



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE 1387 OF 2016**

**MOFFAT MASIGA.....CLAIMANT**

**VERSUS**

**DR. RAJINDER KUMAR SAINI.....RESPONDENT**

**JUDGMENT**

1. The Claimant instituted the suit vide a Memorandum of Claim dated 5<sup>th</sup> July 2016 against the Respondent for unfair/unlawful dismissal from employment and non-payment of terminal dues and compensatory damages. He avers that he was employed by the Respondent as a Driver since October 2013 and was seconded to drive the Respondent's mother and that his last salary was computed at Kshs. 15,750/- per month. The Claimant avers that on 12<sup>th</sup> April 2016, he attended the burial of a close relative with the knowledge and permission of the Respondent's mother whom he ordinarily reported to and further sent a notification message to the Respondent who was absent. The Claimant avers that however when the Respondent returned and found he had proceeded to the funeral, he dismissed him by SMS, an action that amounted to summary dismissal. Further, that the same was unlawful, unfair, inhumane and against the principles of natural justice and the tenets of good labour and best international practices because he had done nothing wrong to warrant the dismissal and only joined in the burial of a bereaved relative; no reason was given for his dismissal; no notice or warning was ever issued to him before the decision to dismiss him was reached; and due process was ignored in the haste to summarily dismiss him. He also avers that the decision to dismiss him was unwarranted and unjustified considering he had diligently served the Respondent and his mother for 2 years and 5 months.

2. The Claimant thus seeks one-month notice pay, payment for untaken leave for the 2015/2016 period, salary for 12 day worked in April 2016, overtime during the employment period, and compensatory damages for the unfair and unlawful dismissal at 12 months' gross salary. He prays for judgment against the Respondent for a declaration that his dismissal from employment was unfair and unlawful and that the Claimant is entitled to payment of his terminal dues and compensatory damages as tabulated, amounting to Kshs. 249,329/-. He also prays for costs of the suit plus interest thereon.

3. In response, the Respondent filed a Defence and Counterclaim dated 30<sup>th</sup> August 2016 admitting to have employed the Claimant as a Driver on 24<sup>th</sup> October 2013 at the stated salary and seconded to his mother. He however denies that the Claimant was diligent, averring that he was habitually late for work despite several warnings, used the Respondent's vehicle for personal errands on many occasions without authorization and also frequently left work well before the assigned time. It is the Respondent's averment that on 8<sup>th</sup> April 2016, he receives a text message from the Claimant to the effect that the Respondent's mother had granted him 3 days' leave to attend a burial but that upon confirming the same with his mother, found out there had been no such discussion. The Respondent avers that he called the Claimant by phone on the same day and asked him to wait for him to discuss the issue further but that the Claimant ignored his instructions and left without permission. He avers that the Claimant's actions of insubordination, dishonesty and absenteeism from his place of work without authorization amounted to gross misconduct and that his dismissal was therefore lawful under the circumstances. He further avers that he notified the Claimant to collect his letter of termination which duly indicated the grounds for his dismissal and clearly outlined the particulars of his misconduct.

4. The Respondent denies owing the Claimant the terminal benefits and compensatory damages as alleged and avers that the Claimant is not entitled to notice and compensation as he was dismissed for gross misconduct. The Respondent further states that on the contrary, the Claimant took excess leave and owes him an equivalent of 10 excess leave days amounting to Kshs. 5,250/-. He avers that he owes the Claimant only 5 days worked in April 2016, which amount he shall seek to offset from the amount owed to him by the Claimant as stated in the counterclaim. The Respondent also denies owing the Claimant any overtime and states that as the Claimant was always late to work reporting at 11:00am and leaving at 3:00pm, he is therefore not owed any overtime hours.

5. In the Counterclaim, the Respondent avers that he granted the Claimant's request for a loan amounting to Kshs 36,000/- and that the Claimant had only paid Kshs 4,000/- towards the said loan at the time of his termination and that the balance of Kshs. 32,000/- remains outstanding to date. He prays the Claimant's suit be dismissed with costs and Judgement be entered against the Claimant in the Counterclaim for the sum of Kshs 37,250/- being the loan balance outstanding and excess leave days taken by the Claimant.

6. The Respondent also filed two witness statements made by the Respondent and his mother. The Respondent's mother Jagindra Kumari asserts in her statement that the Claimant habitually reported to work late at around 10:00am and departed as early as 3:00pm. That this was other than the many occasions she would release him when she had no other errands to run and therefore did not require his services. She recalls a particular instance on 31<sup>st</sup> March 2016 when the Respondent had travelled abroad and the Claimant took advantage of the Respondent's absence where upon paying his salary, he took off with the vehicle for the whole day without informing her or seeking her consent and only returned it late in the evening with no explanation whatsoever. She also confirms not having discussed any leave of absence with the Claimant and that the Claimant had thus lied to the Respondent and gone on leave without authorization.

