



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 309 OF 2017

ANTHONY NASENYA SAKWA.....CLAIMANT

VERSUS

CAPWELL INDUSTRIES LIMITED.....RESPONDENT

JUDGEMENT

1. This matter arises out of a statement of claim filed on 15th February, 2017. The dispute relates to unlawful termination with the claimant stating that his employment was unfairly terminated by the respondent hence prays for the following orders;

i. A declaration that the termination was unlawful, untimely and an order that the claimant be paid his dues and benefits of Kshs 456,768/= as aforesaid.

ii. Costs of the claim.

2. The respondent opposed the Claim and stated that the claimant was terminated upon being paid one months' salary in lieu of notice and upon being subjected to due process. It urged the Court to dismiss the Claim with costs.

3. The employment relationship which lasted from sometimes in July, 2006 upto 26th September, 2016 is not contested. What is in contest is the manner in which the employment relationship was terminated and the benefits payable as a result thereof.

4. The matter proceeded for hearing on 28th July, 2021 with the claimant testifying in support of his case. On its part, the respondent called 2 witnesses.

Claimant's case

5. The claimant adopted his witness statement together with the bundle of documents which were filed together with the claim. He testified that his termination was occasioned by an unfounded allegation that he had concealed 4 sacks of rice each weighing approximately 25 kgs. He testified that he worked as a general worker and his work entailed overseeing the screening of rice. That the screening was done by the machines and it entailed separating the rice from the waste product. It was his testimony that another team would later come and collect the waste bags from the husk area.

6. He testified that he was on duty on the night of 14th September, 2016. He denied concealing the good rice totaling 100kgs that was found in the husk area. He also denied carrying the waste bags to the husk area. He further told court that the main reason for his termination was actuated by witch-hunt on the part of one Mr. Wambua who was in the union leadership.

7. That he was confident that the CCTV footage would exonerate him but the respondent had refused to avail the same during the disciplinary hearing. He admitted being called in for a disciplinary hearing on 23rd September, 2016, but disputed its outcome. He further testified that the respondent had not reported the alleged theft to the police despite his request. He further informed court that the respondent had refused to pay him his terminal dues hence prayed that his claim be allowed as prayed.

Respondent's case

8. On its part, the respondent called two witnesses that is, Mr. Obadiah Gitiye, the Head of Human Resource and Administration (RW1) and Mr. Leonard Wambua (RW2), the Chief Shop Steward of the claimant's union.

9. RW1 adopted his witness statement, further witness statement, the respondent's list of documents and further list of documents. He prayed that the same be admitted as part of his testimony in chief. He testified that on or about 14th September, 2016, the claimant was put in

charge of organising the removal of all screenings from the respondent's premises. That the screenings were later sorted into paddy sacks, weighed and signed off by the claimant whereafter he would transport them to the husk area for eventual transportation to the dump site as waste product.

10. That one Mr. Kanji who was a supervisor noted 4 concealed bags of good rice while he was carrying out an inspection of the screenings. That the good rice had been concealed together with the waste. That Mr. Kanji reported the matter to him and to Mr. David Mutuku, another employee as well as the security supervisor. Upon investigations, it was ascertained that the claimant was on duty the previous night and was in charge of handling the screenings.

11. That the claimant's explanation was unsatisfactory hence he was immediately suspended together with 3 other employees (Elisha Malenje Omuchere, Alex Waithaka Gichagua and Silas Njiru Nyaga) who were on duty on the night of 14th September, 2016 so as to allow for investigations. That the investigations revealed that it was the claimant who had been in charge of the screening process and disposal of the waste hence it could only have been him who had knowledge of the concealed rice.

12. A disciplinary hearing was later constituted on 23rd September, 2016 and the claimant was granted an opportunity to defend himself. The claimant's colleagues who were on duty on the night of 14th September, 2016 were also taken through a disciplinary process and each rendered an account of what transpired. That the claimant did not deny being in charge of the screenings. That further, the 3 other employees stated that the claimant was the only person in charge of screenings that night and for transporting the same to the husk area.

