



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1256 OF 2017
(Before Hon. Justice Dr. Jacob Gakeri)

ETHAN NGIGI GATHEGE.....CLAIMANT
VERSUS
NAIROBI INSTITUTE OF BUSINESS STUDIES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed a memorandum of claim on 5th July 2017 alleging that the Respondent unlawfully terminated his employment contract on 24th April 2017 on grounds of absenteeism. The Claimant prays for –

- (a).. One month’s salary in lieu of notice.... Kshs.30,500.00
- (b).. 12 months’ compensation..... Kshs.366,000.00
- (c)... Salary for 7 days worked in
 March 2017..... Kshs.7,624.96
- (d).. Leave as per your records..... Kshs.22,874.88

Total.....Kshs.525,034.08

Less

- PAYE..... Kshs.120,673.00
- NSSF..... Kshs.200.00
- NHIF..... Kshs.900.00

Total..... Kshs.403,261.08

2. The Respondent filed its statement of defence on 11th September 2017 alleging that the Claimant’s termination was lawful since he refused to report to work on 21st March 2017 as directed by the suspension letter dated 6th March 2017.

3. The Respondent prays for dismissal of the suit with costs.

4. The suit was heard on 18th October 2021. The Claimant testified as CW1 while the Respondent relied on the evidence of **Mr. Anthony Wanyoike**. Thereafter parties filed written submissions.

Claimant’s Case

5. The Claimant avers that he was employed by the Respondent on 26th August 2011 as an Accounts Clerk at the Ronald Ngara Campus on permanent basis at a monthly salary of Kshs.26,000 and was later promoted to a Procurement Officer at a salary of Kshs.30,000 per month

until 24th April 2017 when he was summarily dismissed on the ground of absenteeism.

6. He avers that he was a loyal and diligent employee without prior complaints but the Respondent did not appreciate his services. That he dutifully observed his working hours (Monday to Friday 7.30 am. – 5 pm.).

7. He further avers that on 6th March 2017 he received a suspension letter for alleged absenteeism from work on a Saturday without notification and subsequently received the dismissal letter on 24th April 2017.

8. He contends that his dismissal was not effected in accordance with the dictates of the Employment Act, 2007 and that due process was not followed.

Respondent's Case

9. The Respondent admitted that the Claimant was its employee from 26th August 2011 to 24th April 2017 when he was summarily dismissed for desertion of duty. That on 6th March 2017, he was suspended for two weeks for absenteeism and was supposed to report back on 21st March 2017 but did not which culminated in the summary dismissal.

10. It is further averred that the Claimant had several disciplinary issues for instance on 6th August 2013, he was served with a verbal warning for unprofessional conduct and warning letter for negligence on 5th February 2016 and a show cause letter on 30th January 2017.

11. The Respondent finally avers that the Claimant's termination was lawful.

Evidence

12. The Claimant adopted his written statement and was cross examined. On cross examination, he confirmed that he signed the letter of employment on 26th August 2011. He acknowledged receipt of two warning letters but stated he did not receive one letter. He also confirmed that he had received the show cause letter dated 30th January 2017.

13. He further confirmed the working hours and days as per the letter of appointment. On the suspension letter dated 6th March 2017, the witness confirmed that although the letter had a timeframe, it indicated that he had to await communication from the Human Resource. That he received a letter of termination on 24th April 2017. He also confirmed that he was a Seventh Day Adventist but had no official exemption from the employer not to work on Saturdays.

14. In re-examination, the Claimant testified that he responded to the complaint about not reporting to work on Saturday, 14th March 2017 alleging that he was a Seventh Day Adventist, a fact acknowledged by RW1.

15. That he enquired from the Operations Manager about reporting after suspension but was informed to await communication from human resource but received none.

16. He testified that he reported the matter to the Labour Office on 23rd March 2017 and made a follow up on 4th April 2017. That the Respondent honoured the third invitation by the Labour Office after which the Claimant was directed to visit the Ruiru Campus only to be issued with a summary dismissal letter dated 24th April 2017. He testified that he was not taken through any disciplinary hearing.

17. **RW1, Mr. Anthony Wanyoike** testified that the Claimant was a former employee of the Respondent and the two had not agreed that he would not be working on Saturdays. He told the Court that he was aware that the Claimant was a Seventh Day Adventist and had accommodated him under a local arrangement with the Accountant but had to serve students till 7.00 pm on weekdays.

18. On cross examination, the Witness confirmed that he could not tell whether the Claimant worked on Saturdays or did not work or that he was part of the team that interviewed the Claimant for the job. That all verbal warnings were documented and filed for records.

19. He also confirmed that the letter dated 5th February 2016 related to failure of the Claimant to update payment on the ERP system.

20. He further confirmed no commination was made to the Claimant within the two (2) weeks of suspension and admitted that the wording of the letter could have been more refined. That after the Claimant was suspended, there was a disciplinary hearing but provided no evidence of the invitation and minutes of the proceedings.

21. On re-examination, he testified that the summary dismissal of the Claimant was lawful

Claimant's Submissions

22. The Claimant identified three (3) issues for determination:

- a) Whether the Claimant's services were illegally terminated;
- b) Whether the Claimant is entitled to the reliefs sought;

c) Costs of the suit.

