



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. 168 OF 2015

JOAB OMBOTO MOMANYI.....CLAIMANT

VERSUS

DATA RUSH SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The claimant sued the respondent for unlawful termination and for payment of his terminal dues.
2. It is stated that the claimant was employed by the Respondent on or about the 1st December, 2009 as an upcountry Courier at a gross salary of Kshs. 6,500 which was increased to Kshs 18,000/- as at the time of termination.
3. The claimant states that his employment was suddenly and prematurely terminated on the 2nd March, 2015 without any Notice or disciplinary hearing.
4. He contended that during the 5 years he served the Respondent he never took his leave days which he prayed for compensation herein.
5. He stated that his union, communication workers' union of Kenya (COWU-K) entered a Collective Bargaining Agreement (CBA) on the 20th August, 2013 for salary increment of 10% as from 1st August, 2013 which was never implemented by the Respondent which he now claims.
6. The claimant therefore prayed for judgment against the Respondent for; -
 - a) **Terminal dues**
 - b) **Leave days not taken for 5 years**
 - c) **Compensation under section 49(c) of the employment Act**
 - d) **One-month salary in lieu of Notice**
 - e) **CBA Increment for 20 months**
 - f) **Costs of suit and interest**
 - g) **Any other relief this Honourable Court may deem fit to grant.**
7. The Respondent entered appearance on 12th August, 2015 and filed its response on the 17th August, 2015 and admitted that it employed the claimant on 1st December, 2009 on a contract.
8. It contended that the claimant had sought for leave which was approved. However, on 7th February, 2015 the claimant, while still on leave took up an assignment, without authority or request of the Respondent of delivering a client's consignments against the company policy which resulted to loss of the clients' laptops.
9. The loss was blamed on the claimant who took the said consignment without authority of the Respondent. Further that the claimant influenced his replacement in Nakuru to defy procedure and issue consignment at the Respondent office instead of the clients' door step, actions that caused the respondent clientele to switch to other service providers and therefore it suffered financial loss.

10. The Respondent avers that pursuant to the loss of laptops incident, the claimant's employment was no longer tenable and it terminated the claimant services by issuing him with a termination letter of 2nd March, 2015 in line with section 44 of the Employment Act for gross misconduct of breaching the company procedures.

11. During hearing the claimant adopted his witness statement dated 5th June, 2015 which basically reiterated his claim and on cross examination he testified that he went on leave from 2nd February, 2015 and was report back on 23rd March, 2015. However on 7th February, 2015 he received a call from one of the Respondent clients' who directed that his parcel should not be taken to him rather that he will collect the parcel from the Respondent office. He stated that since he was on leave he relayed the said information to one of the staff called Moses Odhiambo. He stated that the said Mr. Odhiambo while delivering other parcels to another client passed by their client who had earlier called to inquire on the reason he wanted to pick the parcel by himself and in response the client requested he be delivered the said parcel. The witness told the court that later that day the client received a called from unknown person masquerading as the claimant indicating that the delivery of his parcel will delay and the client never received the said parcel. He maintained that he was at home and never delivered any consignment to any client while on leave.

12. The Respondent's witness, **Mr. Daniel Odwisa(RW-1)** sought to adopt his statement dated 27th January, 2020 which in nutshell stated that he is the Human Resource Manager at the Respondent and reiterated the Response to the claim.

13. On cross examination, he testified that the claimant was terminated without payment of terminal dues which the Respondent held to pay for the loss of the laptops. He stated that the claimant was not issued with a certificate of service since he did not clear with the Respondent. on whether he was paid salary increase as per the CBA, the witness stated that he was not aware whether the claimant was paid the CBA 10% increment, nevertheless that the claimant was promoted and given 15% increment.

Submissions

14. The claimant submitted that he was terminated unfairly when the Respondent terminated his services without notice to him or subjecting him to due process. He argued that as much as the claimant was terminated for gross misconduct under section 44 of the employment Act, he ought to have been subjected to disciplinary hearing and before termination given notice of termination with reasons for the said termination. He submitted that an employee must be subjected to due process regardless of the offense committed by the employee, in this he cited the case of **Kenya Union of Commercial Food and Allied Workers –v- Meru North Farmers Sacco Limited [2013] eKLR**.

15. Accordingly, he argued that since the claimant was not subjected to any disciplinary hearing as admitted by the Respondent, the termination was unfair. It was also submitted that the allegation that the respondent withheld the claimant salary to pay for alleged loss of laptops has no legal basis and the Respondent should be compelled to pay the claimant his terminal dues. In this he cited the case of **Katembe Kirongo Mtumwa –v- Steel Makers Limited [2012] eKLR**.

16. It is the claimant's submissions that he has made out a case before this Court and urged this Court to allow the claim as prayed.

