



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 994 OF 2015

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

SAMUEL OMACHE.....CLAIMANT

VERSUS

TUFF STEEL LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant has brought a claim against the Respondent for unlawful termination of employment. He filed a statement of claim dated 9th June 2015. He also gave evidence in Court on 6th August 2021.
2. The Respondent filed a response to the statement of claim dated 7th January 2020 and prays the Claimant's claim be dismissed with costs.
3. The Respondent's witness was STEPHEN WANYOIKE, who testified on behalf of the company. He described himself as the Respondent's Accountant.

Claimant's Case

4. The Claimant in his evidence in chief states that he worked for the Respondent company as Driver.
5. He says that on 28th July 2012 he was at the place of work and he saw a binding wire on the vehicle he was meant to drive to Kisumu.
6. He says he was called by the Asian boss and was asked to leave the premises. He was called after one week and was given at termination letter. He was asked to sign the letter but he refused. He says he was not paid the terminal benefits.
7. The Claimant says he was informed that his services were terminated for stealing.
8. The Claimant was employed by the Respondent on 2nd December 2020.
9. The Claimant prays that-
 - (a) His termination from employment be declared unlawful.
 - (b) He be paid Kshs.966,888/= as his terminal dues inclusive –
 - (i) Salary for July 2012 13,857
 - (ii) Leave balance for 18 months 19,188
 - (iii) Salary in lieu of notice of termination 13,857

(iv) Overtime of 54 x 13,857 748,278

(v) House allowance at 15% per month 5,424

(vi) Compensation for unfair termination 166,284

Total Kshs.966,888

(c) The Respondent be ordered to compensate the Claimant for unlawful termination at the equivalent of twelve (12) months gross salary.

(d) The Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

(e) The Respondent to pay the costs of this suit.

(f) Interest of the above at Court rates.

(g) The Respondent be ordered to give the Claimant a certificate of service in terms of Section 51 of the Employment Act, 2007.

Respondent's Case

10. Stephen Wanyoike, the Respondent's Accountant gave his evidence in chief on behalf of the Respondent. He states that the Claimant was employed as a Driver by the Respondent from 3rd December 2010.

11. The Witness testifies that the Claimant's employment was terminated when he was irregularly found with a roll of binding wire inside the cabin of the vehicle he was designated to drive. He says that the Claimant's turn boy Evans Atambi confessed he witnessed the theft.

12. The Respondent avers that the Claimant was called to appear for an internal disciplinary hearing process which he ignored and never returned to work.

13. The Respondent's witness states that as a result of the Claimant failing to attend the disciplinary hearing, he was served with a dismissal letter.

14. The Respondent says that the Claimant refused to collect his salary for July 2012 and further that the Claimant was paid equivalent of 12.25 leave days being Kshs.11,999/=.

15. The Respondent further says that the Claimant was not entitled to notice since he was summarily dismissed due to gross misconduct

16. The Respondent says the Claimant did not work overtime and further his house allowance was consolidated to his salary.

17. The Respondent avers the Claimant was not unfairly terminated.

18. Last but not least the Respondent says the Claimant refused to collect his certificate of service.

19. The issues for determination are as follows –

(i) Was the Claimant unfairly dismissed;

(ii) Is the Claimant entitled to the reliefs he has prayed for.

20. The Claimant's submissions are that the Claimant was dismissed from employment without being given a valid reason and also he was denied an opportunity to be heard. The Claimant alleges that on 28th July 2012 he was assigned a lorry to drive and on entering the lorry he saw binding wire in the cabin. He was then called by "an Indian Man" and was told that a loader Evans Atambi had said that the Claimant had asked him to put the wire in the vehicle. He says that he was then given a termination letter dated 28th July 2012 bearing the name Thomas Mutiso which letter was also unsigned.

21. The Claimant is relying on the case of **Abraham Nyabane Asiaga v Barclays Bank of Kenya Ltd. (2019) eKLR** where Appellate Judges stated that for a termination to pass the test of fairness there must be substantive justification and procedural fairness. He says failure to sign the dismissal letter appears to be an oversight that had serious repercussions for the Respondent, entitling the Appellant to make a claim under Section 47 of the Employment Act.

