



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1116 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

MOSES STANLEY OKOTH.....CLAIMANT

VERSUS

HYPER MARKET LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant instituted this suit by way of a statement of claim filed on 16th June 2017 alleging that his termination by the Respondent on 24th March 2017 was unlawful, unfair and unprocedural and prays for:

(a)..Declaration that the Respondent's actions on 24th March 2017 amounted to unlawful, unfair and unprocedural termination

(b).. Damages for unlawful termination calculated at one year's

salary (12 x 14,750)..... Kshs.177,000

(c)... Damages for expected loss of earning up to the expected retirement age

(20 years x 14,750 x 12 months)..... Kshs.3,480,000

(d).. Leave pay for the period

(20 years x 11,712)..... Kshs.234,240

(e).. Unpaid dues for the suspension period

working days = 545.4545 x 7. Kshs.3,818.18

(f) Compensatory damages towards false accusation of theft

2. The Respondent filed its memorandum of response on 15th August 2017 admitting that the Claimant's employment was terminated by a letter dated 16th March 2017 and prayed for the dismissal of the suit with costs.

Claimant's Case

9. The Claimant avers that he was employed by the Respondent on 21st January 2015 on permanent terms at a salary of Kshs.12,000 per month. The effective date of employment was 1st January 2015.

10. That he worked diligently until 16th March 2016 when he was informed by the Director's Personal Assistant (PA) that he had been placed on suspension on account of absenteeism from the place of work for 3 hours on 12th March 2017 and a robbery incident for which he was a suspect. That he remained in suspension for 7 days to pave way for investigations and had no knowledge of the robbery.

11. He further avers that when he reported to work on 24th March 2017, he was given a letter of termination.

12. That he was not given any other reason for his termination nor was he given an opportunity to be heard on the allegations made against him.

13. The Claimant finally avers that termination of his employment was unfair, unprocedural, against the principles of natural justice, fair administration and basic tenets of fair labour practice.

Respondent's Case

14. The Respondent avers that the Claimant was terminated by a letter dated 16th March 2017 and denies the contents of paragraphs 4, 5, 6, 7 and 8 of the memorandum of claim. That the termination was lawful, proper and justified, in that on 10th March 2017, the Claimant reported on duty but disappeared from 8.00 am and returned three (3) hours later and his absence was without cause.

15. It is further averred that despite being given the opportunity to explain the reasons for his absence, he was unable to. That his absence without lawful excuse connotes careless and reckless disregard of performance expectations at the work place.

16. That the Respondent was justified to take the action it took and the Claimant was paid all terminal dues as tabulated in the letter of dismissal.

Evidence

17. The Claimant adopted his witness statement and was cross examined. He testified that he worked for the Respondent on permanent terms for 2 years and 3 months as a Warehouse Assistant. That the Respondent had a procedure for an employee to absent him/herself from the workplace. That as his Supervisor at the Warehouse, Mr. Kennedy Bedi (RW1) was supposed to know whenever he was away or required authority to go out for whatever reason.

18. He confirmed that the Warehouse had three floors. That he was at his place of work on 10th March 2017 as was Kennedy Bedi, his Supervisor on the 2nd floor and had informed Kennedy that he was proceeding to the 1st floor for orders and later went back to the 2nd floor. He testified that had been told to wait for 30 minutes. He denied having been rude to Mr. Kennedy Bedi.

19. He also confirmed that he had not indicated the reason for termination in the statement of claim but used the alleged theft yet there was no record of any theft at the work place and he had no evidence about it.

20. He also confirmed that he was paid for one month's salary in lieu of notice, service pay, leave days (21 days) and salary up to 16th March 2017. He also confirmed that he was a member of the NSSF.

21. In re-examination, he testified that the workshop was an expensive place with toilets inside and outside. That he was not taken through any disciplinary hearing by the Human Resource Department before termination and had a clean record.

22. The Respondent's witness, **Mr. Kenneth Bedi (RW1)** testified that he and the Claimant were on the 2nd floor on the material day and the task of the day was levelling of goods to a manageable level for ease of movement. The goods were heavy and required more persons. That the Claimant proceeded to the 1st floor to write orders for Nairobi.

23. The Witness told the Court that he received a complaint from the 1st floor where the Claimant was supposed to be but he was not there. That his attempts to locate him were unsuccessful. That the Claimant He reported later and when questioned about it and he was rude to the Supervisor. The orders to be acted upon by the Claimant were not ready and RW1 had to step in assist. He further testified that the Claimant was away for about 3 hours (9.30 – 12.30 pm).

