



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 47 OF 2017

ELIUD ODHIAMBO AGO.....CLAIMANT

VERSUS

OCEAN AGRICULTURE (EA) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent his erstwhile employer vide the memorandum of claim dated and filed on 12th January 2017. He avers that he was employed by the Respondent on 1st June 2005 as a turnboy and that he earned Kshs. 31,483/- a month inclusive of allowances. He averred that he was unfairly dismissed on 17th June 2016. The Claimant sought the payment of compensation for the unfair and unlawful dismissal, his terminal dues of Kshs. 5,439,393/- , severance pay for 30 years – Kshs. 2,347,650/-, general damages for wrongful termination, an award of service pay for each completed year of service, interest and costs of the suit.

2. The Respondent in the defence to claim dated 23rd February 2017 and filed on 28th February 2017 averred that the Claimant had in fact been employed by the Respondent as a watchman from 1st June 2005 and thereafter from 29th March 2007 as a vehicle conductor. The Respondent averred that the Claimant earned Kshs. 31,483/- as at the time of termination. The Respondent averred that the Claimant was contrary to policy found in possession of goods belonging to the Respondent's client Equinox Flowers and it was suspected there was a scam in place between the client's storeman, the Respondent's driver and the Claimant. The Respondent averred that the excess stock was one metric tonne and the Claimant was unable to explain the discrepancy. The Respondent averred that the storeman fled when investigations commenced and the investigations revealed the Claimant had participated in the scheme. It averred that the Claimant was summoned for a disciplinary hearing and he failed to show up and that the refusal to be subject of disciplinary proceedings led the Respondent to prepare the terminal dues for the Claimant and deposit them with the District Labour Officer on 22nd June 2016. The Respondent averred that the Claimant's claim ought to be dismissed with costs.

3. The Claimant testified and the Respondent did not call a witness. The Claimant stated that he was terminated from employment unfairly as he was not heard by the Respondent. The parties thereafter filed written submissions. The Claimant submitted that the issues for determination were whether the

4. It is the Claimant's case that that he was employed as a delivery man for a period of Eleven (11) years. The Claimant diligently served the Respondent as a delivery man until his services were unfairly terminated on 21st June, 2017. Your Honour, the Claimant claims that the termination of his services was illegal and unfair as the procedure for termination was not observed contrary to the Employment Act, 2007. The Claimant also contends that his one month salary in lieu mandatory statutory contributions and terminal dues were not paid. That despite demand made for payment the Respondent refused and/or declined to pay the outstanding dues to the Claimant. The Claimant thus prays that he be paid severance pay, payment in lieu of notice and general damages for wrongful dismissal, compensation for unfair termination and terminal dues including NHIF and NSSF unpaid amounts. The Claimant submitted that the issues for determination before this Honourable Court were:-

(a) Whether the Claimant's employment was unfairly terminated by the Respondent.

(b) Whether the Claimant is entitled to the prayers sought in the Memorandum of Claim.

As to whether the Claimant's employment was unfairly terminated by the Respondent that the Claimant was unfairly terminated from his employment the Claimant submitted that the manner in which he was dismissed from employment was breached by the employer. The Claimant submitted that in his case, the termination was initiated by the employer. He conceded that the employer can terminate a contract of employment under Section 41 on various grounds such as misconduct, poor performance or breach of contract. The Claimant submitted that the grounds for gross misconduct are listed under Section 44(4) of the Employment Act but the termination on those grounds should be fair in the eyes of the law. He submitted that the reason for the termination must be valid and that the reason for the termination is a fair reason related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer; and that the