22. Further the Claimant submits that if at all the Respondent had grounds to accuse him of theft they should have reported the matter to the police and recorded a statement.

23. The Claimant also relies on the case of **Nicholas Muasya Kyulo v Farmchem Limited Industrial Cause No. 1792 of 2011** which stated

“The employer is required to have internal systems and processes of undertaking administrative and verifying the occurrence of misconduct before a decision to terminate is arrived at.”

24. The Claimant further says he was not given an opportunity to be heard as he was ordered to leave the premises. He quotes case of **Mary Mutanu Mwendwa v Ayuda Ninos De Africa Kenya (2013) eKLR** where it was held that the Employment Act has made it mandatory by virtue of Section 41 of the Employment Act for an employer to notify and hear any representation an employee may wish to make whenever termination is contemplated by the employer and is entitled to have a representative present.

25. The case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited (2013) eKLR** it was held that the right to be accorded a hearing and be accompanied by fellow employee or union representative during hearing is a sacrosanct right.

26. Other cases referred are **CMC Aviation Limited v Mohammed Noor [2015] eKLR** and **Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR** where the principle of according the employee a fair hearing is upheld by a wealth of jurisprudence. In the latter case it was affirmed that the two elements must be satisfied and that is **fair procedure** and **valid reason**.

27. The Claimant therefore submitted that he was unfairly terminated and was entitled to the reliefs prayed.

Respondent’s Submissions

28. The Respondent’s submissions are to the effect that they had a valid reason to terminate the Claimant. He relied on the case of **Thomas Sila Nzivo v Bamburi Cement Limited (2014) eKLR** where the Court in reference to Section 44(4) of the Employment Act observed –

“The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under Section 44[4][g] of the Employment Act 2007. The Employer was not required to have conclusive proof of the Claimant’s involvement; it was only expected to have reasonable and sufficient grounds.”

29. He further avers that burden of proof of unfair termination of employment shall rest on the employee while burden of justifying grounds for termination of employment or wrongful dismissal rests on the employer according to Section 47(5) of the Employment Act.

30. He says further that the Respondent tendered a written statement by a turn boy supporting its averments that the Claimant was caught with a roll of binding wire and upon inquiry he could not explain why he was in possession of the same.

31. According to the Respondent’s submissions the Claimant refused to attend a hearing to defend himself and instead absconded from duty.

32. The Respondent’s submissions dated 1st September 2021 are that his claim is baseless and unmerited and should be dismissed with costs.

Determination

33. The Court has in its determination considered the entire evidence, pleadings, exhibits and submissions tendered by the Respondent and the Claimant.

34. Section 45(1) of the Employment Act provides that no employer shall terminate employment of an employee unfairly. Section 45, Subsection [2] provides that termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid.

35. In the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** Ndolo J. noted –

“... that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”

36. Further Section 43 of the Employment Act obligated an employer to prove the reason for the termination and where the employer failed to do so the termination was deemed to have been unfair. In the instant case there was an allegation of stealing of some roll of binding wire which the Respondent claimed was found in the cabin of the vehicle that the Claimant was to drive.

37. The Claimant was supposed to drive that vehicle. The Court was not informed if the vehicle where the binding wire was found was only exclusively handled by the Claimant. In fact the Claimant says he did not go near the vehicle when the goods were being loaded. He says he would be given the vehicle after the loading was completed and he was not in charge of the loading.

38. There is also an averment by the Respondent that a turn boy by the name Evans Atambi confessed he witnessed the theft. The Respondent did not call the said Atambi as his witness. A copy of a statement purported to have been written by Atambi was filed in Court but there is no reference to it except a mention in the Respondent’s submissions.

39. The Court finds the Respondent’s evidence does not pass the test of proof on balance of probability and the reason given for summary dismissal of the Claimant is not valid. It is a mere speculation with no iota of proof.

40. The Court is inclined to agree with the findings in the cases of **Nicholus Muasya Kyula v Farmchem Ltd [2012] eKLR** as well as **Mary Mutanu v Ayuda Ninos De Agrica Kenya (2013) eKLR** among many others which have ruled that the two crucial elements in establishing whether termination of employment is lawful is fair procedure and valid reason.