13. It was RW1's testimony that following the incident, the respondent lost trust in the claimant hence resolved to terminate his services pursuant to the provisions of clause 3 (a)(i) of the Collective Bargaining Agreement (CBA) with the Bakery, Confectionery, Food Manufacturing and Allied Workers Union (K) (the claimant's Union). Subsequently, he averred that the claimant was paid one month's salary in lieu of notice. He denied that the claimant was entitled to the prayers sought as the respondent had settled all his dues.

14. RW2 also adopted his witness statement filed before court. He informed court that he was the chief shop steward of the claimant's union and that he was present at the claimant's disciplinary hearing. He further stated that the claimant was at work at the material time. He denied having any disagreements with the claimant.

Submissions

15. Both parties filed written submissions and maintained their rival positions. The claimant submitted that the respondent did not follow due process as stipulated under section 41 of the Employment Act. He relied on the case of **Loice Otieno vs Kenya Commercial Bank (2013)eKLR**. He further faulted the respondent for not demonstrating reasons to justify his termination. On this issue, he relied on the case of **Nicholas Otinyu Muruka vs Equity Bank Limited (2013) eKLR**.

16. On its part, the respondent submitted that the claimant's termination was lawful and that he was accorded fair hearing before his services were terminated hence was not entitled to any dues or accrued benefits as claimed. The respondent submitted that it had discharged its burden under sections 43(1), 45(2) and 47(5) of the Employment Act. It sought reliance on several authorities including **Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR**, **Kenya Revenue Authority vs Reuwel Waithaka & others** and **Mary Wakwabubi vs British Airways**.

17. The respondent further submitted that the claimant was accorded fair hearing prior to his termination as required under section 41(1) of the Employment Act. To buttress its submissions, it relied on the case of **Standard Group Limited vs Jenny Luesby and H. Young (EA) Limited vs Samuel Gikunda Mbiuki**.

Analysis and determination

18. Arising from the issues raised in the pleadings, the submissions as well as the documentary and oral evidence, the questions falling for the court's determination are;

a) Was the claimant's termination unfair and unlawful?

b) Is the claimant entitled to the reliefs sought?

a) Was the claimant's termination unfair and unlawful?

19. The claimant has alleged that his termination was unfair, untimely and therefore unlawful. He contends that the respondent did not proffer a reason to justify his termination and neither did it comply with the provisions of the Employment Act in doing so.

20. Under the Employment Act, there is a shared responsibility between the employer and the employee in terms of proving unfair termination. The employee is required under section 47(5) to prove that an unfair termination has occurred and that the same was unfair. On the other hand, the employer is required under section 45(2) to prove that there was a valid and fair reason to justify an employee's termination. This position was reaffirmed by the Court of Appeal in the case of **Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR** as follows;

“So that, the appellant(employee) in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "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.”

21. The above position was also echoed by the Court of Appeal in the case of **Bamburi Cement Limited vs William Kilonzi [2016] eKLR**.

22. Essentially, both parties have to discharge their respective burdens. Hence, has the claimant proved that he was terminated? the answer is in the affirmative as there is a termination letter on record. The second question is whether he has proved that the termination was wrongful and unfair. The answer to this question can only be answered upon analysis of the reasons for termination and the attendant disciplinary process vis a vis the documentary and oral evidence tendered before Court.

(i) Reasons for termination

23. **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. Further on in the Act, **section 45 (2)** provides that 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 employees conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c) that the employer was terminated in accordance with fair procedure.

24. In view of the provisions of section 43(1) and 45 (2) of the Act, the respondent was required by law to prove that there was a reason for terminating the claimant's services and that such reason was fair and valid. Specifically, section 45 (2) (b) (ii) of the Act stipulates that the reason must be fair and in respect of an employee's conduct, capacity and compatibility.

