



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1185 OF 2016

DAVID MOSHI INGANGA.....CLAIMANT

VERSUS

ASSOCIATION OF GAMING OPERATORS-KENYA (AGOK).....RESPONDENT

JUDGEMENT

1. The claimant avers that he was employed as the Chief Executive Officer of the respondent with effect from 20<sup>th</sup> February, 2014 and served as such until 29<sup>th</sup> February, 2016, when his services were terminated. He avers that the said termination was unfair, unlawful and unprocedural hence the claim herein. He seeks various reliefs including reinstatement and compensatory damages.

2. The claim was defended through the respondent's Memorandum of response through which it denied the averments contained in the claim. It averred that the claimant was summarily dismissed on grounds of misconduct and that the said dismissal was undertaken within the legal parameters. It prayed that the claim be dismissed with costs.

3. The matter came up for hearing on 27<sup>th</sup> September, 2021 and the respondent was not present in court. The claimant produced an Affidavit of Service sworn on 7<sup>th</sup> July, 2021 by one Gabriel Mwanja Nduva, wherein he deponed that he effected service of the hearing notice, upon the firm of Muturi Mwangi & Associates Advocates, who were on record for the respondent.

4. The court being satisfied with the return of service, proceeded to hear the claimant's case in absence of the respondent, pursuant to Rule 22 of the Employment and Labour Relations Court Rules (2016).

**Claimant's case**

5. The claimant took the stand and testified in support of his case. He told court that he was terminated following allegations that he misrepresented the respondent. It was his testimony that the said allegations were untrue and that indeed, he had always carried out his duties in the best interests of the respondent and had never received any negative review or warning through his tenure.

6. He further told court that his services were terminated abruptly in a manner that was unfair, unlawful and unprocedural. That his appeal to the respondent against his dismissal was ignored, just as the demand letter sent by his advocates.

**Submissions**

7. The claimant filed its written submissions dated 28<sup>th</sup> October, 2021 and attached thereon a copy of an Affidavit of Service indicating that it had effected service of the said submissions upon the respondent electronically, via the email address, [info@mmajuris.com](mailto:info@mmajuris.com).

8. The claimant filed written submissions through which it submitted that the reasons for his termination were not valid. He further submitted that his termination was not in line with fair procedure as required by law. He sought reliance on the case of **Loice Otieno vs Kenya Commercial Bank limited, Cause No. 1050 of 2011**.

9. The respondent did not tender any submissions for consideration by court.

**Analysis and determination**

10. Having considered the pleadings on record, and the claimant's submissions, the issues for determination can be distilled as follows;

**i. Whether the claimant's termination wrongful and unlawful?**

**ii. Is the claimant entitled to the reliefs sought?**

**Was the claimant's termination unfair and unlawful?**

11. The claimant has alleged that his dismissal was unfair and unlawful in terms of section 45 (2) of the Employment Act. He contends that the respondent did not advance valid reasons to terminate his services and did not comply with the requirements of fair hearing in so doing.

12. Under the Employment Act (Act), the burden of proving that an employee's termination was fair, valid and in line with fair procedure falls squarely on an employer. In order to demonstrate that a termination is fair and lawful, an employer must prove that there was substantive justification to warrant the employee's termination and that in effecting the said termination, it accorded the employee procedural fairness. It is therefore imperative to apply the set of facts and circumstances presented herein against the two crucial limbs set under section 45(2) of the Act.

**i. Substantive justification**

13. Substantive justification is broadly provided for under **Section 43(1)** of the Act and it requires an employer to prove reasons for termination, and in absence thereof, such termination is deemed to be unfair. It is noteworthy that section **45 (2)** of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer. To this end, the burden of proof, lies with the employer.

14. In the case of **Parliamentary Service Commission v Christine Mwambua [2018] eKLR**, the Court of Appeal had this to say on the issue;

**“the burden of proof in any complaint of unfair termination of employment or wrongful dismissal rests with the employee. But the burden of justifying the grounds for the termination or dismissal rests on the employer.”**

15. As was also held in the case of **Walter Ogal Anure –vs–Teachers Service Commission (2013) eKLR**, substantial justice refers to establishment of a valid reason for termination while procedural fairness refers to the procedure adopted by the employer in effecting the termination.

16. Simply put, it is not enough to advance a reason, the same must be valid and fair to justify an employee's termination. To establish the validity and fairness of the reason given, regard must be had to the circumstances leading to an employee's termination as well as the facts presented before court. This entails proving the veracity of the allegations the employee is accused of.

17. It is therefore necessary to interrogate the reasons advanced by the respondent and apply the same against the evidence presented in the case herein.