41. The Court finds the Respondent did not give any supportive evidence that the Claimant was the one culpable of stealing the binding wire. There is neither collaborative evidence nor circumstantial proof that the Claimant was the only one who could have put the binding wire in the vehicle. I regret to state that the Respondent's evidence is mere allegations without proof. The reason given for terminating the Claimant's employment is therefore not valid as it has not been proved on the balance of probability.

42. I also must allude to the case of **Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR** where the Court found that the summary dismissal of the Respondent was fair in substance and on procedure. This is the case referred by the Respondent in his submissions. The facts of the above case differ from the instant case. In the case of Thomas Sila, the Claimant was in charge of receiving industrial diesel oil. He received 13,500 litres on 12th September 2012. There was an elaborate process of checking the oil and the Claimant was in charge of the process. It was then alleged that on 12th September 2012 the said oil was not found in the Respondent's physical stock.

43. The Claimant was given a chance to defend himself and he did. A decision was made to dismiss him and he appealed. His appeal was dismissed. So the Court found his termination is lawful as Respondent had reasonable and sufficient grounds to suspect the Claimant acted in a way that was detrimental to the Respondent and its property and so was justified to dismiss him under Section 44(4)(g) of the Employment Act.

44. It is therefore to be noted that the facts of this case of Thomas Sila Nzivo are substantially different from this instant case. The case of Nzivo there was sufficient evidence to connect him to the loss of the diesel. In this instant case, there is no evidence to establish that the Claimant was the only one culpable of having put the wire in the cabin of the vehicle. It has also not been established that the wire was stolen.

45. The tenets of Section 44 of the Employment Act have not been proved by the Respondent to qualify for grounds of summary dismissal.

46. As for procedural fairness, the evidence given is that on the 28th July 2012, the Claimant reported to work and was told to go home after being informed a rod of binding wire was found in the cabin of the vehicle he was driving. He was recalled a week later and was informed he was found to have stolen some roll of binding wire. He was then given a letter for summary dismissal and was asked to sign it but he declined. The letter was dated 28th July 2018 the same day he was informed of the binding wire.

47. The Respondent says they called the Claimant to attend disciplinary meeting. He says that the Claimant ignored the meeting and instead left the place of work. The Respondent would have been more convincing should they have shown written invitation to the Claimant at least. The Court has no way of establishing that the Claimant was invited to a disciplinary meeting and whether he was asked to invite another person of his choice or a shop floor union representative.

48. It is the requirement under Section 41(2) of the Employment Act that an employer must be fair in dismissing the employee by adhering to the requisite procedure. An employer who dismisses an employee without a hearing fall a foul of Section 41(2) of the Employment Act. In all fairness, there is no evidence by the Respondent that they gave Claimant opportunity to be heard in the presence of his representative.

COURT'S DECISION

49. It is the Court's finding that the Claimant was unlawfully dismissed because there was no proven substantive justification for such termination and the procedure was flawed since the Claimant was not given opportunity to present his side of the case in the presence of his representative.

50. The Court therefore enters judgment in favour of the Claimant as hereunder –

(i) Salary for July 2012 Kshs.13,857

(ii) Leave balance for 18 months Kshs.19,188

(iii) Notice Kshs.13,857

(iv) Compensation for unfair termination for 4 months considering the period worked for the Respondent was only two years and also considering his salary was quite low Kshs.55,436

(v) The claim for overtime is not proven and is declined. No evidence oral or otherwise that he worked overtime

(vi) House allowance was part of the salary according to the Claimant's letter of employment and so is declined.

51. In conclusion judgment is entered in favour of the Claimant for a total sum of Kshs.102,338/=.

52. Costs are awarded to the Claimant.

53. Interest at Court rates till payment.

54. Certificate of service to be issued immediately.

55. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF OCTOBER 2021

ANNA NGIBUINI MWAURE

JUDGE

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 has 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.

ANNA NGIBUINI MWAURE

JUDGE