



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 1841 OF 2016

(Before Hon. Justice Ocharo Kebira)

FRANKLINE NICODEMUS MOGUNDE CLAIMANT

VERSUS

STYLE INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. Through a memorandum of claim dated 18th August 2016, the Claimant herein sued the Respondent seeking for the following reliefs:

- (a) A declaration that the Claimant's dismissal from his employment was wrong, unfair and unlawful.
- (b) A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded – Kshs, 310,648.4.
- (c) Interest on (b) above from the date of filing suit till payment thereof.
- (d) Costs of this suit.
- (e) Interest.

2. The statement of claim was filed contemporaneously with a witness statement and a list of documents dated 18th August 2016, under which the documents that the Claimant wished to put reliance on in support of his case were filed.

3. Upon being served with summons to enter appearance, the Respondent did enter appearance and file a statement of defence. Like the memorandum of claim, the statement of defence was accompanied by a witness statement and a list of documents under which the documents that the Respondent intended to rely on in fortification of its defence were filed. At the close of pleadings there was a joinder of issues. The matter got ripe for hearing on merit.

Claimant's case

4. When this matter came up for hearing on the 13th October 2021, the Claimant testified. He adopted the contents of his witness statement as part of his evidence in chief, and the documents, namely a demand letter dated 5th August 2016, pay slips, National social Security Fund registration letter and job identity card as his documentary evidence.

5. It was the Claimant's case that he came into the employment of the Respondent on or about February 2014, as a machine operator until 20th July 2016, when his services were terminated. The Claimant stated that his salary was Kshs. 10,956, which was never increased during the currency of the employment relationship.

6. On how the termination of his contract of employment happened, the Claimant testified that on or about the 20th July 2016, he was at his place of work when he was accused of browsing using his phone during working hours. His Supervisor, Mr. Dancan Lumati escalated the matter to the General Manager. The General Manager, directed the Claimant to write an apology letter. Holding that he was not guilty of the allegation, the he declined the instructions.

7. The Claimant stated that consequently, the General Manager referred them to the Human Resource Manager, to handle the issue.
8. The Claimant stated that, then the Human Resource Manager was not present so they ended up at the Assistant Human Resource Manager's office, though he talked to them, he was not able to resolve the issue. He directed the Claimant to go home, and wait to be called for a meeting with the Human Resource Manager when he resumed duty.
9. The Claimant testified that on the 22nd July 2017, a meeting was held in which the Human Resource Manager, the assistant Human Resource Manager, the Supervisor and him were present. He had a chance to explain to them what happened, and denied the allegations. He went ahead to state that they directed him to write an apology letter. He refused to. At that juncture, the Human Resource Manager pronounced that his employment was over.
10. The Claimant contended that prior to the meeting, he had not been informed that the same was to be a disciplinary hearing. He was not given a chance to be accompanied by a fellow employee. He asserted further that he had at no time been issued with a warning over any conduct.
11. The Claimant testified that he did at no time proceed for leave and that he was not compensated for the leave days unutilized.
12. At the time of termination, he was earning Kshs. 12,599.
13. The Claimant stated that throughout his period of service, the Respondent never remitted his National Social Security Fund and National Health Insurance Fund (NHIF) dues to the relevant entities.
14. He pleaded that as a result of the illegal and unfair summary dismissal complained of, he suffered, an abrupt loss of income, trauma and inability to meet his continuing obligations, as a result of which he suffered loss and damage.
15. Cross examined by counsel for the Respondent Ms. Obonyo, the Claimant admitted that he signed the disciplinary proceedings minutes.
16. Shown his pay slip, the Claimant admitted that the same had leave pay, NSSF and NHIF items.
17. He stated that he signed the minutes only to demonstrate that he was present in the meeting.

