoon), engaging in business involving the Respondent's competitors, being indisCIPLINED and dishonest, failure to obey lawful commands, reporting to work late in the morning, failure to submit sales proceeds to the Respondent, misappropriation of funds, selling newspapers below the agreed price and causing massive loss to the Respondent.

5. The Respondent further pleaded that it as a result sustained a huge loss amounting to ksh.149,520 during the period that the Claimant was its sales executive. The Respondent Counter-Claimed the said amount against the Claimant.

6. The Respondent, however, partly admitted the Claimant's claim by pleading as follows at paragraph 19 of its Response to the Memorandum of Claim:-

“The Respondent therefore denies that they (sic) owe the Claimant any dues but if at all there is which is otherwise denied, the Respondent in the alternative states that the Claimant (sic) claim should be as follows:-

I. annual leave for the year 2013/2014ksh.12,500

II. annual leave for the year 2014/2015 ksh.....Ksh.12,500

III. annual leave for the year 2015/2016.....ksh.13,700

IV. service pay for three yearsksh.20,500

TotalKsh.59,250

7. When trial opened on 28th July 2021, the Claimant adopted his filed witness statement as his evidence in chief and substantially orally restated what is stated in the said witness statement. Basically, the witness statement replicates the averments made in the Memorandum of Claim reproduced in paragraphs 1 and 2 of this judgment. Further, the Claimant testified that he was not served with any notice of termination, was never served with any warning letter, and that for the three and a half years that he worked for the Respondent, he never took annual leave; and did not do any job other than that which he had been employed to do. The Claimant contended that his termination was unlawful. He produced as exhibits the documents listed in his list of documents referred to in paragraph 3 of this judgment.

8. It was the Claimant's evidence that his monthly salary was ksh.13,700 but as at the time he left, he was earning ksh.16,000 per month and that his salary was being paid by phone/M-pesa. That he earned ksh.16,000 per month during the last six months of his employment.

9. Cross examined by counsel for the Respondent, the Claimant testified that he had signed a document with the Respondent which he had not brought to court and that the agreement was that the Claimant would work from 5.00 am to 12.00noon, but ended up working upto 7.00 or 8.00pm on weekdays, which was six hours overtime. The Claimant admitted that although he alleged to have worked on public holidays, he had not specified the holidays on which he worked.

10. Re-examined, the Claimant testified that although he signed a contract of employment with the Respondent, he was not given a copy thereof, that the reason he was leaving work late was because he had to tie up newspapers and prepare returns.

11. The Respondent's witness, Jackson Kamau Mugugu, adopted his filed witness statement dated 11/3/2019 as his evidence in chief. He also produced some four documents filed together with the Respondent's Response to the Memorandum of Claim as exhibits. The documents are three letters and a bulky statement showing all newspapers transactions involving the Claimant.

12. Cross-examined by the Claimant's counsel, the Respondent's said witness testified that although the Respondent signs contracts with its employees, the Claimant did not sign one because he was a casual. That the employment contract referred to in paragraph 5 of the Respondent's Response to the Memorandum of Claim was oral. That the Respondent did not have any code of conduct, contrary to the averments made in the Respondent's pleadings. The Respondent's witness further told the court that he had no evidence to show that the Claimant engaged in a competitor's business. That although the Respondent alleged a recurring balance in the Claimant's sales statements, no demand was ever issued to the Claimant.

13. Parties herein did not frame issues for determination. From the pleadings filed and evidence adduced by both parties, issues for determination appear to me to be as follows:-

a) whether there was a valid reason for termination of the Claimant's employment.

b) whether the Claimant's termination was fair and lawful in the circumstances.

c) whether remedies sought are available to the Claimant.

14. On the first issue, the Respondent did not tender any evidence in proof of any of the allegations made against the Claimant in the Respondent's pleadings. 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.”

15. No evidence was led by the Respondent to demonstrate wrong doing by the Claimant, either in the performance of his duties as a sales executive or at all. The running balance alleged by the Respondent to be running through the Claimant’s transaction statements produced in Court by the Respondent was not shown to have been caused by the Claimant; and its relationship to dishonesty on the part of the Claimant was neither established by the Respondent nor traced to alleged poor performance of duties by the Claimant. The Claimant’s testimony that he was never served with any warning letter during his employment by the Respondent was not rebutted by the Respondent. It is my finding that there was no valid reason for termination of the Claimant’s employment.

16. On the second issue, I do state that in termination of employment, both procedural and substantive fairness must be employed. The issue of whether or not an employer’s allegations against an employee are true or valid is a secondary issue. The primary issue is whether due process was followed and the employee was given a fair hearing before termination of employment. This is the creed of Section 41 of the Employment Act 2007 which provides:

(1) “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 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 representation 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.”

17. The Claimant was never confronted with any particular charges and required to respond to the same before termination of employment, either as set out in Section 41 of the Employment Act 2007 or at all. He was not called upon to show cause why his employment could not be terminated or why disciplinary action could not be taken against him.

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

“...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.”

19. I find and hold that termination of the Claimant’s employment was both procedurally and substantively unfair.

20. On the third issue, I find and hold that the Claimant is entitled to some of the reliefs sought and to those admitted by the Respondent in paragraph 19 of its Response to the Memorandum of Claim. The Claimant pleaded in his Memorandum of Claim that he was earning ksh.13,700 per month at the time of his dismissal, though he changed tune at the hearing of the claim and testified that he was earning ksh.16,000 per month in the last six months of his employment. It is trite that parties are always bound by their pleadings.

21. Having considered evidence adduced and submissions filed by counsel for both parties, I enter judgment for the Claimant against the Respondent as follows:-

a) eight (8) months salary being compensation for unfair termination of employment Ksh.109,600

b) one month salary in lieu of notice..... Ksh 13,700

c) annual leave for 2013/2014

(admitted by the Respondent).....12,500

d) annual leave for 2014/2015

(admitted by the Respondent....Ksh.12,500

e) annual leave for 2015/2016

(admitted by the Respondent)...ksh.13,700

f) severance pay for three years (admitted by the Respondent).....ksh20,550

Total = ksh.182,550

22. The Claimant's claim for payment for overtime and holidays worked during the period of employment is declined as it has not been proved. The claim having been denied by the Respondent, it behoved the Claimant to prove it on a balance of probability. Claims for unpaid salary or accrued dues are in the nature of special damages and must not only be pleaded, but must be specifically proved as well. Nothing was produced in evidence in support of this claim.

23. The Respondent's counter-claim was not proved, and the same is hereby dismissed.

24. The Claimant is awarded costs of both the claim and counter-claim, plus interest at court rates.

25. Orders accordingly.

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:

Miss Kerubo for the Claimant

Mr. Wanyigi for the Respondent