employment was terminated in accordance with fair procedure. The Claimant submitted that the law provides that the termination of employment shall be unfair for the purposes of this part where the employer did not act in accordance with justice and equity in terminating the employment of the employee. The Claimant submitted that in deciding whether it was just and equitable for an employer to terminate the employment of an employee, the Court should consider 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. He submitted that the Court should also consider the conduct and capability of the employee up to the date of termination; the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under Section 51 and the procedural requirements set out in Section 41; the previous practice of the employer in dealing with the type of circumstances which led to the termination; and the existence of any previous warning letters issued to the employee. The Claimant submitted that for the procedure to be fair, it should take into account the right of an employee to be heard before a termination decision is taken against the employee. He submitted that the reasons that the Respondent alleged to have used to terminate the employment of the Claimant was on the issue of misconduct. The Claimant submitted that the Respondent produced letters dated 21st June 2017, alleging the said misconduct in which the Claimant carried excess goods contrary to the dispatch of goods company's rules. The Claimant however denies any of the above allegations and avers that his duty was to deliver the products to their various designations and not to load the products in the motor vehicle. The Claimant submitted that if anyone is to take the responsibilities for the allegations made, it would be the people responsible for loading the products on the said date. The Claimant submitted that the purported reasons for terminating his services were invalid on grounds that there are certain procedures that need to be followed before the termination otherwise the termination would be unfair and unlawful. He relied on the case of **Fred Makori Ondari v The Management Committee of the Ministry of Works Sports Club [2013] eKLR** which provided that despite the existence of valid reasons for dismissal, it can successfully be challenged for failure to abide by the laid down procedures as to a fair hearing. The Claimant submitted that the Court observed as follows: "*the Respondent had valid reasons to dismiss the Claimant summarily but the Respondent did not follow the minimum statutory procedure...*" The Claimant also cited the case of **Sarah Wanyaga Muchiri v Henry Kathii & Another [2014] eKLR** in which the Court cited with approval the holding in the South African Labour Appeals Court case in **Engen Petroleum Ltd v Commissioner for Conciliation Mediation and Arbitration & Others (2007) ZALAC 5** that

A dismissal could be found to be unfair by reason of the fact that, although the employee was guilty of misconduct, dismissal as a sanction was excessive in all the circumstances of the case and therefore unfair"

The Claimant submitted that in this case, he was actually not given notice to show cause and subsequently no fair hearing. The Claimant submitted that the procedure to be followed before terminating an employee's contract is that: an investigation into the conduct must be undertaken and concluded, a notice to show cause should be issued to the employee inviting him to a disciplinary hearing to show cause why he should not be summarily dismissed on account of the charges levelled against him or her. The Claimant submitted that the notice should specify the charges clearly as well as the date, time and venue of the hearing. The Claimant submitted that the employee should also be informed, via this notice, that he is entitled to have another employee of his choice to accompany him to the hearing. On this limb, he relied on the case of **Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] KLR** in which the case of **Caliph O Ogega v National Social Security Fund Cause 280 of 2013 (unreported)** was relied on where the court held:

"Before any employee is terminated or dismissed, such an employee must be taken through a fair procedure. This is per Section 43 and 47 of the Employment Act where such an employee must receive notice with an outline of the reasons for termination. A hearing of the employee is paramount in fair employment and Labour relations based on Section 35 and 41 of the Employment Act, 2007 due process must be followed."

The Claimant submitted that he was summoned by the Respondent on 23rd June 2019 upon which he was handed a dismissal letter without being afforded an opportunity to a fair hearing. Additionally, he was informed to report at the Labour offices whereupon arrival at the offices he was issued with a cheque of shillings One Hundred and Nineteen Thousand, Seven Hundred and Ninety Eight and forty Cents which was to be divided equally with his colleague. The Claimant submitted that the legal procedure listed above was followed by the Respondent and his submission was that the termination of his services by the Respondent was unfair and unlawful. As to whether the Claimant is entitled to the prayers sought in the memorandum of claim, the Claimant submitted that he is entitled to the prayers sought in the Memorandum of Claim for reasons that the Respondent did not follow the due procedures laid down in the Employment Act before terminating his employment. The Claimant submitted that he thus seeks a declaration that the dismissal was wrongful, unlawful and malicious, terminal dues, severance pay award of service pay, general damages for wrongful termination, interest and cost and that the Claimant be reinstated to his former employment. The Claimant relied on the case of **Irene Akoth v Tobias See & 8 Others [2021] eKLR** in which the Claimant who had been employed by the Respondent for a period of 14 years was allegedly terminated on ground misconduct, the court declared his termination unlawful and unfairly. The Claimant submitted that he is entitled to service pay pursuant to Section 35(5) of the Employment Act which guarantees every employee the right to be awarded service pay for every year worked. The Claimant submitted that the Respondent in this matter failed to remit the statutory deductions are required by the law. He relied on the case of **Gordon Godfrey Baraza v Pedesa Stationary Services Limited [2015] eKLR** in which the court awarded the Claimant service pay on grounds that the Respondent failed to remit the statutory deductions for the Claimant during his employment. He also referred to the case of **Dominic Mutisya Sammy v Tahir Sheikh Said Transporters [2021] eKLR** in which the court awarded the Claimant severance pay where the Claimant who had worked for the Respondent for a period of 8 years was unfairly terminated. Similarly, the court in the case of **Maureen Atieno Ouma v Njuca Consolidated Company Limited [2018] eKLR** awarded the claimant severance pay for 8 years of service. The Claimant urged the Court to find that he was terminated unfairly and/or unlawfully from employment and grant the following prayers to the Claimant: Severance pay Kshs. 2,347,650/-, terminal dues amounting to Kshs. 5,439,393.60, award of service pay for each completed year of service from the date of employment, general damages for wrongful termination, remittance of statutory deductions by the employer, Claimant's reinstatement in his former employment and cost and interest of this suit.