23. On dismissal, it was submitted that the Claimant responded to the suspension letter dated 6th March 2017 and as he awaited the Respondent's communication as stated in its letter which never materialised. He reported the complaint to the Labour Office and the Respondent was invited by letters dated 23rd March 2017 and 4th April 2017 and no compromise was reached and the complaint was withdrawn on 17th May 2017.

24. That the fact that the Claimant had had two warning letters did not make him a candidate for summary dismissal.

25. It was submitted that the letter of dismissal was unequivocal that the reason for termination was unlawful absenteeism which the Claimant disputes since the suspension related to a different matter of which he was awaiting communication which never came.

26. Reliance was made on the Court of Appeal decision in **Kenfreight (EA) Limited v Benson K. Nguti [2016] eKLR** on the duty of the employer to issue a proper notice of termination or payment in lieu of notice coupled with compliance with Section 41 of the Employment Act.

27. It was also submitted that since the Claimant was not taken through any disciplinary hearing as envisaged by the Employment Act, and the reason for termination by the Respondent was not valid since he had not absconded duty, his dismissal was unfair as observed in **Kenfreight (EA) Limited v Benson K. Nguti (supra)**.

28. On the issue of discrimination, it was it submitted that the Respondent's testimony showed that discriminated the Claimant contrary to Article 27 of the Constitution of Kenya, 2010. Reliance was also made on Article 32 on the right to freedom of conscience, religion, thought, belief and opinion.

29. Emphasis was laid on Sub Article 4 which states that "**A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.**" That the Respondent's actions of punishing the Claimant based on religion was discriminative and against Article 27 and 32 of the Constitution.

30. On reliefs, it was submitted that the Claimant was entitled to the reliefs prayed for because he was suspended from duty on 6th March 2017 and no communication was forthcoming as promised and was subsequently dismissed on allegations of absenteeism, and was discriminated on account of his faith, a violation of the Constitution of Kenya.

31. The decision in **VMK v Catholic University of Eastern Africa [2013] eKLR** was relied upon to urge the Court to award exemplary damages.

32. As regards costs of the suit, reliance was made on the decision in **Orix Oil (Kenya) Limited v Paul Kabeu & 2 Others [2014] eKLR** on the general rule that costs follow the event.

33. Finally, the decision in **Magare Gikenyi v County Government of Nakuru & 4 Others [2020] eKLR** was also relied upon.

Respondent's Submissions

34. The Respondent isolated one issue for determination, namely whether the Claimant's termination was unlawful. The Respondent makes reference to the letter of appointment dated 26th August 2011 which inter alia required the Claimant to observe all rules and regulations governing the institution and specifically the grounds for summary dismissal. It is submitted that since he had received two warning letters and had absented himself from the workplace, the Claimant was due for summary dismissal. On the suspension letter dated 6th March 2017, it is submitted that the letter was explicit. The last sentence of the letter read as follows "*your are hereby suspended for two weeks starting 7th March 2017 awaiting further communication from the Human Resource.*"

35. According to the Respondent, a plain reading of the letter clearly shows that the suspension was for two weeks only and meant that that Claimant was supposed to report back to the office on 21st March 2017 and never did which culminated in his dismissal on 24th April 2017 for desertion.

36. Reliance is made on Section 47(5) of the Employment Act on the respective burden for poof of the employer and employee to urge that the Respondent had discharged its burden of proof. Section 41 of the Employment Act was used to demonstrate that the Respondent's letter dated 6th March 2017 informed the employee his transgressions.

37. It is also submitted the Respondent had observed the requirements of Section 41 of the Act on procedural fairness and the termination was therefore lawful.

Analysis and Determination

38. Having carefully considered the pleadings, evidence and submissions on record, the issues for determination are:-

- (a) Whether the Claimant's summary dismissal was lawful;
- (b) Whether the Claimant is entitled to the reliefs sought.

39. As regards termination, Sections 35, 40, 41, 43, 44 and 45 of the Employment Act 2007 prescribe the substantive and procedural requirements to be complied with for a termination to pass as lawful. Section 45(2) of the 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.

40. This provision sets forth the test for a fair termination. The employer must not only have a valid and fair reason of termination but must employ a fair procedure. Section 41 of the Act elaborates the procedural aspects of termination.

41. These provisions underscore the principle of substantive and procedural fairness in termination of employment contracts.

42. As explained in legions of decisions, for a termination to be deemed lawful, it must be substantively and procedurally fair.

43. In **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR**, the Court of Appeal expressed itself as follows;

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the Evidence Act and the Civil Procedure Act/Rules.”

44. The Court is in agreement with these sentiments. See also **Samsung Electronics East Africa Limited v KM [2017] eKLR**.

45. The Court of Appeal emphasised the importance of due process in termination in its decisions in **Standard Group Limited v Jenny Luesby [2018] eKLR** and **CMC Aviation Limited v Mohammed Noor [2015] eKLR**.

