



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 277 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

KENNEDY MUTUKU MWOVE

CLAIMANT

VERSUS

M-KOPA KENYA LIMITED

RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a memorandum of claim dated 16th February 2016 and filed in Court on 25th February 2016 alleging that the was unlawfully dismissed by the Respondent on 7th January 2016 and prays for –

(a) Declaration that the Claimant's termination of employment by the Respondent was wrongful and unfair;

(b) Compensation for the remainder of the contract plus a month's salary for wrongful dismissal

(Kshs.42,500 x 9) Kshs.382,500.00

(c) One month's salary in lieu of notice Kshs.42,500.00

(d) Compensation for unutilized leave for

18 days Kshs.25,500.00

(e) Overtime pay for work done during three public

holidays Kshs.4,250.00

(f) Certificate of service

2. The Respondent filed its response to the memorandum of claim on 22nd March 2016 alleging that the Claimant absented himself from duty on 25th December 2015 without leave or lawful authority and prayed for dismissal of the suit with costs.

3. The Claimant amended the memorandum of claim on 12th May 2016 and the Respondent filed its response on 25th July 2016. The memorandum of claim was amended again on 29th March 2017.

4. The suit was heard on 18th October 2021.

Claimant's Case

5. The Claimant avers that he was employed by the Respondent on 26th September 2015 as a Customer Care Representative at a gross salary of Kshs.40,000.00 per month. That on 7th January 2016 he was summarily dismissed allegedly for breach of Attendance/Punctuality Policy of the Respondent's Policies and Procedures Manual.

6. The dismissal followed a show cause letter dated 31st December 2016. That he responded to the show cause letter explaining the reasons for his absence at the work place.

7. The Claimant further avers that he was not given a warning and/or a hearing before the summary dismissal. That the Claimant had worked for about 3 months before termination and had already received a salary increment owing to his good performance.

8. He further avers that he was not paid for 18 unutilised leave days and had worked on three public holidays namely 20th October, 12th December, and 26th December 2016.

9. That the Respondent acted in breach of its Policies and Procedures Manual Disciplinary Procedures and the provisions of the Employment Act.

10. Finally, it was averred that the Claimant was an exemplary performer.

Respondent's Case

11. The Respondent on the other had avers that its relationship with the Claimant was based on a contract of employment signed by the parties on 18th August 2015 as well as the Respondent's Policies and Procedures Manual dated 6th October 2015.

12. It is also averred that on 25th December 2015, the Claimant did not report for duty and did not provide any reason either prior to or on the said date. That when contacted by the Respondent on telephone, the Claimant indicated that he could not report for duty as he was nursing a hangover. That the Respondent issued a notice to show cause on 30th December 2015 received by the Claimant on 4th January 2016 when the Claimant reported on duty.

13. The Claimant's response to the notice to show cause is admitted.

14. It is further averred that the Respondent invited the Claimant for a disciplinary hearing during which meeting he explained that he was attending to a sick fiancé and did not deny that he was nursing a hangover. That the Respondent relied on its Policies and Procedures Manual to dismiss the Claimant's summarily for absenteeism on 7th January 2016.

15. That the Claimant did not work on the three public holidays as alleged. Finally, it is averred that the Respondent had a good and sufficient reason to terminate the Claimant and prayed for dismissal of the suit with costs.

Evidence

16. CW1, the Claimant adopted his written statement and was cross examined. He confirmed that he did not appeal the decision to the Managing Director and was supposed to be at work on 25th December 2016 is from 11.00 am to 8.00 pm. That he texted his Supervisor explaining the reason for his absence. That he was not requested to provide evidence of the emergency. He did to provide any evidence of the emergency nor its nature.

17. He confirmed that he was called by one Nelly Njuguna enquiring about the failure to report to the work place but denied he was intoxicated.

18. He testified that he was not invited for a disciplinary hearing and had not received any call from the Supervisor before termination.

19. The Witness was unable to explain the 18 days' leave claimed. He told the Court that he was not paid the salary for January though there was a payslip on record. He confirmed that he sent a message to the Supervisor at 11.30 am.

