



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO.528 OF 2014

JARED MASERO ISANYA.....CLAIMANT

VERSUS

MARIDADI FLOWERS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 15th October, 2014 on the 22nd October, 2014 through the firm of Muthanwa and Company Advocates, claiming unfair termination and seeking to be compensated for the alleged unfair termination.

2. The summary of the claimant's case is that he was employed by the Respondent on 9th February, 2012 as a sprayer earning a monthly salary of Kshs. 7,310/- which work he performed diligently until 28th June, 2014 when his services were terminated.

3. The claimant believes that his termination was occasioned by an allegation that he incited other workers to strike on the basis that he was a ring-leader of the union.

4. He avers that he was subjected to a sham hearing as the allegation facing him were not communicated in time to enable him respond adequately, neither was he accorded a representative during the said hearing. Also that the result of the hearing was never communicated to him to allow him appeal if need be.

5. The claimant therefore prays for judgment against the Respondent for; -

i. A declaration that the termination of the claimant was unfair, wrongful, unlawful and illegal

ii. Find that the claimant is eligible to payment for;-

a) One month pat in lieu of notice.

b) Severance pay.

c) 12 Months' salary as compensation as per section 49(c) of the Employment Act.

iii. A certificate of service.

iv. Costs of suit.

6. The Respondent entered appearance on the 13th November, 2014 and filed a defence to claim on the 3rd December, 2014.

7. The Respondent conceded having employed the claimant but states that it employed the claimant on 9th February, 2013 as a general worker on casual basis which employment was made permanent on the 30th September, 2013. His salary is stated to have been Kshs 7,376/=.

8. The cause of dismissal according to the Respondent was that on 6th June, 2014 the claimant was given sick off to attend Ndonyo Health clinic to check his eye and was to report back to work the following day however that the claimant added himself two more days as sick off claiming to have been directed by the clinic to take the days off.

9. On 21st June, 2014, the claimant visited the same clinic and was given medication with instruction to collect spectacles within 3 days and

instead of reporting back to work the claimant opted to take two days off without permission on the same reason that he was given sick off by the Hospital. Further that on the day of collecting his spectacles that on the 24th June, 2014 the claimant was directed by the doctor to have 2 sick off days, which were the only genuine sick off days given.

10. The Respondent became concerned on the doctors' instruction which gave the claimant sick offs every time he went for check and carried out investigation on the said issue and requested for the doctor's confirmation vide a letter of 26th June, 2014.

11. The Doctor in response by the letter of 27th June, 2014 denied issuing the said sick off notes save for the ones issued on the 24th June, 2014. It is on that basis that the claimant was issued with a Notice to show cause and a hearing was conducted where the claimant attended together with a witness and admitted having forged the doctor's treatment notes to include sick offs.

12. The Respondent then opted to discharge the claimant from employment for gross misconduct under section 44 of the Employment Act. Also that the claimant was paid his terminal dues.

13. During hearing, the claimant testified as CW-1, adopted his witness statement filed on 23rd October, 2014, which basically reiterated the claim.

14. On cross examination, he maintained that he was sick during all his absent days and that he was given sick off by the Clinic, he denied ever making any forgery on the said documents. He also denied being issued with a Notice to show cause or being subjected to any disciplinary hearing whatsoever. He stated that he did not appeal the Respondent's decision and that he was not paid any terminal dues as alleged.

15. On re-examination he testified that the signature appearing on the attendance sheet was his however that the one on the minutes of the disciplinary hearing is not his and that the sick off forms from Ndonyo Clinic are strange to him.

16. The Respondent called one witness, **Susan Kihara**(RW-1) the Respondent's Human Resource manager who equally adopted her witness statement dated 14th February, 2020 and filed on even date together with list of documents filed on 3rd December, 2014. The Respondent witness testified that the claimant was terminated for forging the sick off sheet and was given his terminal dues of Kshs. 10,573.64.

17. On cross examination, RW-1 testified that the letter from Ndonyo clinic is not signed. She also testified that the claimant admitted to signing the attendance form and not signing the one on the minutes and denied ever forging the claimant signature appearing on the minutes of 28th June, 2014.

18. On further cross examination, RW-1 testified that the claimant was dismissed from employment for forging the sick off notes and not for participating in a strike.

19. The Respondent filed their submission on the 19th October, 2021 however the claimant did not file any submissions.

Respondents Submissions.

20. The Respondent submitted that the claimant was fairly terminated from employment in compliance with substantive justification and procedural fairness as envisaged under section 42 of the Employment Act and reinforced in the case of **Walter Ogal Anuro V Teacher Service Commission [2013] ekr.**

21. It was submitted that the reason of termination was demonstrated before this Court was one of absenteeism from work and the forgery of the sick off forms which according to the Respondent amounted to gross misconduct whose verdict ought to be summary dismissal as per section 44(4) of the Employment Act but rather they subjected the claimant to hearing who admitted having forged the said treatment notes to include sick offs. Further that he was paid his terminal dues.

22. Accordingly, the Respondent submitted that the claimant was justifiably terminated from employment for gross misconduct and therefore is not entitled to the reliefs sought.

23. I have examined the evidence and submissions filed herein. The claimant has averred that he was terminated on allegation of participating in a strike.

24. The respondents contend that the claimant was terminated for absenteeism and forging of sick off. The respondents sought to rely on their appendix Min 8 a letter apparently written by one Sarah Shisikame in-charge Eye Unit from Ndonyo Healthcare.

25. The RW1 in cross-examination indicated that the letter was not signed. Indeed the letter was unsigned and the author was not called to authenticate it.

26. It is therefore not proved by the respondent that the claimant had forged sick offs as indicated.

27. From the letter dismissing the claimant from employment he was dismissed for faking hospital documents and for absenteeism. This reason has however not been proved because there is no proof that the claimant faked any offs from hospital given the reason that the letter denying the sick off were given is not signed.

28. Section 43 of the Employment Act 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”.

29. The respondents have however not discharged the burden to prove they had valid reason to dismiss the claimant.

30. As to disciplinary hearing, the claimant told court that he was subjected to an unfair process. The letter that invited claimant to a hearing was dated 28th June 2014.

31. He was informed that the committee was expected to sit at 10.00am the same day. The same letter asked claimant to show cause why disciplinary action should not be taken against him.

32. It is ironical that the claimant was asked to show cause why disciplinary action should not be taken against him and in the same letter asked to appear for a disciplinary hearing at 10.00am.

33. It is my finding that the respondent had already made up their mind to proceed for disciplinary hearing for its worth before considering his reply to the show cause letter.

34. The process in my view fails below the expected standard as per Section 41 of the Employment Act 2007 which provides 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”.

35. It is therefore my finding that the dismissal of the claimant was unfair and unjustified and I declare it so.

36. Given the finding, I award the claimant as follows;-

1. 1 month salary in lieu of notice = 7,310/=

2. 8 months compensation for unfair dismissal = 8 x 7,310 = 58,480/=

GRAND TOTAL = 65,790/=

3. Issuance of certificate of service

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

DATED AND DELIVERED IN OPEN COURT THIS 30TH DAY OF NOVEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Okoth holding brief for Kinyanjui for Respondent – present

No appearance for Claimant

Court Assistant - Fred