5. The Respondent submitted that it was admitted that the Claimant was employed by the Respondent as a watchman commencing 1st June 2005, thereafter from the 29th March 2007, as a vehicle conductor, and at the time of the termination of the contract was in receipt of a gross salary of Kshs. 31,483/-. The Respondent submitted that the Claimant in testimony before the Court was referred to his payslip which confirmed the sums paid and as per the said payslip it is evident that the Claimant was registered for NSSF. The Respondent submitted that it was not controverted that there was a spot check by the Respondent's client and that examination, the Claimant was found with excess stock of over one metric tonne in the truck. The Respondent submitted that upon enquiry, the Claimant was unable to properly explain or justify the excess stock which was on the truck. The Respondent submitted that the Claimant at first claimed the excess goods were for another client and in a bid to cover up the illegality, he called the Respondent's office in charge of issuing the relevant documentation, and

tried to get them to falsely write a delivery note for the excess stock. This the Respondent's office refused to do whereupon the Claimant and his conductor then fraudulently altered the delivery note of the next client they were to deliver to. The Respondent submitted that it launched an investigation in the incident and it was discovered that the Claimant had illegally and without authority taken goods belonging to the Respondent's client in collusion with the Respondent's client's storeman who it should be noted resigned and fled during further investigations by the said client. The Respondent's case is that they followed due process and allowed the Claimant and his conductor to give an explanation the following day even though the evidence against the Claimant was both compelling and absolute, the Claimant however, left/fled the Respondent's premises and refused to return for further notification and hearing proceedings. The Respondent submitted that this information was contained the letter attached to the Claimant's bundle of documents dated the 17th June 2016. The Respondent submitted that when Claimant refused return to work, they reported the matter to the District Labour officer and submitted the dues calculated by the District Labour Officer on 22nd June 2016. The Respondent submitted that the Claimant had received the sum of Kshs. 59,899/- from the District Labour Officer. The Respondent submitted that the conduct of the Claimant regarding the excess goods is a clear breach of fidelity, company procedures, and the law. The Respondent submitted that it is evident that the Claimant was called upon to answer to the Respondent's claims of illegality and that the Claimant refused to return to work and went to the Labour officer to collect his dues that were left there. The Respondent submitted that it was for the Claimant to prove that a) the reason for his dismissal was not valid and b) the employment was terminated with unfair procedure. The Respondent submitted that the Claimant was rightfully dismissed for gross misconduct, for his illegal and unlawful possession of the Respondent's client's property. The Respondent submitted that the Claimant was dismissed in accordance with Section 44 and 45 the Employment Act, 2007

6. The Claimant was dismissed from all accounts after a consignment was discovered in a vehicle he was marshalling from a client's premises. He was given a letter seeking an explanation but he never responded to the letter which he produced in his bundle of exhibits. This was the first step in getting the Claimant to the hearing he craves. He declined to subject himself to the disciplinary process by absconding from his work place and that cannot be grounds for a claim for unlawful dismissal. He was paid a salary that encompassed NSSF and as such under the law he cannot be entitled to severance pay. His suit was full of misstatements, lacks merit and is dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER 2021

Nzioki wa Makau

JUDGE