The Respondent's case

18. The Respondent presented its defence to the Claimant's case, through Dancan Lumati, its Industrial Relations Officer. The witness did adopt the contents of his witness statement of 13th October 2021, as his evidence in chief, and the documents the Respondent filed herein, as documentary evidence of the Respondent.
19. The witness stated that the Claimant was in the employment of the Respondent as a machine operator in the production Department. Performance of his duties were subject to the directions by his Supervisor. That as at the time of separation, he was earning Kshs. 13,528.80.
20. He stated that some times in July 2016, the Claimant was found browsing on his phone contrary to the Work Ethics and Regulations, despite numerous warnings not to engage in such misconduct during working hours. That for this he was issued with a warning letter which he refused to acknowledge.
21. He further stated that the Claimant was issued with a notice to appear before a disciplinary committee to explain why action would not be taken against him for using his phone during working hours and refusing to accept a warning letter from the Supervisor.
22. That on the 22nd July 2020, a panel was constituted to hear his case. He attended, but did not offer a satisfactory explanation on his failure to accept the warning letter.
23. He asserted that the Claimant was given a termination letter on same date as he had failed to give a satisfactory explanation and he turned rude to the panel.
24. Cross examined by counsel Kamau for the Claimant, the witness stated that he joined the work force of the Respondent in November 2016 after the termination of the Claimant's employment.
25. The witness by way of an admission, stated that he had not tendered any warning letter as evidence, warning letter that he had asserted was issued to the Claimant, not even the one that he had alleged in his evidence in chief, the Claimant had refused to receive.
26. He alleged that the meeting of 22nd July 2016 was a disciplinary hearing. The Claimant had been notified verbally as much. His right to have a fellow employee present was communicated to him verbally.

The Court's directions

27. At the close of the Respondent's case, the Court did direct the parties to file written submissions within specific time lines. The Claimant complied. The Respondent did not.

The Claimant's submissions

28. Counsel for the Claimant submitted that as testified by the Claimant, his salary was Kshs. 10,956 at the time of termination, contrary to the Respondent's position that he was earning Kshs. 13,528.80. That his pay slip tendered as evidence under the list of documents clearly shows that his basic salary was Kshs. 10,956. The Respondent's insistence that the Claimant was earning Kshs. 13,528.80 yet he was not, was *mal fides*, only intended to cover up the fact that the Respondent was paying the Claimant below the legal minimum wages.

29. Counsel submitted that the Respondent was under duty to prove that, the Claimant was guilty of the misconduct of browsing on his phone during working hours, there had been warnings to him verbally and in writing, he had been invited for a disciplinary hearing, and that he attended a disciplinary hearing on 22nd July 2016. The Respondent failed to discharge this duty. Counsel further submitted that the signature on the minutes was not the Claimant's.

30. That there are no specifics on the date and time when the incident of browsing occurred. That if there was, nothing could have been easier than the Respondent giving this information.

31. It was further argued that there was no evidence on the part of the Respondent that could sufficiently dislodge the Claimant's that he was not invited for a disciplinary hearing.

32. Counsel submitted further that the Respondent did not follow the procedure laid down by section 41 of the Employment Act, in terminating the Claimant's employment. He placed reliance on the decision in the case of **Walter Anuro vs Teachers Service Commission [2013] eKLR, and Rebecca Ann Maina & 2 others vs Jomo Kenyatta University [2014] eKLR.**

Determination

33. The following are the issues that commend themselves to this Court as the issues for determination in this matter thus:

- (a) Whether the termination of the Claimant's employment was procedurally fair.
- (b) Whether the termination of the Claimant's employment was substantively fair.
- (c) What reliefs are available to the Claimant if any, in the circumstances of this matter.
- (d) Who should bear the costs of this matter.

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

34. It is common cause that the Claimant's employment was terminated, what is not, is how the process leading to the termination was carried out. The combatants herein seem to have taken parallel positions on it.

35. Section 45 (2) (c) of the Employment Act provides that a termination is unfair where the employer fails to prove that the employment was terminated in accordance with fair procedure. The fair procedure contemplated by this provision is that provided for in section 41 of the Act, thus:

" Subject to section 42 (1), an employer shall before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employer shall be entitled to have another employee or a shop floor union representative of his choice, present during this explanation.

(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 employer within subsection (1), make."

36. Therefore, in order not to be afoul with section 45 of the Employment Act, an employer contemplating to terminate an employment of an employee or dismiss an employee summarily, must fulfil the following statutory pre-requisites: bring to the attention of the employee the contemplation, and the reasons forming basis for the contemplation, in a language that the employee understands; express to the employee that he is entitled to, and allow him to, be accompanied by a fellow employee or a shop floor union representative of his choice during the explanation; accord an opportunity to the employee, and, if chosen, the fellow employee or shop floor union representative, to be heard on the contemplated action, and the reasons thereof; and consider the representations by the employee and the person, if any, chosen as herein stated before making a decision to take one of those actions put forth in section 41 (2).