25. From the facts herein, the termination was in respect of the claimant's conduct. The specific reasons advanced by the respondent was that it lacked trust in the claimant's character as an employee hence he could not be entrusted with responsibilities.

26. The question before court now is to determine whether the reasons advanced by the respondent are valid and fair within the terms of section 45(2) of the Act. Therefore, it is imperative to evaluate the circumstances leading to the claimant's termination and determine whether the reasons fall within the prescribed legal parameters.

27. It was not contested that the claimant was on duty on the night of 14th September, 2016 and was in charge of the screenings. Subsequently, he was the one responsible for separating the good rice from the waste product. In his pleadings and oral testimony, the claimant did not name any other employee who was in charge of the screening process.

28. He could not explain how the good rice found its way to the disposal site whilst he was in charge of the screening process. In as much as he contended that there were other persons assisting him, he did not dispute the fact that he was the person in charge. In any event he did not the persons who were assisting him.

29. Further, 3 of his colleagues who were with him on the night shift at the material time and who were suspended alongside him, confirmed that the claimant was the only person in charge of the screening process and that he was the one transporting the bags to the husk area. From the record of the disciplinary hearing, the testimonies of the claimant's co-workers were all in accord.

30. The claimant further asserted that his termination was instigated by Mr. Wambua but did not render proof to substantiate the said allegation. Besides, all the employees who were on the night shift of 14th September, 2016 were suspended to pave way for investigations. It would therefore seem that at that point, everyone who was on the night shift of 14th September, 2016 was a suspect and it was not clear who was culpable. It was after investigations that all evidence pointed to the claimant as being the person who ought to have known how the good rice ended up disguised as waste in the husk area. It will therefore be far-fetched to state that the claimant was picked on and his assertion that he was the only one who was reprimanded is therefore unfounded.

31. The claimant has further contended that the respondent ought to have availed the CCTV footage which he was confident would exonerate him. He also pegged his innocence on the fact that the matter was never reported to the police since it bordered on criminality.

32. In an employment scenario, it is not practical to expect an employer carry out investigations with the same precision required in a criminal process. This is on account of the fact that the applicable standard of proof is on a balance of probability.

33. In the case of **Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 others [2019] eKLR**, the Court of Appeal found that the standard of proof required is on a balance of probability and not beyond reasonable doubt, and all the employer is required to prove are the reasons that it **“genuinely believed to exist,”** causing it to terminate the employee's services.

34. In the instant case, the respondent only needed to prove that that the reasons for the claimant's termination genuinely existed and in this case, it touched on the claimant's level of honesty as an employee. *The claimant's termination letter as clearly expressed, indicated that it lacked trust in his character as an employee.*

35. In the Canadian case of *McKinley vs BC Tel*, [2001] 2 S.C.R. 161, 2001 SCC 38 the Court in assessing whether an employee's dishonesty would justify a dismissal, found that the test applicable is **whether the employee's dishonesty led to a breakdown in the employment relationship**. The court further found that just cause for dismissal would exist where the dishonesty violates an essential condition of the employment or breaches the faith inherent to the work relationship, or is fundamentally inconsistent with the employee's obligations to his employer.

36. The circumstances of this case, indicate that the respondent could no longer retain the claimant owing to trust issues. In applying the test set in the *McKinley* case, the trust issues herein seemingly went to the root of the employment relationship. This is more so because the claimant was entrusted with handling the resources of the respondent hence honesty and trust was a key element for the sustenance of that relationship.

37. It is therefore apparent that the respondent genuinely believed that there was lack of trust in the employment relationship thus the claimant's termination.

38. The total sum of the foregoing is that the respondent has demonstrated that it had reasonable grounds to terminate the services of the claimant hence has discharged its burden as by law required.

39. The next issue for consideration under this limb is whether the respondent accorded the claimant procedural fairness prior to his termination.

