



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1386 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

KITONGA KIVUNDU.....CLAIMANT

VERSUS

BEN & JANS CARE SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed his claim vide a Memorandum of claim dated 26th May 2016 in which he prays for the following remedies.
 - a) A declaration that the Respondent actions amount to summary dismissal from employment which dismissal was unlawful and unfair
 - b) A declaration that the Claimant is entitled to payment of his compensatory damages as pleaded.
 - c) An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totalling to Kshs.302,600
 - d) Costs of the suit plus interest thereon
2. The Respondent, despite being served with the summons to enter appearance did not respond to the claim. The facts as pleaded in the memorandum of claim are therefore uncontested.
3. The matter proceeded to hearing on 18th October 2021 and the Claimant testified in support of her claim.
4. The Claimant pleaded that she was employed by the Respondent on the 20th August 2005 as a support staff in the cleaning department at a salary of Kshs.9,700/=
5. The Claimant states that sometime in October 2015 the Respondent circulated a memo stating that effective 1st November 2015 working shift would change to include more working hours. That attempts by the Claimant to engage the Respondent on the proposed changes were unsuccessful and the Claimant was dismissed by letter dated 3rd November 2015.
6. The Claimant avers that the Respondent did not give him the reasons for his termination, which rendered it unlawful/unfair and contrary to the provisions of the Employment Act, 2007.
7. The Claimant avers that arising from the unlawful dismissal, he is entitled to compensatory damages calculated as follows;
 - i) Payment in lieu of notice Kshs.9,700.00
 - ii) Overtime for 2 hours for the period of service being Kshs.89,467.74
 - iii) Underpayment Kshs.10,954.00
 - iv) Underpaid/Untaken public holidays Kshs.78,246.00

v) Damages for wrongful and unfair dismissal calculated at 12 months (9,700 x 12) Kshs.116,400.00

vi) Certificate of service

Claimant's Submissions

8. The Claimant raises three issues for determination as follows:

- a) Whether the procedure applied by the Respondent was fair;
- b) Reasons for dismissal;
- c) Prayers

9. On procedure, reliance is made on Section 45 of the Employment Act to underscore the essentials of a fair dismissal. It is submitted that the Claimant was not subjected to any disciplinary hearing contrary to legions of Court decisions. The decision in **Justine Onwoyo Among'a v Mount Kenya University [2016] eKLR** is used to demonstrate the submission. As was the decision in **Peter Wangai v Egerton University [2019] eKLR**.

10. Finally, the decision in **Walter Ogal Anuro v Teachers Service Commission** is relied upon to demonstrate the essence of substantive and procedural fairness in termination of contracts of employment.

11. On the reasons for termination, the Claimant relies on the decision in **Stanley Mwangi Gachungu & another v Barclays Bank of Kenya Limited [2019] eKLR** to urge that where no witness is called on behalf of the defence, the evidence tendered by the plaintiff remains uncontroverted.

12. On reliefs, the Claimant submits that he is entitled all the reliefs stated in paragraph 7 of the memorandum of claim and relies on the decision highlighted above.

Analysis and Determination

13. From the pleadings, evidence on record, submissions and the law relied upon, the issues for termination are –

- (i) Whether the Claimant's termination was fair;
- (ii) Whether the Claimant is entitled to the reliefs sought.

14. On termination, the Claimant alleges that he and five others were terminated on 3rd November 2015 for having sought audience with the management on alleged increase of working hours effective 1st November 2015. He also alleges that he was neither told the reason(s) for termination nor taken through a disciplinary process as required by law.

15. As submitted by Counsel, Section 45 of the Employment Act prescribes the substantive and procedural requirements for a fair termination. The Section 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.**

16. In addition, legions of Court decision have emphasised the essence of substantive and procedural fairness in termination of employment contracts. The Court of Appeal decision in **CMC Aviation Ltd v Mohammed Noor [2015] eKLR** is a classical example. The decision in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** illustrates the same principle.