24. On cross examination, RW1 confirmed that he was the head of the 2nd floor only at the time. That when queries arose from the 1st floor and the Claimant was not there, he had to search for him. That the Claimant was supposed to be on the 1st floor but was not there. That he had to explain why the Nairobi orders were delayed. He also confirmed that he had no evidence that the Nairobi orders were delayed. That the Claimant and RW1 were supposed to be on the 2nd floor on that day.

25. On re-examination, he testified that for about 3 hours, the Claimant was neither on the 2nd floor nor 1st floor

Claimant's Submissions

26. The Claimant raises the following issues for determination:-

(i) Whether the Claimant was a permanent and pensionable employee of the Respondent for purposes of the process of dismissal envisaged by the Employment Act;

(ii) Whether the process was followed;

(iii) Whether the Claimant is entitled to the remedies sought;

(iv) Who should bear the costs?

27. On the nature of employment, the Claimant submitted that the Respondent did not deny the fact that the Claimant was on permanent and pensionable terms from 21st January 2015. Reliance was made on Section 2 of the Employment Act for the definition of term employee, isolating the key element in the definition as wages and salary which the Claimant had. Further, the Claimant cited the definition of employer and submitted that the Respondent fell within the four corners of the definition. It was submitted since the Claimant's summary dismissal was conducted in contravention of the provisions of the Act, the Claimant was entitled to terminal dues.

28. On whether the process of dismissal was conducted in accordance with the provisions of the Employment Act, the Claimant submitted that when the Claimant resumed work on 24th March 2017, the Respondent handed him a termination letter without any explanation or opportunity to be heard contrary to the provisions of Section 41 of the Employment Act. That the Respondent dismissed the Claimant in total disregard of the procedural safeguards provided by the Employment Act.

29. It was also submitted that the Claimant had not left his place of work for the three hours as alleged that it was the Supervisor who could not trace him within the building.

30. To demonstrate the effect of failure to abide by the procedure the Claimant cited the Court of Appeal decisions in the **Standard Group Limited v Jenny Luesby [2018] eKLR** as well as the decision in **CMC Aviation Limited v Mohammed Noor [2015] eKLR**.

31. The Court was urged to find that the Claimant should have been afforded the opportunity to be heard as a minimum since the case against him was not so severe. That if the Claimant had been taken through a disciplinary hearing, he would not have been dismissed on a mere allegation. That the Court should find that the Respondent did not prove the Claimant's absence from the work place on 10th March 2017.

32. Finally the Claimant submitted that on account of the unfair termination he was entitled to the remedies sought in the statement of claim a total of Kshs.3,262,058.18.

33. On costs, the Claimant submitted that the general rule was that costs follow the event. The Claimant urged the Court to find in his favour and award costs of this suit.

34. In conclusion, it was submitted that the Respondent was hardworking and served the Respondent well and faithfully but was dismissed in a disgraceful manner. That dismissal without a hearing is an unfair labour practice which courts of law should discourage.

Respondent's Submissions

35. According to the Respondent, the issues for determination are:

- (i) Whether the Respondent had a valid and lawful reason to terminate the Claimant's employment;
- (ii) Whether termination of the Claimant's employment was in accordance with a fair procedure;
- (iii) What remedies, if at all is the Claimant entitled to?

36. On procedural fairness of the Claimant's termination of employment, it was contended that since the circumstances in this case were not too dissimilar to those in **Henry Shikoli Milimu v Hypermart Limited [2021] eKLR**, it was ready to concede that the provisions of Section 41 of the Employment Act 2007 were not scrupulously followed and the Claimant's termination was procedurally unfair for want of compliance with the provisions of the Act.

37. It is submitted that the Court should on the basis of the evidence on record find that the Respondent had a valid and justifiable reason to terminate the Claimant's employment as particularised in the letter of termination dated 16th March 2017 and there was no basis for the Claimant to allege that he was terminated on account of involvement in a suspected robbery incident.

38. It is submitted that the three (3) hours absence of the Claimant at the work place was a sufficient justification for termination.

39. Reliance was made on the decision in **John Kamunya & another v John Nginyi Muchiri & 3 others [2015] eKLR** on the probative value of evidence.

40. Reliance is also made on Section 44(4)(a) and (c) of the Employment Act, 2007 on the grounds for summary dismissal if an employee without leave or other lawful cause absents himself from the place appointed for the performance of his work. It is submitted that the Respondent was entitled to terminate the Claimant's employment.

41. The decision in **Consolata Kemunto Aming'a v Milimani High School [2019] eKLR** was also relied upon to buttress the submission on summary dismissal on the ground of absence from work without good cause and without the permission of the employer.

42. As regards reliefs, it was submitted that since the Respondent had already paid the Claimant one month's salary in lieu of notice, the same ought not to be awarded. That the Respondent had in addition paid service pay notwithstanding the fact that the Claimant was a member of NSSF, a demonstration that the Respondent had already made generous payments to the Claimant following termination of employment.