20. On re-examination, he indicated that he sent the message through the office line and the message had been deleted by the date of termination and could not access the company line.

21. The Respondent had three witnesses. **RW1 ELIZABETH NYAKWEYA** adopted the witness statement and was cross examined. She confirmed that the Claimant responded to the notice to show cause on 4th January 2016 and the notice to show cause had not indicated that there would be a disciplinary hearing. The witness admitted that it was an error on the part of the Respondent. That the Claimant's salary was payable through the bank.

22. The Witness confirmed that she had no evidence of when the Claimant collected his dues. That no action was taken against the Claimant between the notice to show cause and response.

23. Finally, the witness testified that the Claimant had to clear with the Respondent to access his dues and the same were available.

24. **RW2, NELLY NJUGUNA** adopted her written statement and testified that she did not receive any call or message from the Claimant on 25th December 2015.

25. On cross examination, the witness confirmed that she was the Claimant' immediate Supervisor, and called him on 25th December 2016 enquiring about his absence at the work place. That the Claimant was terminated for absenteeism for not more than one day and the same was categorised as a minor offence by the Respondent's Policies and Procedures Manual 2014 and the attendant disciplinary action was a verbal warning to a written caution. That the disciplinary process was conducted on call.

26. **RW3, FELISTUS NJERU** adopted the written statement and was cross examined.

27. On cross examination RW3 confirmed that she was present during the disciplinary hearing and it was virtual but had no evidence of the proceedings. That the show cause letter had not indicated that there would be a disciplinary hearing. That the Claimant responded to the notice to show cause. The Witness confirmed that she was not aware whether the Claimant's dues had been paid.

Claimant's Submissions

28. The Claimant listed four issues for determination:

- (i) Whether the Claimant was accorded a fair hearing before termination;
- (ii) Whether the Claimant's termination was unfair/wrongful;
- (iii) Whether the Claimant was paid terminal dues;
- (iv) Whether the Claimant is entitled to the reliefs sought.

29. As regards fair hearing, it is submitted that the issue of a disciplinary hearing had to be canvassed on the basis of the evidence on record. That since the show cause letter was reticent on the disciplinary hearing after the Claimant had responded to its contents, there was no disciplinary hearing as pleaded by the Claimant who was terminated three days after the notice to show cause.

30. That the termination letter dated 7th January 2016 makes no reference to any disciplinary proceedings. In addition, the Respondent did not provide a record of the proceedings or minutes as evidence. The Respondent admitted that it had no such evidence. In addition, evidence on the reason for the Claimant's absence from work was not provided.

31. Reliance is made on Section 41 of the Employment Act, 2007 so is the decision in **John Rioba Maugo v Riley Falcon Security Limited [2016] eKLR** where the Learned Judge relied on the decision to **Anthony Mkala Chituvi v Malandi Water and Sewerage Company Limited [2013] eKLR** on the requirements of Section 41 of the Employment Act.

32. It was submitted that based on the evidence on record, the Claimant was not accorded a fair hearing before termination. Similarly, Section 44(2) of the Act and the decision in **Nicholas Otinyu Muruka v Equity Bank Limited [2013] eKLR** are cited for the requirement of notice and the applicability of Section 41 to summary dismissal respectively.

33. As to whether the Claimant's termination was unfair/wrongful, it is submitted that in the termination in question the Claimant was not accorded an opportunity to confront the allegations made against him. That the Respondent's witnesses confirmed as much. The decision in **Behold Shako v Shifa Chem Limited [2014] eKLR** was used to urge the Court to find that Section 41 was not complied with.

34. It was further submitted that Respondent's Policies and Procedures Manual, 2013 provided that the sanction for absence at work for one (1) day, which was a minor offence, was limited to a verbal warning to written caution. That the disciplinary procedure prescribed the Policies and Procedures Manual, 2013 was not complied with. It was also submitted that departmental correspondence on mail could not override the Policies and Procedures Manual.

