



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 891 OF 2017

BETHWEL ODINDO OWEYACLAIMANT

VERSUS

THE PANARI HOTEL.....RESPONDENT

JUDGEMENT

1. The claimant moved the court vide the instant claim through which he avers that he was employed by the respondent sometimes in February, 2009 until 20th May, 2016 when he was summarily dismissed from employment. He sought among other prayers, a declaration that his dismissal was unfair and/or unlawful. Consequently, he prayed for damages.

2. The claim was defended vide a response dated 10th August, 2021, through which the respondent admitted the employment relationship and averred that the said relationship was terminated on account of the claimant being linked to an alleged fraud.

3. The matter proceeded for hearing on 13th August, 2021 when the claimant testified in support of his case. The matter was adjourned to 21st September, 2021, when the claimant's second witness testified. On the same day, the matter proceeded for defense hearing and the respondent called one witness.

Claimant's case

4. The claimant testified as CW1 and at the outset, sought to rely on his witness statement together with his bundle of documents both dated 11th May, 2017, which he produced as exhibits before Court. He asked the court to adopt the same as part of his evidence in chief.

5. The claimant told court that he was initially employed as a security guard but was later promoted to the position of senior guard and/or supervisor. He told court that the issue in question was in regards to an alleged fraud at the respondent's ice rink and which led to his eventual dismissal. He averred that he was not aware of the fraud and only came to know of the same when he was issued with a notice to show cause upon his resumption from leave. He admitted attending a disciplinary meeting on 18th May, 2016 and the Disciplinary Committee (DC) found that he had no case to answer hence directed that further investigations be undertaken.

6. It was his testimony that no further investigations were undertaken despite the findings of 18th May, 2016. He avers that he was later called in for another disciplinary meeting on 19th May, 2016 but was not allowed to appear before the DC. He also stated that no audit report was tabled in regards to the alleged fraud and that none was availed to him. He summed his testimony by stating that that there was no evidence to demonstrate that he was involved in the alleged fraud.

7. In cross examination, the claimant admitted receiving the documents he had requested for in the DC hearing of 16th May, 2016.

8. The 2nd claimant's witness, Mr. Peter Kinambi Lolmodoni testified as CW2. He also adopted his witness statement dated 17th August, 2021 to constitute part of his evidence in chief. He told court that he was a former colleague of the claimant and that he held the position of union representative at the shop floor level hence by virtue of his position in the union, he was a member of the DC.

9. He informed court that on 18th May, 2016, the claimant appeared before the DC, which upon considering his defense, found that he had no case to answer and directed that further investigations be undertaken in the matter. That another DC was convened for 19th May, 2016 and despite absence of an investigation report implicating the claimant, the management of the respondent resolved to dismiss him. He pointed out that the meeting of 19th May, 2016 does not contain the signatures of the members of the DC. He summed up his examination in chief by stating that the claimant was not implicated in the alleged fraud hence his dissenting view at the DC.

Respondent's case

10. The respondent called one witness, Ms. Esther Mathenge, who testified as RW1. She identified herself as as the respondent's Human Resource Officer.

11. She also adopted her witness statement dated 11th August, 2021 as well as the bundle of documents filed on behalf of the respondent. She asked the court to adopt the same as part of her evidence in chief.

12. RW1 averred that despite joining the respondent's employment in 2018, after the exit of the claimant, she was well versed with the issues at hand, on account of records held in his official file.

13. It was her testimony that the claimant was issued with a show cause letter in regards to an alleged fraud which had occurred at the respondent's ice rink. That the claimant responded to the show cause letter and requested for documents which were all availed to him. These included witness statements and names of persons who had been interrogated on 4th April, 2016 in regards to the alleged fraud. That the claimant was later invited to appear before the DC on 18th May, 2016 where he was given an opportunity to defend himself.

14. That the DC later recommended that the claimant's services be terminated on account of the allegations levelled against him. She added that the claimant did not lodge any appeal against his termination and that he was issued with a certificate of service and all his dues paid accordingly.