17. The Respondent on the other hand submitted on two issue; **whether the claimant was unfairly dismissed** and **whether the claimant is entitled to the reliefs sought**. on the first issue it was submitted that it was affirmed during hearing that the Respondent's parcel that was to be delivered to the client got lost after the intervention of the claimant who was on leave and opted without any request to assist leading to the loss. The Respondent submitted that pursuant to the said loss, the Respondent incurred a huge financial loss caused by the actions of the claimant therefore the Respondent opted to summarily dismiss him from employment in accordance with section 44 of the employment Act.

18. The Respondent submitted further that the since the claimant was summarily dismissed under section 44 of the employment Act for carelessly and improperly performing his duties, Notice before termination was not necessary as provided for under section 44(1) of the Employment Act.in this it cited the case of **Vincent Abunga Obunga –v Mast Rental Services Limited [2019] eKLR**.

19. It was submitted further that the claimant has failed to plead the claim of unfair termination in the claim neither did it pursue during hearing, therefore the relief sought must fail. In this it relied on the case of **Kenya Power and lighting Company Limited –v- County Government of Nairobi and another [2017] eKLR**.

20. Accordingly, it was submitted that the claimant was summarily dismissed from employment in accordance with section 44 of the Employment and his failure to plead in his claim cannot be remedied in the Submission. In this the Respondent cited the Court of appeal case of **Nation Media Group Limited-v- Onesmus Kilonzo [2017] eKLR**.

21. On the leave not taken for the 5 years, the Respondent submitted that during hearing the RW-1 testified that the claimant had taken his leave days and exhausted them and told court that he had 3 leave application forms which were not produced, also that during the occurrence of the incident leading to his termination, the claimant was on leave therefore affirming that he enjoyed his leave. The Respondent urged his court to disallow the claim under this head.

22. The Respondent maintained that the Claimant's dismissal was justified and urged this court to dismiss the claim with costs.

23. I have examined the averments of the parties herein. The issues for this court's determination are as follows;

1. Whether there were valid reasons to warrant dismissal of the claimant.

2. Whether the due process was followed before the claimant was dismissed.

3. Whether the claimant is entitled to the remedies sought.

REASONS

24. The claimant was terminated vide a letter dated 2/3/2015 which indicated that the claimant whilst on normal leave assumed responsibility for the delivery of a client's consignment and facilitated (with or without knowledge) the loss of the client's laptop.
25. In essence reasons given for dismissal are that the claimant caused loss of a client's laptop by his actions.
26. The claimant admitted he was indeed on leave but denies causing loss of the client's laptop. The claimant had been placed on a contract and was also supplied with a code of conduct and Rules and Regulations of the company.
27. The respondents aver that the claimant breached the company regulation by handling client's property while on leave. They aver that the claimant influenced his replacement to defy normal procedure by issuing the consignment at the respondent's premises instead of delivering the same at the client's door steps as the respondent's procedure.
28. Neither the claimant nor the respondent however exhibited before this court the respondent's work procedure or code of conduct and regulation to enable this court examine whether indeed the claimant flouted these procedures.
29. The claimant has denied flouting any procedures. He denies he took any consignment as alleged.
30. It is not clear what the respondent's procedures on delivery of parcels is though the respondents insist that the claimant defied procedure, it would have been prudent to produce the said procedures as exhibit.
31. This being the position and with claimant denying any responsibility on his part, I find that there is doubt as to his failure to follow the correct procedure.
32. Section 43 of the Employment Act 2007 states as follows;

"43. Proof of reason for termination

(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 services of the employee".

33. According to the law, the reason for which a termination must be effected must be valid and in existence.
34. I find that though the respondents believed the claimant acted against procedure the reason is not validly established.

DUE PROCEDURE

35. On issue of due procedure, the law is that before any termination or even dismissal, due process must be followed.
36. The due process envisaged is that provided under Section 41 of the Employment Act which states as follows;

"41. Notification and hearing before termination on grounds of misconduct

(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 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".

37. The respondents indicated that they didn't subject the claimant to any disciplinary process because he was guilty of gross misconduct. Indeed that is not the correct state of the law because even where an employee has committed a gross misconduct, he is entitled to a fair disciplinary process.
38. Section 45 (2) of the Employment Act 2007 provides as follows;

“45. (1).....

(2) *A termination of employment 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”.

39. Given that the respondents didn’t subject the claimant to a fair disciplinary process and neither did they establish the presence of valid reason for dismissal, I find the claimant was unfairly and unlawfully dismissed.

REMEDIES

40. Having found as above, I find the claimant is entitled to the following remedies.

1. 1 month’s salary in lieu of notice = 19,800/=

2. 8 months’ salary as compensation for the unfair & unlawful termination

= 19,800 x 8 = 158,400/=

3. CBA Increment of 10% not paid for 20 months = 1,800 x 20 = 36,000/=

TOTAL = 214,200/=

Less statutory deductions

4. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF OCTOBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Oumo for Claimant – present

Musili for Respondent – present

Court Assistant - Fred