17. As regards the reason(s) for termination, the Respondent's letter dated 3rd November 2015 addressed to the Claimant states that on Monday, 2nd November 2015 he was involved in unruly behaviour which amounted to gross misconduct, that the Claimant –

- i) Knowingly failed or refused to obey a lawful and proper command by the employer which was within his scope to obey

ii) Used abusive and insulting language to the employer

iii) Wilfully neglected to perform his work which was his duty to perform according to his contract of employment.

18. For unexplained reason, the Claimant availed no evidence to contradict the reasons for termination as itemised by the letter of termination.

19. From the Claimant's testimony and the dismissal letter dated 23rd November 2015, it would appear that the Claimant and his colleagues protested the alleged increase in working hours by the Respondent and were consequently dismissed for their behaviour. Instructively, in his statement, the Claimant states that he was dismissed presumably for advocating for his rights as an employee.

20. Section 43(2) of the Employment Act. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee. See **Naima Khamis v Oxford University Press (EA) [2017] eKLR**.

21. As to whether the Claimant was taken through a fair process before termination as required by law, there is no evidence on record to show that he was. More importantly, he testified that he was not given an opportunity to be heard as provided by Section 41 of the Employment Act having been accused of gross misconduct as exemplified in Section 44 of the Act.

22. Section 41 of the Employment Act is unambiguous on the procedural steps to be complied with by the employer before termination of employment on the grounds of misconduct, poor performance or physical incapacity.

23. Without a doubt, the Claimant was condemned unheard. The Respondent may have had a valid reason to terminate the Claimant's employment contract but did not subject him to due process as required by law. In **Naima Khamis v Oxford University Press (EA) (supra)** the Court of Appeal stated that:

“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.”

24. Having found no evidence to show that the Claimant was accorded a chance to be heard before dismissal, it is the finding of the Court that the Claimant's dismissal on 3rd November 2015 was unfair and unjustified under Section 45(2) of the Employment Act and it is so declared.

Conclusion

25. Having found that the Claimant's dismissal was unfair and unjustified, the Court proceeds as follows: -

a) One month's salary in lieu of notice Kshs.9,700.00

26. The Claimant is awarded **Kshs.9,700** in lieu of notice as mandated by Section 35(1) of the Employment Act.

b) Overtime payment for two extra hours for the entire period of service being Kshs.89,467.74

27. This claim was not proved by evidence. Although the Claimant stated that the day shift commenced at 7.00 am to 5 pm and the night shift from 5 pm to 7.00 am and that he used to work for 10 days on day shift and 10 days on nightshift, and would be off duty for three days consecutively, he led no evidence to demonstrate how he worked the extra two hours and whether he had previously demanded payment. The claim is **declined**.

c) Underpayment for the period of service from May 2015 to November 2015

28. Since the minimum wage is a prescription of the law, the sum claimed amounting to **Kshs.10,954/-** is awarded.

d) Underpaid/untaken public holidays for the entire period of service

29. The Claimant led no evidence to prove this claim. The public holidays in question are unnamed so are the years in question. In addition, the Claimant did not demonstrate that he actually worked on public holidays. The claim is **declined**.

e) Damages for wrongful and unfair dismissal from employment

30. Having found that the Claimant's termination was procedurally unfair, the Claimant is eligible for the discretionary remedy under Section 49(1)(c) of the Employment Act and the Court is enjoined to found its decision on the parameters set out in Section 49(4) of the Act. The Court has taken into account the following: -

i) The Claimant worked for the Respondent for approximately 10 years and two months and wished to continue;

ii) The Claimant did not contradict the grounds of dismissal relied upon by the Respondent in its letter dated 3rd November 2015;

iii) The Claimant had served the Respondent diligently and had not previous warnings or show cause letters.

31. The equivalent of 5 months' salary **Kshs.58,500/=** is fair.

f) Certificate of service to issue

32. **In conclusion judgment is entered for the claim for Kshs.69,154/- with costs.**

33. Interest at Court rates from the date of judgement till payment in full.

34. 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