37. Imperative to state that the procedure is mandatory, considering the tone in which the provision is couched.

38. Contrary to the Claimant's counsel's submissions, the Claimant testified that he was called into a meeting comprising of the Human Resource Manager, his assistant, the Supervisor and him, when he got back to the work place on the 22nd July 2016. That there was a meeting on the 22nd July 2016, in a non-issue therefore. However, the issue is, was the meeting a disciplinary meeting? Was he explained to well in advance that the meeting was to be a disciplinary meeting? Was he explained to within reasonable time of the charges that were being levelled against him, to enable him prepare a representation as contemplated by section 41 of the Act? Was he accorded an opportunity to be accompanied by a fellow employee?

39. I have considered the evidence and material placed before me, the Respondent does not controvert the Claimant's evidence that he was called into the meeting on the same day he got back to work. The meeting that the Respondent asserts was a disciplinary meeting. The question then which arises is, was the Claimant given sufficient time to prepare for his representation, as he was entitled to? In the circumstances of the matter, I find in the negative.

40. Looking at the pleadings of the Respondent, its witness's witness statement and the oral testimony in chief, the same does not demonstrate that the Claimant was informed of the allegations that were being levelled against him before the meeting, that he was accorded an opportunity to be accompanied by a person chosen by him in accordance with the provisions of section 41 of the Act. All that the witness did, which I consider to be an after thought was to baldly assert in his evidence under cross examination that the Claimant was verbally informed. When and by who, he did not give specifics. Where he got this information from, considering his evidence that he joined the Respondent after the termination of the Claimant's employment, he did not state.

41. Consequently, I am not prepared to agree with the Respondent's position that the Claimant knew that the meeting of 22nd July 2016 was going to be a disciplinary hearing, that he had adequate time to prepare for his defence and that he was given an opportunity to be accompanied by a colleague.

42. In the upshot, the Court is not convinced that there was adherence to the mandatory statutory procedure provided for under the Employment Act, 2007. Consequently I hold that the dismissal was procedurally unfair.

Of whether the termination was substantively fair.

43. Section 43 of the Employment Act, 2007, requires of an employer in a claim arising out of termination of a contract of employment, to prove the reason or reasons for the termination. Where the employer fails to do so the termination is deemed unfair pursuant to the provisions of section 45 of the Act.

44. The contract of the Claimant came to an end when the Claimant was summarily dismissed. Section 44 of the Employment Act describes what amounts to summary dismissal and what can attract the sanction of a summary dismissal against an employee, thus;

“(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or such less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2). Subject to the provisions of the section, no employer has right to terminate a contract of service without notice or less notice than that to which the employee is entitled by any statutory provisions or contractual term.

(3). Subject to the provisions of this Act, the employer may dismiss an employee when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under a contract of service.”

45. Section 44 (4) provides for the actions and inactions of an employee that may amount to gross misconduct so as to justify a summary dismissal against him or her. However, it cannot be said that the list is exhaustive. An employer can summarily dismiss an employee on an account outside those in the catalogue for as long as the account has the characteristics such as I will demonstrate shortly hereinafter.

46. It was the Respondent's case that the Claimant's acts that were in issue amounted to grounds for summary dismissal.

47. In the case of **Dairus Kiseu Mwamburi vs Cooperative Bank of Kenya Limited [2021] eKLR**, this court held;

“(99). It is not enough for an employer to cite that an employee committed one or more of those actions or omissions obtaining in the list provided for in section 44 (4) of the Employment Act, 2007, or its Human Resource Policy. An employee's misconduct does not inherently justify a summary dismissal unless it is “so grave” that it intimates the employee's abandonment of the intention to remain in employment.”

48. Whether an employee's misconduct warrants dismissal requires assessment of the degree and the surrounding circumstances, the contextual approach. In **Mckinley vs BC Tel** it was held;

“29. When examining whether an employee's misconduct justifies his or her dismissal, Courts have considered the context of the alleged insubordination. Within this analysis, a finding of misconduct does not, by itself, give rise to a just cause. Rather, the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship could no longer viably subsist.”