7. The Claimant then filed Answer to Defence and Defence to Counterclaim dated 30<sup>th</sup> September 2016, denying the allegations of misusing the Respondent's motor vehicle and absconding duty. In answer to the Counterclaim, he states that the loan granted to him was on the security of his salary and since the Respondent breached his employment thereby frustrating his ability to pay the loan, he cannot claim interest and costs on the recovery of the stated loan. That the loan balance amount could have been offset from the terminal benefits due to him had the Respondent paid him upon dismissal and confirms that the loan balance of Kshs. 32,000/- can be offset from his entitlement in this case.

8. The Claimant and Respondent each testified in support of their case and parties thereafter filed submissions.

#### 9. Claimant's Submissions

The Claimant submits that under Section 45 of the Employment Act, 2007, the employer must not only prove that the reason for termination is valid, factual at the time of dismissal and fair but also that the employment was terminated in accordance with fair procedure. That if the Respondent thought the Claimant was liable for any gross-misconduct, he ought to have subjected him to a fair disciplinary process and this Court has on countless occasions held that if an employee is not heard, the termination is ipso facto unfair. He cites the case of **Justine Onwoyo Among'a v Mount Kenya University [2016] eKLR** where Wasilwa J. held that there could have been valid reasons to dismiss the claimant from duty but he was supposed to be given due process to explain himself as envisaged under Section 41 of Employment Act, 2007. It is the Claimant's submission that his dismissal was unfair and unlawful as fair procedure was not applied and that this position was enunciated in the case of **Peter Wangai v Egerton University [2019] eKLR**. He also urges the Court to be guided by the authorities of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where it was held 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.*" The Claimant submitted that there was no substantive justification for the reasons leading to the dismissal at the material time since the Respondent admitted during cross examination that Claimant's services were terminated via an SMS and that the termination letter dated 12<sup>th</sup> April 2016 is a sham as the same did not give him an opportunity to respond to the allegations raised. He further submits that this Court has numerous times held that the provisions of the Constitution of Kenya, 2010 and the Employment Act, 2007 were not enacted for cosmetic purposes and that he has proved his case to the required standards. It is the Claimant's submission that he is entitled to notice under Section 36 of the Employment Act, payment in lieu of leave pursuant to Section 28 as read with Section 90 of the Act and salary for days worked as under Section 17 of the Employment Act. That as for damages, he testified that he had diligently served the Respondent for 3 years without blemish but was nevertheless dismissed in the most inhumane way and this Honourable Court should thus award damages for unfair and unlawful dismissal to the full extent of 12 months' gross salary.

#### 10. Respondent's Submissions

The Respondent submits that he testified that the Claimant was dishonest, absent from work without permission and his action of insubordination all amounted to gross misconduct under Section 44(4) of the Employment Act and justified his dismissal as under Section 44(3) of the Act. The Respondent submitted that from the evidence produced and the testimony of both the Claimant and the Respondent's witnesses, it is evident that the Claimant absented himself from work without permission when he failed to report to work on 11<sup>th</sup> and 12<sup>th</sup> April, 2016. The Respondent submits that pursuant to Section 45(2) of the Employment Act, he has proved that the reason for terminating the Claimant was valid and fair and which grounds of termination were clearly communicated to the Claimant. That he has thus proved by way of oral and documentary evidence that the termination of the Claimant's employment was not unlawful and/or unfair whereas the Claimant has failed to rebut the evidence by the Respondent as to the grounds that led to his dismissal.

11. The dismissal of the Claimant was for absenteeism which occurred when the Claimant went for a funeral and returned later than was expected. He is further accused of having not sought permission from his employer, the Respondent, for the leave of absence and instead sought permission from the mother of the Respondent. It is clear the Claimant absented himself from the workplace and as a result the Respondent had cause to terminate in terms of Section 43 of the Employment Act as read with Section 45. However, the Respondent was required to accord the Claimant a hearing before the dismissal in terms of Section 41 of the Employment Act. I find and hold that failure to accord the Claimant the safeguards under Section 41 rendered the dismissal *ipso facto* unlawful and unfair. The Claimant would be entitled to recover for the unlawful and unfair dismissal. On his part, the Claimant owed the Respondent some money which he admitted was to be offset against or deducted from his wages. He owed Kshs. 32,000/- for which the Respondent is entitled to recover in full. As both parties were partly successful the Court enters judgment as follows for the Claimant:-

a. Compensation to the Claimant for unlawful and unfair termination – 5 months salary – Kshs. 78,750/-.

12. The Court enters judgment as follows for the Respondent:-

a. Refund of loan owed by Claimant – Kshs. 32,000/-

b. Leave dues refund by Claimant Kshs. 5,250/-.

The sums ordered against each party can be offset with the net result that the Claimant will receive Kshs. 41,500/- from the Respondent. In relation to costs as each party was successful to an extent, each party is to bear their own costs for the claims herein.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2021**

**Nzioki wa Makau**

**JUDGE**