(ii) Procedural fairness

40. Besides proving reasons for termination, an employer is also required under Section 45 (2) (c) of the Employment Act, to comply with the provisions of fair process and prove that it accorded an employee procedural fairness.

41. Section 41 of the Employment Act provides for the manner in which fair procedure is to be achieved. It requires an employer to notify an employee of the intended termination. In this regard, the employee is to be notified the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.

42. Consequently, the respondent was required to prove that it accorded the claimant an opportunity to make his representations in answer to the allegations leveled against him.

43. The claimant admitted attending the disciplinary hearing of 23rd September, 2016. Prior to this, he had been suspended alongside other employees who were on the night shift when the good rice is suspected to have been concealed at the husk area. The suspension letter which was copied to the secretary general of the claimant's union, stated the reasons for the suspension and notified the claimant of the date he would be required to appear for the disciplinary hearing. The notice for hearing was about 8 days or so.

44. He was also advised through the said letter to appear in the company of the chief shop steward.

45. During hearing, the claimant did not deny the record tendered by the respondent as being the minutes of what transpired during the disciplinary hearing. If anything, he appended his signature on the minutes, a fact he confirmed before court during the hearing. In attendance at the disciplinary hearing, was the chief shop steward Mr. Wambua who was RW2 in this case.

46. To this end, the procedure for termination as applied by the respondent cannot be faulted as it met the legal threshold under the Employment Act.

47. In the circumstances, I find that the claimant has not established his case on a balance of probability to the effect that his termination was unfair.

48. The upshot of the foregoing is that the Court finds that the claimant's termination was not unfair or unlawful as the respondent has proved that there were fair and valid reasons to terminate him and that in doing so, it complied with the requirements of procedural fairness.

b) Is the claimant entitled to the reliefs sought?

3 months salary in lieu of notice

49. The claimant has averred that he is entitled to 3 months' salary in lieu of notice by virtue of clause 3(a) (iii) of the CBA executed between the claimant's union with the respondent. The CBA was annexed to the respondent's list of documents. Clause 3 (a) which provides for the notice period in respect of termination reads as follows;

“After the completion of the probationary period, employment maybe terminated by either party giving to the other written notice and in the absence thereof, pay in lieu of notice as follows: -

(i) Employees with less than ten (10) years' service-one (1) month notice or pay in lieu thereof.

(ii) Employees with ten (10) years up to fifteen (15) years of service- two (2) months or pay in lieu thereof.

(iii) employees with above fifteen (15) years service-three (3) months' notice or pay in lieu of notice."

50. On its part, the respondent has disputed this proposition and asserted that the claimant was paid one month's salary in lieu of notice on account that he became a permanent employee on the date the CBA came into force, which is 1st January, 2016 hence had served for a period of less than 10 years at the time of his termination.

51. It is notable that clause 3 of the CBA does not mention the nature of an employee's service whether casual or permanent. The claimant at paragraph 3 of his claim averred that he was employed as a general worker with effect from 13th July, 2006. This averment was not disputed by the respondent in its response to the claim. The claimant's assertion was confirmed by RW1 in his testimony and in his witness statement filed in Court. The respondent further annexed the claimant's pay slips going way back to 2007. It is also notable that the duration of the claimant's employment with the respondent was never in dispute during trial. It is therefore apparent that the claimant has been in the respondent's employ with effect from sometimes in July, 2006 upto 26th September, 2016 hence had served for approximately 10 years, 2 months at the point of his termination.

52. The only contention from the respondent is that the claimant's employment terms were converted from casual to permanent basis with effect from 1st January, 2016 hence he had not served for a period of 10 years. As I have stated herein, clause 3 did not make reference to the nature of employment contemplated. In any event, were the claimant's terms of employment not converted pursuant to the CBA, the conversion would still have taken place by operation of law under section 37 (1) (c) of the Employment Act.

