



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1678 OF 2017

GODFREY MESO KOMBA.....CLAIMANT

-VERSUS-

INTER BEUTY PRODUCTS LIMITED.....RESPONDENT

JUDGMENT

Introduction.

1. At all material times relevant to this suit, the Claimant was employed by the Respondent as a compounder. He got employed as such on or about the 1st January 2014 at a monthly salary of Kshs. 26,862.00/=. His services were terminated by the Respondent on 23rd January 2017. The controversy here being whether or not the decision by the Respondent to terminate the contract of employment was anchored on valid and fair reasons as required by law and whether the process as was undertaken leading to, the decision to terminate, and the termination was a process in accord with the law.

Claimant's case.

2. The claim herein was instituted vide a memorandum of claim dated 20th March 2017. The Claimant prays for judgement against the Respondent for:

- a. A declaration that he was wrongfully and unfairly terminated from his employment.
- b. Notice period of one month –Kshs. 26,862.00/=
- c. 12 months' salary as compensation for wrongful and unfair termination Kshs. 322,344.00/=
- d. Punitive and aggravated damages for breach of the Claimant's constitutional rights.
- e. Costs incidental to this suit.

3. When this matter came up for hearing, this Court was moved to adopt and it did the contents of the Claimant's witness statement as his evidence in chief. Imperative to state that then he got an opportunity to do a highlight on the statement and be cross examined by counsel for the Respondent. The documents that he filed under the list of documents dated 20th March 2017, a, pay slip, show cause and suspension letter dated 22nd January 2016, termination of service letter dated 23rd January 2016, and copy of demand notice dated 2nd February 2017, were tendered in evidence as exhibits in that order.

4. The Claimant avers that prior to his termination he had not received a notice of termination, payment in lieu of notice, the outstanding wages owed to him, severance and or leave pay. He states that the above acts by the Respondent breached the actual and implied terms of the employment contract and that the termination amounted to an intentional interference with economic relations between himself and the Respondent.

5. The Claimant avers that his expectation that the Respondent would maintain the employment relationship and that the same would only be terminated in accordance with the contract of employment and or with the law was within the range of reasonable expectations. He maintains that he has suffered mental distress, inconvenience and psychological injury as a result of the termination without notice.

6. He states that the conduct of the respondent was high handed, reckless, actuated by malice and was an intentional disregard of the

Claimant, indifferent to the consequences and motivated by economic considerations. He contends that he was an excellent employee whose performance always exceeded expectations and at all material times he acted within the scope of his job requirements, and as instructed.

7. Cross examined by Counsel for the Respondent, the Claimant acceded to a suggestion that the termination letter was clear, that the Respondent instead of summarily dismissing him decided to hand down on him a sanction which was less heavy, an ordinary termination.

8. He further stated that in the said letter of termination, the Respondent expressed what it intended to pay him upon him completing clearances with its various departments. He asserted that he obtained the clearance and that is how he managed to receive his sacco shares and pension.

9. Cross examined on the termination process, the Claimant admitted that he was given an opportunity to appear before the Respondent's disciplinary committee for a hearing.

10. All his benefits were normally paid into his bank account. He remembered having been issued with a warning letter in the month of December 2016, this followed an incident where factory material splashed into his eyes while he was working.

Claimant's submissions.

11. The Claimant's counsel submits that the parties herein have taken parallel positions on the Claimant's case. The Claimant asserts that the termination of his employment was unfair as the termination letter dated 23rd January 2016, did not bring forth the reasons for the termination. The Respondent on the other hand maintains that the termination was fair and procedural based on its right to terminate the contract by issuing a one month's notice.

12. The Claimant's counsel considers two issues as the issues that emerge for determination in this matter namely;

a. Whether the Respondent could elect to terminate the Claimant's employment outside of the Employment Act and instead rely solely on the contract of employment.

b. Whether the Claimant was entitled to remedies for unfair termination under section 49 of the Act.