35. On the right appeal as intimated by the termination letter, it was submitted that the fact that the Claimant did to exercise the right was not fatal. After all the same would be heard by the Respondent's administration. The decision in **Republic v National Land Commission & 3 Others Ex parte Muslim Associations [2018] eKLR** was used to emphasize the importance of natural justice in termination of contracts of employment.

36. As regards terminal dues, it was submitted that even though a payslip had been generated, the dues had not been paid.

37. On the reliefs sought, it was submitted that the Claimant was entitled to all the claims set out in the amended memorandum of claim.

Respondent's Submissions

38. The Respondent submits that since the Claimant's allegation of suspension was not supported by evidence the claim ought to be dismissed.

39. On the reason for termination, the Respondent relies on Section 44(4) of the Employment Act to urge that the law recognises absenteeism and neglect of duty as valid grounds of summary dismissal. The decision in **Banking, Insurance and Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] eKLR** is relied upon to reinforce the submission. That it behoved the Claimant to justify the absenteeism and he did not and had not previously notified the Supervisor as required. That the Claimant admitted that he did not report to work on 25th December 2015 and did not disclose the nature of the emergency by way of documentation and did not show that he had in fact communicated his absence to the Supervisor. RW2 denied having received communication from the Claimant.

40. It is further submitted that the Claimant had in fact notified the Respondent that he was nursing a hangover and since he reported on 4th January 2016 his intoxication could not be confirmed. That having communicated his absence on 25th December 2015 as alleged, there was no need to apologise and in writing. That this was a contradiction.

41. It is also submitted that the Claimant's absence on that day inconvenienced the Respondent as it was difficult to get a replacement, the light penalty provided notwithstanding.

42. Finally, it is submitted that since the Claimant provided no evidence to explain his absence from work, the absence was a justifiable reason for termination.

43. On the procedure for termination, it is submitted that the Respondent did not take any step before it received a response to the show cause letter. The Court is invited to note that Section 41 of the Employment Act does not make it mandatory for the employer to invite an employee for a disciplinary hearing. That it only required the employee to explain the reason(s) why it was considering termination.

44. It is also submitted that an oral hearing was not mandatory under Section 41 of the Act. It is contended that the Claimant was invited to a disciplinary hearing conducted prior to his termination. That the Claimant's failure to appeal the termination be held against him for disregarding internal company policies. The Court is urged to find that the procedure employed by the Respondent was lawful and rendered the termination fair.

45. On claims it is submitted that the Claimant provided no evidence of alleged overtime and the same should not be awarded. Reliance is made on the Court of Appeal decision in **Patrick Lumumba Kimuyu v Prime Fuels (K) Ltd [2018] eKLR** on the Claimant's burden to establish that he indeed worked on those days before the Respondent could respond.

46. That the unpaid leave days were not approved. It is also submitted that Claimant's dues were ready for collection but the Claimant declined the same. The Respondent confirmed that it was ready and willing to release the dues.

47. On reliefs, it is submitted that the Claimant is not entitled to the declaration since the Respondent had a justifiable reason for termination and invoked a lawful procedure.

48. It is further submitted that the Claimant is not entitled to compensation for the remainder of the contract since the termination was justified nor is he entitled notice pay. The decision in **Kenya Tertiary and Schools Workers Union v Ananda Marga Academy [2019] eKLR** was relied upon for the proposition that notice pay and compensation are remedies not due in cases where summary dismissal is found justified, since the Claimant breached the terms of his contract and repudiated the same by his absence on 25th December 2015.

49. That the Respondent was not opposed to issue a certificate of service.

50. Finally, it is urged that should the Court not agree with the Respondent's submissions, it should be guided by Section 49(4)(f) of the Employment Act and award the equivalent of one month's salary as compensation.

Analysis and Determination

51. Having considered the pleadings, evidence and submissions, the issues for determination are:-

(a) Whether the Claimant's summary dismissal was unfair;

(b) Whether the Claimant is entitled to the reliefs sought.