Reason for termination

46. In the instant case, documents on record show that the Claimant was summarily dismissed on the ground of desertion from duty that he did not report back to work on 21st March 2017 and did not communicate the same until 20th April 2017, a month later. He was thus dismissed for absconding duty under Clause 4(ii) of the letter of employment dated 26th August 2011.

47. In order to appreciate the context of the employment letter, it is important to recapitulate the events before 24th April 2017.

48. On 6th March 2017, the Claimant was suspended for two (2) weeks for alleged insubordination and absenteeism on a Saturday without prior notification allegedly. The last paragraph of the suspension letter stated as follows –

“You are hereby suspended for 2 weeks starting 7th March 2017 awaiting further communication from the HR.” (Human Resource).

49. The Claimant testified that he awaited communication from the human resource as promised and none was forthcoming during and after the two weeks and none came at all. He testified that he enquired from the Operations Manager but was told to await communication.

50. After the two weeks, the Claimant acted promptly and lodged a complaint with the Labour Officer on 23rd March 2017. Summons to the Respondent remained unresponded to until a third summon was issued in April 2017.

51. On cross examination the Claimant maintained that although the suspension letter limited the suspension to two weeks it additionally indicated that he should await communication from the Human Resource.

52. More significantly, RW1 conceded on cross examination that the wording on the suspension letter could have been done better. Whereas the suspension had a commencement date, it had no end date and appears to have made the Claimant’s return to work conditional upon communication from the Human Resource. The Respondent submits that the Claimant should have reported back to the office on 21st March 2017 ostensibly to know his fate but the Claimant interpreted the sentence of the letter differently. The sentence was amenable to different interpretations and the Claimant cannot therefore be faulted for having interpreted it as such. Moreover, he did not sit back and wait after the two weeks lapsed.

53. For unexplained reasons, the Respondent led no evidence of any attempts to contact the Claimant after the two weeks lapsed and he did not report to the work place. It waited for over one (1) month to dismiss the Claimant for desertion.

54. The Claimant submitted that the reason or summary dismissal was not valid since the communication promised by the letter of suspension was not forthcoming. That it is inequitable for Respondent to turn around and punish the Claimant for its ambiguous letter.

55. The Court is satisfied that the Claimant has on a balance of probabilities established that the reason for the summary dismissal was neither valid nor fair as required by Section 45(2) of the Employment Act.

Procedure

56. On procedural fairness, the Court is guided by the words of Radido J. in **Loice Otieno v Kenya Commercial Bank Ltd [2013] eKLR** on the requirements of Section 41 of the Employment Act as follows –

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

(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 ...”

57. On re-examination, the Claimant testified that he was not taken through any disciplinary hearing. Although RW1 confirmed that the Claimant was taken through a disciplinary hearing, he provided no evidence to back his assertion. In addition, he contradicted himself by testifying that the Respondent did not invite the Claimant in writing.

58. There is no evidence on record to show that the Claimant was notified of the transgressions he had to confront before dismissal, or was invited for a disciplinary hearing or minutes of the meeting. In other words, the Respondent has failed to prove that it complied with the provisions of Section 41 of the Employment Act.

59. For the foregoing reasons, it is the finding of the Court that the Claimant’s termination was unfair on account of non-compliance with the provisions of the Employment Act.

60. Finally, although the Claimant’s submissions advert to exemplary damages for discrimination on the ground of religion and a claim of 1,500,000 made in the submissions, the issue was not pleaded and no evidence was led by the Claimant for the Respondent to contradict the same. It is trite law that submissions are not pleadings and claims not pleaded can neither be introduced in the suit nor prosecuted through submissions.

Reliefs

61. Having found that the Claimant’s termination was unfair and unlawful for noncompliance with the provisions of the Employment Act, the Claimant is entitled to the reliefs provided by law and the Court awards as follows: -

(a) One month’s salary in lieu of notice

62. The Respondent dismissed the Claimant summarily without notice as required by Section 35 of the Employment Act, 2007. The Court awards **Kshs.30,500/-** being one month’s salary in lieu of notice.

(b) Compensation for unlawful termination

63. The Court has taken into account the following –

(i) The Claimant served the Respondent for about 5 years, 8 months and wished to continue

(ii) The Claimant had two previous warning letters

(iii) The anxiety the Claimant was subjected to during and after suspension.

64. In view of the foregoing, the equivalent of four (4) months’ salary is fair, sum of **Kshs.122,000/-**.

(c) Salary for 7 days worked in March 2017

65. The suspension letter is dated 6th March 2017 and the effective date is 7th March 2017. The Claimant worked for 6 days in March 2017. The Court awards **Kshs.6,535.68/-**.

(d) Leave due as per your records Kshs.22,874.88

66. The Claimant led no evidence on outstanding leave. Neither the written statement nor the oral evidence made reference to outstanding leave days. The prayer is **disallowed**.

(e) General damages for unlawful dismissal

67. The Claimant led no evidence to establish this prayer. It is **disallowed**.

68. **In the final analysis, judgment is entered for the Claimant for Kshs.159,035.68/- with costs.**

69. **Interest at Court rates from the date of judgment till payment in full.**

70 Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF DECEMBER 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