13. It was submitted that where an employer fails to demonstrate that the reason for the termination is valid or fair related to the employee's conduct, capacity, compatibility or based on the operational reasons, the termination shall be considered unfair.

14. It was further submitted that a burden lies on the employer to prove that the termination was effected in accordance with fair procedure.

15. The Claimant was not accorded a fair hearing in contravention of the provisions of section 41 (1) and (2) of the Employment Act, Article 7 of the **Termination of Employment Convention of 1982** as well as settled court Principles. To buttress this, counsel has cited the decision in **County Council of Kisumu and 2 others =vs= Kisumu County Assembly services Board and 6 others [2015] eKLR**.

16. It was contended that the minutes that the Respondent tendered as evidence were not a true reflection of the happenings in the disciplinary hearing. The minutes are unsigned. The procedure that was adopted by the Respondent from suspension to termination was alien to the Claimant. The holding in **Menginja Salimi Murgani =vs= Kenya Revenue Authority [2006] eKLR** thus;

“It is clear too that the suspicions which led to the suspensions and termination of employment, were not set out in a document availed to the Plaintiff, so he could respond. For the most part, the Plaintiff did not share a forum with his accusers, so that differing views could be resolved through an informed process. I have considered the foregoing facts and come to the conclusion that they were not consistent with the requirements of a fair hearing.”

was cited.

17. It was counsel's view that the Respondent's actions prior to the termination letter echo different reasons for termination. The Respondent's reliance on the contractual provision was an attempt to out contract the provisions of sections 41, 43, 45 and 49 of the Employment Act.

18. Counsel submitted that section 49 of the Employment Act, 2007 provides for a galaxy of reliefs awardable to a successful employee in a matter where he has assailed a termination of his or her employment or a summary dismissal against him or her. The Court has discretion to consider the extent of the award.

19. Counsel further submits that section 49 of the Act gives this Court power to grant a compensatory relief in favour of an employee, where it finds that the termination was unfair. This Court is urged to grant the Claimant 12 (twelve) month's gross salary under this head, therefore Kshs. 322,344.00. reliance is put on the decision in **Pamela K. Butalanyi =vs= University Council for the Kenya Polytechnic University College [2015] eKLR**.

20. That the Claimant's contract of employment provided for a one month's salary in lieu of notice. The Claimant was not given any notice or payment in lieu thereof. He is therefore entitled to an award of Kshs. 26,862.

21. Costs of the claim should be granted for the Claimant, he submitted.

Respondent's case.

22. The Respondent filed its memorandum of defence accompanied by a witness statement of on Peter Muthua, its Human Resource Manager- both dated 3rd September 2019. In the Memorandum of defence the Respondent denied the allegations that form the substratum of the Claimant's case and his entitlement to the reliefs he has sought. The documents that it filed under the list of documents namely the, employment contract, show cause letter, reply to show cause letter, invitation to disciplinary hearing, minutes of the disciplinary hearing, termination letter, pay slip for January 2017, letter in response to a demand letter, and previous warning letters were all produced in evidence as the Respondent's exhibits, by consent.

23. The long and short of the Respondent's pleadings was that the Claimant came into its employment courtesy of an employment contract. The Contract did not lack specificity as regards the duties and responsibilities that were to be discharged by the him, and the consequences that would arise if there was a default in the discharge of the duties and responsibilities as contractually obligated, *inter alia* summary dismissal.

24. The Respondent avers that it decided to terminate the Claimant's employment, following the latter's misconduct that was gross, entitling it to summarily dismiss him.

25. The Respondent states that contrary to the Claimant's averments that he was an excellent employee, he was not. He had been cautioned severally on misconducts in the performance of his duties but he never heeded the cautions.

26. Mr. Muthua states that on 17th December 2016 the Claimant intentionally failed to perform to completion tasks that had been assigned to him and had left work earlier than required without authorization. By absenting himself, the Respondent avers that the Claimant willfully neglected to perform his duties. He further states that on 20th December 2016, the Claimant flushed down the drain/sewerage system, 1.2 tons of the Respondent's industrial material known as Versman Sporty, without approval, an act which occasioned substantial detriment to the Respondent. This action was in violation of his employment contract which required him to utilize the assets entrusted to him with utmost care.