52. On termination, it is common ground that the Claimant was dismissed on 7th January 2016 on the ground of absenteeism on 25th December 2015, an offence the Respondent's Policies and Procedures Manual, 2015 categorised as minor attracting sanctions ranging from verbal warning to written caution.

53. The Employment Act, 2007 contains elaborate provisions on the various ways in which an employment contract may be terminated. These provisions are designed to ensure that that process is fair to both parties. All ingredients of termination are provided for, from notice, reasons, procedure to burden for proof.

54. Section 45 of the Employment Act is the centre piece of fair termination. The Section is unequivocal that a termination is fair provided the employer has a valid and fair reason for the same and employs a fair procedure.

55. Whereas Sections 43 and 47(5) of the Act explain the burden for proof to be borne by the parties, Section 41 of the Act prescribes the procedural requirements to be complied with, with specific reference to notice and hearing. Section 44 of the Employment Act addresses summary dismissal and its application is limited to circumstances in which an employee by his conduct commits a fundamental breach of his obligations under the contract of service.

56. Section 44(4) catalogues examples of gross misconduct. More importantly, Section 41(2) of the Act makes it clear that;

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

57. In **CMC Aviation Limited v Mohammed Noor [2013] eKLR**, the Court of Appeal expressed itself as follows –

“We respectfully agree. 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. On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract.”

58. In **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** Ndolo J. held that –

“However, for a termination of employment to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”

59. Finally in **Naima Khamis v Oxford University Press (EA) Limited [2017] eKLR**, the Court of Appeal was authoritative that –

“On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the Employment Act, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also Section 45(2)(c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”

60. The foregoing is an authoritative articulation of the law on termination which binds this Court. The provisions of the Employment Act and decisions cited above underscore the essence of fairness in the process of terminating a contract of service.

61. I will now proceed to determine whether the Claimant’s termination was substantively and procedurally fair.

Reasons for Termination

62. The evidence on record shows that the Claimant absented himself at the workplace on 25th December 2015 without leave or lawful cause and did not communicate his unavailability to the immediate Supervisor until the Supervisor called him enquiring about his absence.

63. That a notice to show cause dated 31st December 2015 was issued to the Claimant 4th January 2016 and he responded in writing. He apologised for the absence and was finally dismissed on 7th January 2016.

64. The Respondent’s disciplinary procedures in its Policies and Procedures Manual 2015 categorises absence from duty for not more than one day without permission as a minor offence and as submitted by the Claimant, sanctions range from a verbal warning to written caution.

65. Whereas the Court appreciates the critical nature of the Claimant’s work as underlined by the need to have him at work on 25th December 2015, his absence should have been addressed in accordance with the Respondent’s Policies and Procedures Manual, 2015. There is no evidence on record that the Claimant was a habitual absentee or did not perform his duties as required by the Respondent.

66. Similarly, the Respondent’s show cause letter dated 31st December 2015 cited the Policies and Procedures Manual, 2015 which provided inter alia that “... should undue lateness persist, disciplinary action maybe required.”

67. Although the Claimant indicated that he texted the Supervisor on the material day, he had no evidence to substantiate the allegation which appeared unlikely.

68. Finally, the Claimant communicated the reason for his absence by word of mouth when the Supervisor called him. Although the reason is disputed, the Respondent was aware albeit late that the Claimant would not report to work.

69. For the foregoing reasons and as submitted by the Claimant, the Court is satisfied that the Respondent has not on balance of probabilities demonstrated that it had a valid and fair reason to terminate the Claimant as required by Section 45 of the Employment Act. The Court is in agreement with the sentiments of the Court in **Banking Insurance and Finance Union (Kenya) v Barclays Bank of Kenya Ltd (supra)** on the effect of absence from work without permission or justifiable reason.

70. On procedural fairness, although the Respondent’s witnesses confirmed on cross examination that the Claimant was taken through a disciplinary process, no tangible evidence was furnished. The Respondent tendered neither notice of invitation of the Claimant to the hearing, nor record of the proceedings or minutes. The notice to show cause was silent on the course of events after the Claimant had responded. It makes no mention of a disciplinary process and finally the termination letter dated 7th January 2016 makes no reference to a disciplinary hearing or findings of any meeting.