15. In cross examination, RW1 admitted that there was no investigation on record in regards to the allegations against the claimant. She also admitted that the DC minutes of 19th May, 2016 contain only one signature belonging to the secretary to the DC.

Submissions

16. At the close of the hearing on 21st September, 2021, both parties were granted an opportunity to file their respective written submissions. The claimant submitted that the respondent's DC meeting of 18th May, 2016 did not recommend the dismissal of the claimant. The claimant further submitted that the respondent had failed to discharge the burden placed by law pursuant to section 43 of the Employment Act. He placed reliance on the case of **Parliamentary Service Commission vs Christine Mwambua (2018) eKLR**.

17. On its part, the respondent, submitted that the disciplinary proceedings against the claimant were fair and in accordance with the requirements of section 41 of the Employment Act. It relied on the findings in the case of **Nelson Ken Kipkemei vs Diamond Trust Bank Limited (2015) eKLR**. The respondent further submitted that the standard of proof in disciplinary proceedings was not the same as that required in a criminal trial and to this end, he buttressed his submissions on the case of **Elijah Aggrey Atsali vs Nairobi City Water and Sewerage Co. (2015) eKLR**.

18. It was also the respondent's submission, that the claimant was indeed involved in an alleged fraud hence it had reason to terminate his services and as such, it satisfied the requirements of section 43 of the Employment Act. That further, the actions by the claimant resulted in breach of trust hence there was justifiable cause to terminate his s services. It fortified this issue with the findings in the case of **Joseph Njoroge Kiama vs Summer Ltd (2014) eKLR**.

Analysis and determination

19. I have considered the issues raised in the pleadings, the rival submissions as well as the evidence on record and to my mind the court is being called to determine the following twin issues;

a) Was the claimant's termination unfair and unlawful?

b) Is the claimant entitled to the reliefs sought?

Was the claimant's termination unfair and unlawful?

20. The claimant has alleged that his termination was unfair and unlawful. In this regard, he seeks a declaration to that effect, as well as compensatory damages. He contends that the respondent did not adduce evidence to justify his termination and that the decision to dismiss him from employment was not in tandem with the recommendations of the DC.

21. Under the Employment Act (Act), an employer is required to prove fair termination and to do this, it must pass the test of substantive justification and procedural fairness.

(i) Substantive justification

22. Substantive justification is broadly provided for under **Section 43(1)** of the Act which requires an employer to prove reasons for termination, and in absence thereof, such termination is deemed to be unfair. More significantly, 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.

23. This position was reaffirmed in the case of **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR**, as follows; **“the burden on the employee is limited only to asserting that unfair termination has occurred, leaving the burden to show that the termination is fair to the employer.”**

24. Further, it is noteworthy that the position enunciated by sections 43 (1) and 45(2) of the Act have been reiterated through case law time and again by this court as well as the Court of Appeal, hence I will not reinvent the wheel. A classic example is the case of **Chairman Board of Directors (National Water Conservation and Pipeline Corporation) v Meshack M. Saboke & 2 others, Nairobi Civil Appeal No. 241 of 2015**, where the Learned Judges rendered themselves thus;

“In light of the above provision, termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair. Section 43 of the Employment Act deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45.”

25. 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.

26. In the circumstances, it is not enough to advance a reason, the same must be valid and fair to justify an employee’s termination. In determining the validity and fairness of a reason, regard must be had to the circumstances leading to an employee’s termination. This will entail proving the veracity of the allegations the employee is accused of. It is therefore necessary to interrogate the reasons advanced by the respondent and apply the same against the evidence presented in the case herein.

27. The reason advanced by the respondent in terminating the services of the claimant is contained in the show cause letter dated 11th May, 2016 and it reads in part as follows;

“...we refer to the alleged fraud at the ice skating of which you were mentioned by key witnesses as having solicited for a share of the loot while you were in charge on 13th March, 2016. You were actually linked to this scam and therefore the management has reasonable and sufficient grounds to believe that you assisted those directly involved to perpetuate the alleged fraud at the ice-skating department...”