43. It is further submitted that in light of the circumstances of this case and having regard the duration of service and the factors in Section

49(4)(b), (e), (k) and (m) of the Employment Act, an award equivalent to two (2) months' salary would be reasonable compensation for noncompliance with Section 41 of the Act.

44. With regard to other claims especially those on anticipatory salaries and leave benefits attached, the Court was urged to adopt the reasoning in **Henry Shikoli Milimu v Hypermart Limited [2021] eKLR** where the Court held that the claim for anticipated salary and allowances was unsustainable.

45. On the claim for salary for 7 days, during the alleged suspension, it was contended that the same was unmerited because the Claimant rendered no services after 16th March 2017. Moreover the allegation of suspension was not supported by any evidence.

46. On compensatory damages towards the false accusations of theft the Court was urged to reject the claim because the words constituting the alleged falsehoods and their publication were not pleaded as would have been necessary.

Analysis and Determination

47. I have considered the pleadings, evidence and submissions by Counsel.

48. The issues for determination are: -

- (a) Whether the Claimant's termination was fair;
- (b) Whether the Claimant is entitled to the remedies sought.

49. On termination, Section 45(2)(a), (b) and (c) of the Employment Act provides that –

(2) A termination of employment by an employer is unfair if the employer fails to prove—

- (a) that the reason for the termination is valid;**
- (b) that the reason for the termination is a fair reason—**
 - (i) related to the employee's conduct, capacity or compatibility; or**
 - (ii) based on the operational requirements of the employer; and**
- (c) that the employment was terminated in accordance with fair procedure.**

50. Section 43(1) of the Act provides that 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. Section 43(2) elaborates on the reason or reasons for termination of employment.

51. Section 41 on the other hand sets forth the procedural attributes of a lawful and fair termination.

52. The Court is guided by the words of Radido J. in **Loice Otieno v Kenya Commercial Bank [2013] eKLR** as follows: -

“In my view, an employer must demonstrate as a matter of fact that:

- (i) Explained to the employee in a language the employee understood the reasons why it was considering the termination*
- (ii) Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons*
- (iii) Heard and considered any explanations by employee or his representative*
- (iv) Where the employer has more than 50 employees as required by section 12 of the Employment Act that it had and complied with its own internal disciplinary rules.”*

53. In **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**, the Court 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 ...”

54. In **CMC Aviation Limited v Mohammed Noor [2015] eKLR**, the Court of Appeal emphasised that –

“Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee’s service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination.”

Reason for Termination

55. In the instant case, the Claimant was dismissed on 16th March 2017 on the ground that although he reported to work on the morning of 10th March 2017, he disappeared from 8.00 am and re-appeared after about 3 hours when his workmates begun wondering where he had gone.

56. The Claimant testified that the Respondent had a procedure for obtaining authority to proceed on leave or other cause when need arose. He testified although RW1 was supposed to know where he was, there was another Manager whom he did not name, who gave/allowed movement in and out of the warehouse but admitted that he was supposed to inform RW1 of his absence but did not on this occasion.

57. He testified that they were scheduled to transfer or move goods from one warehouse to another yet the Supervisor testified they were scheduled to level goods for ease of movement. Further he confirmed on cross examination that the two other colleagues Emmanuel and Eric were not on the 2nd floor on that day although that was their work station.

58. The Claimant confirmed that he had no evidence to support the allegation that there was a robbery at the company and that he was a suspect. He led no evidence to support the allegation about the suspension by the Director’s Personal Assistant.

59. For unexplained reasons, the Claimant acknowledged receipt of the termination letter on 24th March 2017 as opposed to 16th March 2017 when it was written.

60. From the evidence on record, the Claimant and Supervisor were scheduled to work on the 2nd floor on 10th March 2017. That at one point the Claimant went to first floor for orders for Nairobi but disappeared. RW1 confirmed that he was unaware of the Claimant’s absence until he received a complaint from the 1st floor about orders which the Claimant was supposed to act on and he could not be traced. He resurfaced later. Evidence on record shows that the Claimant was not at his workplace for several hours without authority or lawful cause.

61. It is not in dispute that the Claimant reported to work on 10th March 2017. The Respondent has also demonstrated that the Claimant was not at his place of work for about three (3) hours and his employment was terminated for the foregoing reason. Pursuant to Section 44(4)(a) of the Employment Act which provides that –

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

62. The Claimant reported to work on the material day but left without authority and came back after about 3 hours. Did he absent himself from the place appointed for the performance of his work without leave or other lawful cause as the Act required? The answer to this question is in the negative. This provision in the Court’s view, does not appear to recognise fractions of days as constituting absence.