53. In as much as I have found that the claimant's termination was not unfair, the respondent elected to terminate the services of the claimant by virtue of clause 3 of the CBA. Therefore, in following with the provisions of the CBA, the respondent was bound to terminate the claimant's services pursuant to clause 3 (a) (ii) by giving him 2 months' notice and in lieu thereof, 2 months' pay. I thus find that the claimant was entitled to 2 months' salary in lieu of notice and not one.

54. I hasten to add that I would have arrived at a different conclusion had the claimant been terminated without notice.

Days worked in September, 2016

55. The claimant has prayed for the sum of Kshs 10,495/= being salary for the month of September, 2016 when he claimed to have worked. This claim has been disputed by the respondent on the basis that it paid the claimant's salary to the last cent. To justify this assertion, it produced a "Final Dues Acknowledgement" slip which indicates that the claimant was paid the sum of Kshs 19,302/=. The net pay in the acknowledgment slip is Kshs 12,790/= after deductions.

56. The claimant denied signing the acknowledgement slip though it bears his initials. On record, is also a cheque made out in the claimant's name. The amount in the cheque is the same as the amount in the acknowledgement slip. The respondent further produced a bank statement to show that the claimant actually cashed the cheque. This is enough evidence that the claimant's dues were paid.

57. On his part, the claimant did not tender evidence to dispute the payment despite alleging otherwise. This claim therefore fails.

Compensation for loss of earnings

58. The claimant has claimed the sum of Kshs 145,320/= as being compensation for loss of earnings. This claim has not been justified despite being pleaded. In any event I have found that the claimant's termination was not unfair hence he is not entitled to compensation. I therefore dismiss this claim for lack of basis.

Paternity leave

59. The claimant has claimed paternity leave in the sum of Kshs 11,303/=. He avers that he was denied paternity leave in 2008 and in 2010 when he became a father. He has not produced any evidence to show that he applied for the requisite leave and that the same was denied. In addition, he did not produce any evidence in the form of birth notification or certificate to confirm this assertion. This claim therefore fails.

Annual leave

60. The claimant prayed for annual leave for 10 years in the sum of Kshs 84,770/= on account that he was denied leave while employed by the respondent. To rebut this claim, the respondent has produced evidence that the claimant applied for leave with effect from 8th August, 2016 till 24th August, 2016. A leave statement was also produced to show that the claimant proceeded on leave in April and August 2016. On his part, the claimant did not produce evidence to justify his claim and to discount the evidence of the respondent. The claim is therefore dismissed.

Medical Allowance

61. The claimant has prayed for the sum of Kshs 54,000/= being medical allowance. His pay slip indicate that he was earning a sum of Kshs 500/= itemized as medical allowance. The pay slip also indicates that the respondent was remitting dues towards the National Hospital Insurance Fund (NHIF) in favour of the claimant. The claimant on the other hand has not justified his claim under this head and as such the same is dismissed.

Night shift allowance

62. The claimant has also prayed for the sum of Kshs 54,000/= as being unpaid night shift allowance. His pay slips state otherwise. It has payment in respect of shift allowance and normal overtime. He has not produced evidence to the contrary. Indeed, the pay slip that he annexed to his claim indicate payment for shift allowance. This claim fails as well.

Service gratuity

63. The claimant has alleged that he is entitled to service gratuity in the sum of Kshs 60,550/=. In refuting this claim, the respondent produced a Discharge Voucher from Kenindia Assurance Limited to prove that the claimant withdrew both his contributions and the employer's contributions upon termination. His claim to this end thus lacks merit and is dismissed.

Conclusion

64. The claim succeeds only to the extent that the claimant was entitled to two months salary in lieu of notice as opposed to one, hence the court awards him one months' salary in the sum of Kshs 12,110/= being notice pay.

65. The rest of the claims are dismissed.

66. Each party will bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF OCTOBER, 2021.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Mideva

For the Respondent Mr. Kamwami

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