71. In the absence of evidence to the contrary, the Court is satisfied that the Claimant has on a balance of probabilities established that he was

dismissed without being afforded an opportunity to confront the allegations made against him in the presence of a representative of his choice.

72. It is the finding to the Court that the Claimant's summary dismissal on 7th January 2016 was procedurally flawed for noncompliance with the provisions of Section 41 of the Employment Act.

Reliefs

73. Having found that the Claimant's dismissal was unfair he is entitled to the reliefs sought as follows: -

a) Declaration that the Claimant's employment services with the Respondent were terminated wrongly and/or unfairly

74. Having found that the Claimant's summary dismissal was conducted in contravention of the terms of the contract of employment and the Respondent's Policies and Procedures Manual 2015 as well as the provisions of the Employment Act, a declaration is hereby made that the Claimant's termination was wrongful and unfair.

b) Compensation for the remainder for the contract plus 9 months' compensation for wrongful dismissal

75. From the evidence on record, the Claimant's contract of employment commenced on 26th September 2015 and was due to lapse on 26th September 2016. The Claimant served up to 7th January 2016, a duration of about 3 months and 12 days. The Claimant prays for the salary for the unexpired term of the contract. This is a claim for anticipatory earnings. Regrettably, the Employment Act, 2007 has no provision on anticipatory earnings and courts have been reluctant to make such awards.

76. In **Hema Hospital v Wilson Makongo Marwa [2015] eKLR**, the Court of Appeal cited with approval the decision of the Labour Court in South Africa in **Le Monde Luggage cc t/a Pakwells Petze v Commissioner G. Dun and others, Appeal Case No. JA 65/205** on the Labour Relations Act of South Africa:

"The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This Court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer."

77. In **D. K. Njagi Marete v Teachers Service Commission [2020] eKLR**, the Court of Appeal was emphatic that –

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

78. It is important to note that Clause 11 of the contract of employment between the Claimant and the Respondent provided that *"Either party may terminate your employment on written notice to the other, subject to the following notice period requirements: Notice period required by the company to terminate you 1 month notice. Notice period required by you to terminate your employment 1 month notice."*

79. The fact that the contract had an inbuilt termination mechanism meant that either of the parties could invoke the Clause and terminate the contract at any time. Accordingly, the claim for remainder of the contract is **disallowed**.

80. However, the Claimant is entitled to compensation of unfair termination, under Section 49(1)(c) of the Employment Act. In making the award, the Court has considered the following: -

- (i) The Claimant served for 3 months and 12 days only;
- (ii) The Claimant had no previous notice to show cause or warning;
- (iii) The Claimant did not appeal the decision as advised;
- (iv) The Claimant contributed to the termination.

81. In the circumstances, the equivalent of two months' salary is fair **Kshs.85,000/=**.

c) One month's salary in lieu of notice

82. The Claimant is entitled to one month's salary in lieu of notice, the sum of **Kshs.42,500/=**.

d) Compensation for unutilised leave days

83. The payslip for January on record shows that the Respondent acknowledges that the Claimant had leave entitlement pay of Kshs.30,357.00. The Claimant testified that was not paid. The Respondent confirmed that sum had not been released pending clearance. In the premise, the Court awards **Kshs.30,357/=** as pay in lieu of leave.

e) Overtime pay for work done during three public holidays Kshs.4,250.00

84. Clause 2 paragraph 2 of the Respondent's Policies and Procedures Manual, 2014 provides that "...*The Company does not pay overtime as standard price ...*" the Claimant did not establish his entitlement to overtime pay. The Court is also guided by the decision in **Patrick Lumumba Kimuyu v Prime Fuels (K) Ltd (supra)** on the Claimant's duty to prove that he worked on the public holidays. The prayer is declined.

f) Certificate of Service

85. The Respondent to issue the Claimant with a certificate of service within 30 days of the date hereof.

86. **In conclusion, judgment is entered for the Claimant for Kshs.157,857 with costs.**

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

88. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH 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