18. The reasons for the claimant's dismissal are contained in his letter of summary dismissal which reads in part as follows;

“On 18<sup>th</sup> of January, you acted contrary to the interests of the Association and allegedly reached a consensus on behalf of the Association without consultation and authority from the Executive Committee and its members, and signed a document that was against the interests of the Association and its members on devolved functions to the County Governments which you were well aware of.”

19. The claimant has disputed the allegations as set forth. He asserts that;

i. He was authorized to attend the consultative meetings with the Transition Authority and that the meeting of 18<sup>th</sup> January, 2016 was a culmination of numerous previous meetings which he had attended with the full knowledge and authority of the respondent;

ii. He attended the consultative meetings including the one of 18<sup>th</sup> January, 2016 in the company of some Executive Committee members of the respondent; and

iii. Some executive Committee members, namely Robert Walekhwa and Catherine Kanyunga also signed the impugned document, which was the reason for his dismissal.

20. The respondent did not produce the documents allegedly signed by the claimant without the requisite authority. In addition, it did not produce any minutes or resolution on the way forward as regards its stand in **Nairobi Const. Petition No 295 of 2014** hence advising the claimant of the position to take in the consultative meetings.

21. In absence of such documentation or evidence contained in whatever form and nature, it is impossible to establish whether the claimant acted without authority as alleged.

22. Besides, the respondent did not participate in the hearing before court hence there was no oral evidence from its end to justify the reasons for the claimant's dismissal.

23. In other words, the allegations leading to the claimant's dismissal were never substantiated through evidence. As such, it cannot be determined that the reasons leading to his dismissal were valid and fair within the terms of sections 43(1) and 45(2) of the Act.

**ii. Procedural fairness**

24. **Section 45(2) (c)** of the Act provides that for termination to be fair, it ought to be in line with fair procedure. **Section 41(1)** of the Act is more specific as regards the requirements of fair process. It requires an employer to accord an employee a hearing prior to termination. This procedure entails notifying the employee of the allegations for which the employer is considering terminating his or her services. Thereafter, the employee is granted an opportunity to make representations in response to the said allegations.

25. In the instant case, there is no evidence that the claimant was notified of the allegations against him. There was no evidence that he was ever invited to tender an explanation in response to the allegations facing him. I have carefully perused the minutes annexed to the respondent's defence and note that the meeting of 25<sup>th</sup> February, 2016, does not bear any semblance to a disciplinary hearing. If anything, it appears to be more of a consultative meeting. There is no indication in the said minutes to suggest that the claimant was called upon to tender an explanation to the allegations against him. Interestingly, on page 1 of the minutes, the claimant was required to leave the meeting together with another member of the secretariat, to allow for deliberations by the Executive Committee. The relevant portion reads as follows:

“N/B the chairman requested legal committee members and the secretariat to leave for 20 minutes break for a special deliberation on this case by the Executive Committee.”

26. It is not in doubt that the claimant was part of the secretariat as shown by the attendance list. To this end, any ensuing deliberations in regard to his case, were made in his absence.

27. Further, in another set of minutes containing deliberations of the same day, the claimant is not marked as among those present in the meeting. It is through the said minutes that the respondent's Executive Committee resolved to summarily dismiss him from service.

28. It is therefore apparent that the claimant was not given an opportunity to defend himself either verbally or in writing, against the accusations levelled against him. In short, his case was determined in his absence and he was not granted an opportunity to defend himself.

29. In light of the foregoing, I find that the hearing purportedly afforded to the claimant was not substantially fair and did not meet the legal threshold under the Act.

30. In the final analysis, I find that the claimant's termination was unfair and unlawful within the meaning of section 45 (2) of the Act.

**Reliefs**

31. Having found that the claimant's termination was unfair, I will award him four (4) month's salary as compensatory damages. In making this award, I have considered the length of the employment relationship and the fact that the reasons for the claimant's dismissal from employment were not justified.

32. The employment relationship having been admitted, the claimant is entitled to a certificate of service pursuant to section 51(1) of the Employment Act.

**Orders**

33. Accordingly, I enter Judgment in favour of the claimant against the respondent as follows;

**a. A declaration that the claimant's termination by the respondent was unfair and unlawful.**

**b. The claimant is awarded compensatory damages in the sum of Kshs 760,000/= which sum is equivalent to 4 months gross salary.**

**c. The claimant shall have the costs of the suit.**

**d. Interest on the amount in (b) at court rates from the date of Judgement till payment in full.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2021**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr. Kimathi

For the Respondent No appearance

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**