63. In **Rodgers Titus Wasike v General East Africa Limited [2020] eKLR** where an employee had absented himself from his work station for 8 days without explanation, cause or communication, the Court held that the employer had substantive reason to warrant the sanction of summary dismissal and the appeal was dismissed.

64. In **Thomas Dzombo Kirunga v Krystalline Salt Ltd [2020] eKLR** the Claimant absented himself from work for 9 days without communicating with the employer, the Court found the dismissal lawful and fair.

65. In the instant case, the Claimant was away for about 3 hours only. The pertinent question for the Court to determine is whether 3 hours’ absence meets the threshold for summary dismissal.

66. In light of the foregoing decisions and the evidence on record, it is the considered view of this Court that the Claimant’s absence did not warrant the sanction of summary dismissal. A strongly worded warning would have been sufficient. It does appear to the Court that the dismissal was too harsh a sanction bearing in mind that the Claimant had no history of absenteeism or other forms of wrongdoing.

67. In a nutshell, it is the finding of the Court that the Respondent had no valid and fair reason to terminate the Claimant as required by Section 45 of the Employment Act.

Procedure

68. The Claimant testified that he was not subjected to any disciplinary hearing. RW1 did not testify on disciplinary issues. He was emphatic that *“disciplinary issues were handled by human resource.”*

69. It is evident that no evidence was led on whether the Claimant was notified of his transgressions or was invited for a hearing and what transpired at the hearing. The procedural tenets prescribed by Section 41 of the Employment Act were not complied with. It is the finding of the Court that the Claimant's dismissal was procedurally flawed and thus unfair.

70. Having found that the Claimant's dismissal on 16th March 2017 was substantively and procedurally unlawful, I now turn to the reliefs.

71. The Claimant prays for the following:-

(a). Declaration that the Respondent's actions on 24th March 2017 amounted to unlawful, unfair and unprocedural termination

72. Having found that the Claimant's termination was substantively and procedurally unfair, the Court is satisfied that the Respondent's actions amounted to unlawful termination of the Claimant.

73. It is hereby declared that the Claimant's termination was substantively and procedurally unfair and thus unlawful.

(b) Damages for unlawful termination calculated at one year's salary (12 months x Kshs.14,750) Kshs.177,000

74. Having found that the Claimant's termination of employment was unfair, the Claimant is entitled to the remedies under Section 49 of the Employment Act. Since the remedy is discretionary, the Court has taken into account the following –

- (i). Conduct of the Claimant on 10th March 2017 did not warrant summary dismissal
- (ii). Claimant had no previous record of wrongdoing.
- (iii). Claimant had worked for the Respondent for two years and 2½ months and wished to continue
- (iv). Claimant was paid service pay for 3 years, notice pay, salary for March 2017 (up to 16th March) and 21 days' leave.
- (v). Claimant was a member of the NSSF.

75... Having taken into account the foregoing, the Court is satisfied that the equivalent of 6 months' salary is fair and awards the sum of **Kshs.88,500**.

(c).. Damages for expected loss of earning up to the expected retirement age (20 working years) Kshs.3,480,000

76. The Claimant led no evidence to establish this claim. Relatedly, compensation is a payment made to the wronged party to offset the financial loss which has resulted from a wrongful act. See **Le Monde Luggage CC t/a Pakwells Petje v Dunn and others, Appeal Case No. JA 65/205**, by the Labour Court of South Africa, adopted with approval by the Court of Appeal in **Hema Hospital v Wilson Makongo Marwa [2015] eKLR**.

77. Similarly in **D. K. Njagi Marete v Teachers Service Commission [2020] eKLR**, the Court of Appeal stated that:-

“On the expectation of the employee as to the length of time that he would have continued to serve in the employ of the respondent, while it is true that the appellant was employed on permanent and pensionable terms, this, of itself, is not an indication that the appellant would have continued to be employed until the age of 60 years.”

78. In **Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR**, the Court of Appeal dismissed a claim for anticipatory earnings the appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) Industrial Court in **Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR** where the Court held as follows:

“There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the Employment Act does not mention the word “permanent employment”

79. In **D. K. Njagi Marete v Teachers Service Commission (supra)**, the Court of Appeal was emphatic that –

“Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law ...”

80. In light of the above reasons, the claim for damages for expected loss for earning and leave till retirement is not sustainable and is declined.

(d). Unpaid dues for the suspension period Kshs.3,818.18

81. The Claimant led no evidence to establish the suspension nor the alleged robbery. The claim is declined.

(e). Compensatory damages towards false accusation of theft

82. The Claimant led no evidence to establish the accusation, its nature by who, how or when. The claim is declined.

83. In conclusion, judgment is entered for the Claimant for Kshs.88,500 being the equivalent of 6 months' gross salary with costs. Interest at Court rates from the date of judgment till payment in full.

84. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY OF NOVEMBER 2021

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE