



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1125 OF 2017

SIMON MUKIU NZIOKI.....CLAIMANT

VERSUS

MOMBASA CEMENT LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant’s claim against the Respondent is for compensation for wrongful dismissal and payment in lieu of leave, notice and for days worked. The claim is contained in a Memorandum of Claim dated 16th June, 2017 and filed in court on 19th June, 2017.
2. The Respondent filed a Memorandum of Response to the claim on the 27th of July, 2017.
3. The Claimant responded to the memorandum of response on the 7th August, 2017 and filed on the 14th of August, 2017.
4. At the trial, the Claimant testified on his own behalf, while the Respondent called one Mr. Samuel Maranga, its personnel officer who testified on its behalf.
5. Both parties filed written submissions and which have been duly considered.

The Claimant’s Case

6. The Claimant’s case is that he was employed by the Respondent on 5th September, 2009 as a loader earning a wage of Kshs. 280 per day.
7. It is his further case that he was later promoted to a loading supervisor and that at the time of dismissal, he was earning a gross salary of Kshs. 20,346 per month.
8. The Claimant states that he was wrongfully dismissed on 13th September, 2016, for alleged careless performance of duty.
9. It is his case that he was not paid his dues at the time of dismissal and seeks the following reliefs:
 - a) A declaration that the dismissal of the Claimant is unlawful, wrongful and unfair
 - b) Days worked.....Kshs. 9,390.46
 - c) One month’s salary in lieu of noticeKshs. 20,346.00
 - d) In lieu of leaveKshs. 16, 433.34
 - e) 12 months’ compensationKshs. 244, 154.00
 - f) Costs and Interests of the cause.

The Respondent's Case

10. The Respondent admits that the Claimant was its employee, who worked as a Loading Assistant and earning a gross salary of Kshs. 17,222 and not Kshs. 20,436 as alleged.
11. The Respondent states that the Claimant was employed by the Respondent from 1st March, 2013 and not 5th September, 2009 as alleged.
12. The Respondent further states that the Claimant had several indiscipline cases, most of which bordered on theft by servant through collusion with truck drivers, which caused it massive losses.
13. The Respondent states that the Claimant received several verbal warnings and that he did write apologies in response to the said warnings.
14. The Respondent further states that the Claimant was given several opportunities to be heard and that a union representative appeared to represent him in the final meeting where the decision to dismiss him was reached.
15. The Respondent states that the Claimant was paid all his dues upon dismissal, including his full salary for the month of September, 2016 despite working for only 12 days in that month.
16. The Respondent states that that the Claimant's case is malicious, based on falsehoods and an attempt at extorting it.
17. The Respondent further states that the Claimant did not exhaust the alternative dispute resolution mechanisms available to him, and the suit should be dismissed.
18. It is the Respondent's prayer that the Claimant's suit be dismissed

Findings and Determination

19. There are two issues for determination in this matter:
 - i. Whether the Claimant was wrongfully dismissed; and
 - ii. Whether the Claimant deserves the reliefs sought

Whether the Claimant was wrongfully dismissed

20. Evidence before court is that the Claimant was called to the Respondent's Human Resources Officer's office on the morning of 13th September, 2016 and issued with a letter of summary dismissal.
21. The Claimant told court that he was not issued with notice to show cause and neither was he invited for a disciplinary hearing.
22. The Respondent's position is that a disciplinary hearing took place at the Respondent's premises, but that the Claimant was not in attendance, instead, a union representative was invited to represent the Claimant.
23. Mr. Samuel Maranga, testifying for the Respondent's, told the court that the Respondent did not issue a show cause letter to the Claimant, but that a shop steward was asked to represent the Claimant in accordance with the policies of the Respondent.
24. Minutes of a disciplinary committee meeting held on 13th September, 2016, confirms that the Claimant was not present at the disciplinary hearing.
25. *Section 41(2) of the Employment Act, 2007* demands that an employer before summarily dismissing an employee, shall hear and consider representations from the said employee and that the employee shall be entitled to have another employee or shop floor union representative of his choice present during the hearing.
26. It is thus not enough that a union representative was present during the disciplinary hearing; without the Claimant's attendance, the decision to dismiss was wrongful, unlawful and unfair. In the case of ***David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR***, the Court held that the requirements of *Section 41 of the Employment Act, 2007*, have a long pedigree in administrative/public law and are referred as the rules of natural justice. It is thus paramount that an employer, irrespective of the reasons for dismissal/termination, must do so within the confines of procedural fairness.
27. The court finds and holds that the Claimant's dismissal was unprocedural for having violated the provisions of *Section 41 of the Employment Act* and thus unfair.

Whether the Claimant deserves the reliefs sought

28. The Claimant has prayed that this court awards him for 12 days worked in September, 2016, a one month's salary in lieu of notice, pay in

lieu of leave, 12 months' compensation, costs of the suit and Interests.

12 days worked in September, 2016

29. The Claimant's assertion is that he was not paid for the 12 days worked in the month of September, 2016, when he was dismissed.

30. The Respondent's evidence is that the Claimant was paid full salary for the month of September, 2016, even when he had not worked the full month.

31. The Respondent produced before court a September, 2016 pay slip showing that indeed the Claimant's pay for that month was paid. Additionally, a cheque number 021041 for Kshs.5,401.00 was also produced as evidence that the Claimant was paid fully for the month subject of this claim.

32. The court is convinced that the Claimant is not owed salary for the month of September, 2016 and the claim fails and is dismissed.

A One Month's Salary in Lieu of Notice

33. Section 44(2) provides as follows in respective of notice during summary dismissal:

“Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term”.

34. The contract of service produced by the Respondent between it and the Claimant, does not provide for notice period. The court will for this reason apply the one-month statutory notice period provided under *Section 35 of the Employment Act, 2007*.

35. The court finds and holds that the Claimant was evidently not issued with any notice prior to his dismissal contrary to *Section 35 of the Employment Act* and for this reason the court awards him a one-month salary in lieu of notice.

36. Parties to this suit did not agree on exactly how much the Claimant's salary was. A September, 2016 pay slip produced by the Respondent, indicate that the Claimant's gross salary was Kshs. 17,222.00, while pay slips produced by the Claimant for the months of February and May, 2016, indicated a gross salary of Kshs. 20,346.00 and Kshs. 20,253.00. respectively.

37. None of the three pay slips tally on the amount of salary payable to the Claimant, and parties did not explain why the pay slips had different figure for the three months. This being the Claimant's case, he had a higher duty to prove to the court what his monthly salary was and for having failed to do so, the court awards him one-month salary in lieu of notice at Kshs. 17,222.00.

Pay in Lieu of Leave

38. The Claimant stated that he did not take his leave days and neither was he paid for the same.

39. The Respondent produced a pay slip for September, 2016, which pay slip, the Claimant did not deny to be his and the said pay slip indicated a leave payment of Kshs. 4,840. The Court finds and holds that the Claimant was paid leave allowance and the claim fails and is dismissed.

12 Months' Salary in Compensation

40. In determining an award of compensation, the court is guided by the provisions of *Section 49 of the Employment Act, 2007*. In the case of *Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR*, the Court held that in determining an award of compensation, the court is to consider the 13 factors set out under *Section 49 (4) of the Employment Act, 2007*.

41. The reasons put forward by the Respondent for dismissing the Claimant are that he had several indiscipline issues, most of which bordered on theft by servant through collusion with truck drivers, which caused it massive losses.

42. The Respondent produced letters of apology written by the Claimant after loading excess bags of cement in trucks in the course of duty. This points to negligence of duty on the part of the Claimant. To have written two apologies within a span of two months for the same reasons, confirms that the Respondent had valid and justifiable reasons to dismiss the Claimant, save for failure to adhere to the legal requirements on procedure.

43. Going by the provisions of *Section 49 of the Employment Act, 2007*, the court finds and holds that the Claimant was wrongfully dismissed and is entitled to compensation. However, as the court has stated herein, the Claimant largely contributed to his dismissal. The Court awards him two months' salary in compensation for unfair dismissal.

41. In conclusion, Judgment is hereby entered for the Claimant against the Respondent in the following terms:

1) A declaration that the dismissal of the Claimant from the service of the Respondent was wrongful and unfair.

2) The Respondent shall pay the Claimant:

- i. One-month salary in lieu of notice at Kshs. 17,222/=
- ii. 2 months' salary as compensation for wrongful dismissal amounting to Kshs.34,444/=
- iii. Costs of the suit and interest at court rate until payment in full.

42. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 24TH NOVEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Onyonny Present for the Claimant

Mr. Muli Present for the Respondent

Ms. Christine Omollo- C/A