27. As a result of these actions, the Claimant was issued with a show cause cum suspension letter on 22nd December 2016. The letter detailed the charges against him, clearly expressing that his actions were being considered as gross misconduct. The witness explains that the Claimant responded to the show cause letter on the same date. The Respondent considered the response but found it unsatisfactory. As a result of this, he was invited to a disciplinary hearing meeting vide a letter dated 9th January 2017.

28. Mr. Muthua stated that the disciplinary hearing was conducted on 11th January 2017. The Claimant was in attendance together with a shop steward. He states that the Claimant admitted the allegations that were leveled against him before the disciplinary committee. Subsequently the committee recommended a summary dismissal. The Respondent however commuted the summary dismissal to a normal termination, which decision was communicated to the Claimant vide the letter dated 23rd January 2017.

29. In conclusion, the Respondent states that the Claimant is not entitled to the prayers sought as its reasons for termination were valid and that due process was followed to the letter.

Respondent's Submission.

30. The Respondent did not file any submissions pursuant to the directions of this Court issued on the 29th September 2021. However, it has come to my attention that its pleadings have a summarized submission which for the interest of substantive justice I shall consider, nonetheless.

31. The Respondent submitted that Section 44(3) of the Employment Act allows an employer to summarily dismiss an employee who has by his/her conduct indicated that he/she has fundamentally breached his/her obligations arising under a contract of service.

32. Additionally, Section 44(4) of the Employment Act allows an employer to summarily dismiss an employee who, without leave or other lawful cause absents himself/herself from the place appointed for the performance of his/her work. An employer is allowed to summarily dismiss an employee who willfully neglects to perform any work which is his duty to perform or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performance carefully and properly.

33. The Respondent further submitted that the reasons for termination were absenteeism from work and willful neglect of work which reasons are valid under Section 45(2) of the Employment Act.

On this basis, the Respondent urged the court to find that the termination was fair and resultantly dismiss the Claimant's suit with costs to the Respondent.

Analysis and Determination.

34. From the parties' pleadings, their respective evidence and submissions this Court distills the following broad issues for determination, thus;

- i. Whether the termination of the Claimant's employment was procedurally fair,

- ii. Whether the termination was with a valid and fair reason.
- iii. Whether the Claimant is entitled to the reliefs sought in the statement of claim.
- iv. Who should bear the costs of this matter?

Whether the termination was procedurally.

35. The Claimant contended both in his pleadings and submissions that the Respondent terminated his employment using a procedure that is unknown in law and that was unfair. The Respondent on the other hand took a position that the termination was procedurally fair. This prompts this court to first point out what procedural fairness is, as a starting point. In **Dairus Kiseu Mwamburi versus CO-operative Bank [2021] eKLR**, the court stated that Section 41 of the Employment Act, 2007 provides the structure of procedural fairness.

36. This section of the law, reveals three vital components in the procedural fairness unit. First, the employee against whom the employer intends to act, in form of either a termination of his contract, or by summary dismissal, should be informed of the intended action and the grounds forming the basis for the intended action. This should be done in a manner that is facilitative enough for the employee to understand the intention and the grounds. Second, the employee must be allowed to make his representations on the intended action, the grounds and any material being relied on for the action. This has to be in the presence of a colleague, [where the employee is not a member of a union] or a shop steward [where he is a member of a union], same opportunity for representation should be accorded to the colleague or shop steward. Lastly, the representations should be considered before a decision is made on the intended action.

37. In **Menginyu Salimi Murgani Vs Kenya Revenue Authority [2006] eKLR**, Ojwang J. [as he then was] held:

“It is clear too that the suspicions which led to the suspension and the termination of employment, were not set out in a document availed to the plaintiff, so he could respond. For the most part, the plaintiff did not share a forum with his accusers, so that the differing views could be resolved through an informed process.