28. The show cause letter and subsequent correspondence on the issue do not bring out the particulars of the allegations against the claimant. Notably, fraud presents itself in many forms, for instance, bribery, embezzlement, swindling, double dealing, trickery and the list goes on. In this case, it was not clear what type of fraud the claimant was being accused of. In a nutshell, the show cause letter did not bring out the substance of the charge. As a matter of fact, even the DC Minutes did not help either, as it generally referred to a “fraud” without providing much depth.

29. Above and beyond providing the substance of the charge, the respondent was under an obligation to justify validity of the reasons leading to the claimant’s dismissal. This it would have achieved by tendering evidence before court linking the claimant to the alleged fraud. None was tendered at all. There was a mention of an audio recording through which the claimant was implicated. It would appear that the audio recording constituted the genesis of the allegations against the claimant. Be that as it may, the same was never produced before court and indeed, no appropriate application for its production as evidence, was ever made.

30. Similarly, there was no documentary evidence or such other evidence of whatever form and nature to justify the allegations against the claimant. Such evidence would have greatly assisted the court to determine whether the said reasons were valid and fair, in the circumstances.

31. Furthermore, it is notable that the RW1’s testimony was mainly centered on the disciplinary process. She did not produce any evidence to link the claimant to the allegations at hand. Further, there were no statements from the key witnesses referred to in the claimant’s show cause letter.

32. Simply put, the allegations leading to the claimant’s dismissal was not substantiated before court in any manner whatsoever and were not corroborated 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.

33. I would have stopped there, but I find it imperative to analyse the fairness of the disciplinary process against the claimant, so as to arrive at a reasoned conclusion.

(ii) Procedural fairness

34. **Section 45(2) (c)** of the Act provides that for termination to be fair, it ought to be in line with fair procedure. More importantly, **section 41(1)** of the Act requires an employer to accord an employee a hearing prior to termination. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.

35. The respondent tendered evidence to prove that it accorded the claimant fair hearing. From the record, the claimant appeared before the DC on 16th and 18th May, 2016. It is notable that the DC hearing of 18th May, 2016, absolved the claimant and directed that further investigations be undertaken. Another DC hearing was convened for 19th May, 2016 but it was not made clear whether the investigations as previously recommended, had been undertaken and availed.

36. Further, the minutes of the DC hearing of 19th May, 2016 do not contain a specific recommendation in regards to a disciplinary action against the claimant. Accordingly, the basis for the claimant's termination from employment is not clear. It is also noteworthy that the said minutes of the DC hearing of 19th May, 2016, do not bear the signatures of the members. It is therefore not discernable whether the decision to terminate the claimant's employment emanated from the entire DC panel.

37. RW1 did not provide any explanation to fill these apparent gaps arising from the DC hearings.

38. In view of the foregoing lapses, I find that the hearing was not substantially fair and did not meet the legal threshold under the Act.

39. In totality of the foregoing, I find that the respondent has failed to prove claimant's termination was not unfair and unlawful within the meaning of section 45 (2) of the Act.

Reliefs

40. Having found that the claimant's termination was unfair, I will award him five (5) month's salary as compensatory damages. In making this award, I have considered the length of the employment relationship and the fact that the respondent did not justify the reasons for dismissing the claimant from employment.

41. I have noted that the claimant did not attach his pay slip to the claim but indicated that he was earning a gross monthly salary of Kshs 45,936/=. This averment was not disputed by the respondent hence I take it as factual.

Orders

42. Accordingly, I enter Judgment in favour of the claimant 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 229,680/= which sum is equivalent to 5 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 19th day of November, 2021.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Modi

For the Respondent Mr. Olewe

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 15th March 2020 and subsequent directions of 21st 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