39. To summarise, this first line of case law establishes that the question whether dishonesty provides just cause for summary dismissal is a matter to be decided by the trier of fact, and to be addressed through an analysis of the particular circumstances surrounding the employee's behaviour. In this respect, Courts have held that factors such as the nature and degree of the misconduct, and whether it violated the “essential conditions” of the employment contract or breaches an employer's faith in an employee, must be considered in drawing a factual conclusion as to the existence of just cause.”

49. I have considered the circumstances of this matter, including the nature of work the Claimant was doing, the allegations that he was accused of browsing using his phone during hours of work; absence of any explanation why he thinks the Supervisor would without justification allege that he was so browsing; that in his pleadings and witness statement he deliberately concealed this reason as being the reason that the Respondent anchored its termination on; the admission that he refused to do an apology letter, and find that the dismissal was

valid and fair.

50. Consequently, I find that the dismissal was with a valid and fair reason. The dismissal was substantively fair.

Of the reliefs

51. Now I turn to the reliefs sought by the Claimant. The Claimant sought for a one month's salary in lieu of notice. Having found that the dismissal was with a valid and fair reason, consequently, the conclusion that it was substantively fair, and taking into account that he was summarily dismissed, I find that he is not entitled to the relief. I decline to award the same.

52. The Claimant asserted that for that period between February 2014 up to April 2015, the basic minimum wage that had taken effect from 1st May 2013 was Kshs. 13,201.55, for a machine operator. The Claimant stated and he was able to demonstrate that his basic salary was Kshs. 10,956. He alleged therefore, that for the entire of the period, he was being underpaid by a sum of Kshs. 2,245.55. Hence his claim Kshs. 31,437.7, under this head.

53. It was further asserted that for the period May 2015 up to 20th July 2016, the legal basic minimum wage effective 1st May 2015 was Kshs. 14,785.70, payable to machine operators. That therefore the Claimant was cumulatively underpaid by Kshs. 49,786.1, for this period.

54. I have looked at the relevant wage orders. I agree that the minimum wages that were provided for during the afore-stated material periods, were as submitted by counsel for the Claimant.

55. Pursuant to section 48 of the Labour Institutions Act, I find that the Claimant was being underpaid throughout the period afore-stated and that he is entitled to the cumulative figure, the difference between that which he earned and what he ought to have earned had the Respondent adhered to the wage orders. Therefore, a total sum of Kshs. 81,223.8. I am convinced that throughout, the Claimant earned a basic salary of Kshs. 10,596.

56. The Claimant further claimed for compensation for untaken / unpaid leave for a period of 2 years.

I note that the pay slips which the Claimant exhibited had an item for leave pay. He under cross-examination admitted this. This points to the fact that whenever he did not proceed for leave, he was compensated. I decline to award a sum under the head, save for the two months (March & April) prorated, Kshs. 1,724.9.

57. Having found that the summary dismissal was with a valid and fair reason, therefore substantively fair, and that the Respondent only goofed on procedure, I am prepared to award the Claimant a nominal award of two months gross salary under the provisions of section 49 (1) (c) of the Employment Act.

58. The Claimant has claimed for service pay and submitted that he is entitled to the same. He alleges that though his salary was being deducted for NSSF remittances, the Respondent was not remitting. The Respondent naturally is the one with the documents that would demonstrate that remittances alleged not to have been made, were made. In absence of any such documents, I can only agree with the Claimant that they were not and he is entitled to the sum of Kshs. 14,785.7, that he has sought.

59. In the upshot, I hereby enter judgment for the Claimant for:

- (a) A declaration that the dismissal was procedurally unfair.**
- (b) Compensation under section 49 (1) (c), 2 months gross salary, Kshs. 25,198.**
- (c) Underpaid salary amount, Kshs. 81,223.8.**
- (d) Unpaid leave, Kshs. 1,724.9.**
- (e) Service pay for the period when NSSF was not remitted, Kshs. 14,785.7.**
- (f) Costs of the suit.**
- (g) Interest at court rates from date of filing of this suit till full payment.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF DECEMBER, 2021

OCHARO KEBIRA

JUDGE

Delivered in presence of;

Kamau for the Claimant.

M/s Obonyo for the Respondent.