I have considered the foregoing facts, and the conclusion that they were not consistent with the requirements of fair hearing.”

38. The Claimant stated that he was given a show cause and suspension letter dated 22nd December 2016. He produced the letter as his exhibit number 2. I have considered the letter, I find it very clear on the accusations that were being levelled against him. Again, it is clear that the Claimant was accorded up to 3rd January 2016, a period of about 9 days to respond [show cause] in writing.

39. The Claimant obliged the instruction to show cause through his letter dated 22nd December 2016. I note the response touched on all the accusations that the Respondent made against him.

40. The Respondent stated that it considered the representations that were made in the letter by the Claimant. They were unsatisfactory, constraining it to move a step further. Through its letter dated 9th January 2017, they invited the Claimant for a disciplinary hearing. In my view, the letter is very detailed regarding, the rights of the Claimant during the hearing and after the decision emanating therefrom, *inter alia*, the right to choose a representative- a colleague to assist him in preparing for his defense, to assist him, in presenting his case and cross examination of the Respondent’s witnesses. There was no contestation by the Claimant regarding receipt of the letter and on the contents thereof.

41. It is common cause that following the invitation letter, the Claimant appeared before a disciplinary panel on the 11th January 2017. The minutes of the hearing were tendered in evidence by the Respondent. I have considered the minutes, they are express on the accusations against the Claimant, which accusations appear to be accord with those that were brought forth in the notice to show cause letter, the questions that were put across to the Claimant were done in an unambiguous manner, they touched on the accusations and the Claimant responded to them. In its findings the panel considered the representation by the Claimant.

42. The Claimant made a bald allegation that the minutes are not genuine as they are not signed. He did not contend that the contents of the minutes or of any of them were not accurate, or that they were false. I do not agree with the line taken by him to assail the minutes. There is nothing that comes forth to arose any doubt in my mind as regards the authenticity of the minutes, looking at them in the context of the manner in which the disciplinary process was undertaken by the Respondent.

Using the lens, the court identified hereinbefore, and in the foregoing premises, it is not difficult to conclude that the process was without blemish, it was a fair process.

Whether the termination was with a valid and fair reason.

43. The Claimant argued that the Respondent in its justification of the termination, placed reliance solely on the terms of the contract of employment in a manner suggesting that they intended to defeat the provisions of Sections 41, 43, 45, 47, and 49 of the Employment Act. This Court does not subscribe to this view, as shall come out clearly shortly hereafter. However, it is imperative to state that looking at the structure and texture of the Act, these are provisions that an employer can out contract.

44. Section 45 of the Act stipulates:

“1. No employer shall terminate the employment of an employee unfairly.

2. A termination is unfair if the employer fails to prove-

a. That the reason for termination is valid;

b. That the reason for the termination is a fair reason-

i. related to the employee’s conduct, capacity or compatibility.

ii. based on the operational requirement of the employer.”

45. No doubt the subject matter of the disciplinary hearing and the decision therefrom was the conduct of the Claimant. According to the Respondent the acts amounted to gross misconduct.

46. Section 44 [1] of the Act gives a description of when summary dismissal occurs, with subsection 3 giving an avenue to an employer to summarily dismiss an employee when his conduct indicates that he has fundamentally breached his obligations arising under the contract of service. Subsection 4 provides a catalogue of incidents, acts and omissions that could be considered gross misconduct. However, it is imperative to state that the list is not exhaustive.

47. One of the acts on the part of the employee that could amount to a gross misconduct thus subjecting him or her to a summary dismissal is that set out under section 44[4][c] of the Act, willfully neglecting to perform any work which it was his duty to perform, or carelessly and improperly performing any work which from its nature it was his duty, under his contract, to have performed carefully and properly. One of the allegations against the Claimant and which eventually formed part of the grounds for dismissal, was that he flushed 1.2 tons of the Respondent’s industrial material down the sewerage/drain. Both in his response to the notice to show cause letter, and the disciplinary hearing, he admitted that this happened, only stating that it was accidental. I am of the view that this act by the Claimant fell within the realm of the gross misconduct described under section 44[4][c]. He carelessly and improperly performed work which from its nature was his duty, under his contract to perform carefully and properly.

48. Previously this court has stated that it is not enough for an employer to cite that the employee has committed one or more of those acts, or guilty of one or more of those omissions, in the list brought forth under section 44[4] of the Act, A further step must be undertaken by the employer to demonstrate that in the context of the happening, the conduct of the employee was in nature a fundamental breach of his obligations under the contract of service, obliterating the trust between him and the employer. In the context that the employment contract provided for the do’s and don’ts for the Claimant, the stated amount that went down the drain/sewerage, and the previous warnings by the Respondent, on the spillage of industrial material into the eyes of the Claimant owing to his carelessness, I find that the Respondent was right in deciding that the circumstances justified a summary dismissal.

49. The other allegation against the Claimant was that on 17th December 2016, he intentionally failed to perform to completion tasks that had been assigned to him and in particular, he was assigned to complete compounding of three batches but only completed two. He left work at 2.00 pm instead of 4.45pm as required without authorization. During the disciplinary proceedings, he admitted the non-completion and the absence without authorization. I consider the explanation that was given by the Claimant on this allegation one that was infected with casualness.

50. In the upshot this court finds that the decision to dismiss the Claimant was upon reasons that were valid and fair. The decision and action by the Respondent were therefore substantively fair in terms of section 45 of the Act.

51. The Respondent commuted the summary dismissal to an ordinary termination, offering the Claimant a one month’s salary in lieu of notice. This was a discretion that they were entitled to, and exercise of which was to the benefit of the Claimant. It cannot be faulted.

Of what reliefs.

52. In his pleadings’ reliefs’ section, the Claimant has sought for a host of reliefs. He first seeks that it be declared that the termination of the Claimant’s employment was wrongfully and unlawfully done. By reason of the premises here before, this is a relief for the declining.

53. He further Claimed for a compensatory award of 12 months gross salary, **Kshs.322,344.00**, pursuant to the provisions of Section 49 of the Employment Act, this is an award grantable only where the court has found that a summary dismissal or termination of an employment was unfair. In this case the finding is to the converse, disentitling the Claimant of the relief.

54. The Claimant also sought for punitive and aggravated damages for breach of his Constitutional rights. To this I state that there was no evidence led or material placed before the Court demonstrating a breach of any of the known constitutional rights with a consequence that the Claimant suffered damage. Consequently, I decline to award the relief sought.

55. Lastly, the Claimant claimed for a one month’s salary, **Kshs. 26,862.00** in lieu of notice. The circumstances of the matter warranted a summary dismissal which ordinarily will be effected lawfully without a notice or with a less notice than the statutory notice or that provided in a contract of service, however, the Respondent was gracious, it offered him a one month’s salary in lieu of notice subject to him going through a clearance process. In matters last pay, no doubt, clearance processes are a necessity. The Claimant avers that he went through the process and that he was cleared. The Respondent disputed it. The Claimant asserted that he couldn’t have been paid his pension benefits if he had not been cleared. A clear reading of the termination letter, reveals that the processing of these benefits, [pension benefits] was to be independent of the process towards the payment of the one month’s salary in lieu of notice.

56. In the upshot, I dismiss the Claimant's case, without saying that he is not entitled to the one month's salary in lieu of notice that the Respondent offered. So that the controversy as between the parties is duly brought to rest, I direct that the Claimant does within 14 days of this Judgement avail himself for the clearance, and upon the clearance, the Respondent to pay him the amount or any amount that he shall rightfully be entitled to. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF NOVEMBER, 2021

OCHARO KEBIRA

JUDGE

Delivered in presence of;

Mr. Wachira for the Claimant.

Ms. Obonyo for the Respondent.