



REPUBLIC OF KENYA

IN THE LABOUR AND RELATIONS COURT AT BUNGOMA

ELR CAUSE NO. 29 OF 2018

ALVINE OBUYA ODIMACLAIMANT

VERSUS

ONE ACRE FUND..... RESPONDENT

JUDGEMENT

1. By a memorandum of claim dated 16th April, 2018 the Claimant sought the following orders:-

(a) A declaration that the purported termination offends the Constitution of Kenya 2010 and particularly Article 40, 47 and 50 thereof, The Employment Act 2007 and fair labour Practices and consequently wrongful and that the Claimant is entitled to the most appropriate redress.

(b) An order of compensation in damages for unfair wrongful and/or unlawful termination of employment to the tune of Kshs. 9,050,316/-.

2. The Claimant in addition to the Claim filed verifying affidavit sworn on the 16th August, 2018, list of witnesses dated 16th April, 2018, Claimant's witness statements dated 16th April 2018 and the bundle of documents.

3. The Respondent filed Memorandum of appearance through the law firm of Makokha Wattanga & Luyali Associates Advocates dated 24th day July, 2018.

The Respondent filed Memorandum of defence dated 25th July, 2018, list of witnesses dated 25th July, 2018, witness statement of Francis Odhimabo dated 25th July, 2018, list of Respondent's documents dated 25th July, 2018.

4. On the 26th July, 2018 Justice N. Nduma ordered formal proof on 27th March, 2019, following non-appearance of the Respondent in mention to fix hearing date. On the 27th March, 2019 the Claimant's case proceeded interpartes and defence was not ready for hearing.

5. On the 10th September 2021 the Claimant fixed the case for defence hearing for 28th September, 2021 and filed Affidavit of service of the hearing date upon the law firm of Makokha Wattanga & Luyali Associates in Bungoma on record for the Respondent sworn on 13th September 2021 was filed in court on 28th September, 2021.

The Respondent was absent on the 28th September, 2021 hence the defence case was closed.

6. The court gave directions on the filing of written submissions by parties with notice to the Respondent.

Only the Claimant filed written submissions dated 12th October, 2021.

The Claimant's Case.

7. The proceedings before Justice Nduma record the Claimant's case taken on 27th March, 2019.

8. The Claimant on oath told the court that he lives in Bungoma and was not working. That he used to work for the Respondent. He adopted his witness statement dated 16th April 2018 as his evidence in examination in chief and relied on his statement of claim dated 18th April, 2018 and produced documents as exhibits 1-8 under his list of documents dated 16th April, 2018 filed in court on the 18th April 2018.

9. The Claimant told the court that he took company chairs 30 of them and he used them in funeral at home. That he asked permission from Robert Kearns who was his boss. That the Chairs were booked at the gate and he returned them in the evening. That he did not sleep at work. He was the property manager. That Supervisor Carolyn Mmbone was to supervise closure of the tank. That he was a manager. That he could not go down. That the tanks were cleaned twice a year June and September.

10. That the chairs came in pieces, when they came he was not copied the email. That when he was notified he sent a carpenter who went to attend to the chairs and were assembled. That the company did not incur losses. That the carpenter charged kshs.500 per chair and that was normal. The seats had to be assembled. That the contractor was not paid kshs.20,000 for the assemblance to date. The Claimant told the court that he does not accept he failed in his responsibilities and that he did not mistake. That Carolyn always supervised that and that she was not called at the hearing.

That the 2017 policy was before the court. The 5 steps were not followed. The 6th Step was termination. The procedure was not followed. The Respondent had no valid reason to terminate his employment.

11. During cross examination the Claimant told the court that he was employed on 22nd April, 2013 on casual basis. He was contracted on 1st November, 2013 as property Manager. That he got the terms and conditions of his employment (Document "2"). That conflict of interest was founded for and if this was an issue as such it should be in writing.

That he did not have to write to borrow chairs. That it was a favour from a supervisor. That he did not put it in writing. That he was aware of the policy. That he had an assistant on cleaning of tanks. That he wrote to her about her duties. That he did not supervise on daily basis. That he was her manager. That he was not present at site when tanks were cleaned. That he did not go to see what had been done.

That he did not get any reply from Mmbone on the cleaning of the furniture. That he was to ensure the seats were assembled. That he sent a carpenter and his supervisor at Kakamega supervised the work. That he was in charge.

12. The Claimant said he relied on other people. That policies were in writing. That he did not follow up as a manager. That he still wanted to continue working. That he was invited to the hearing. That he was not asked to bring a person of choice. That he made a response to the charges in writing. That he did not call a witness. That he asked to be forgiven. That he was coerced and told he would be reinstated if he played along. That it was not true he did not follow procedure. That the plumber was a private contractor to clean tanks and the supervisor oversaw that. That the assembling of furniture was by a private contractor.

13. In re-examination the Claimant told the court that he was given permission to take seats by head of department. That they never made written requests it was most verbal on mode of seats. That it was his father's funeral. That Carolyn was in charge of supervising the plumber when cleaning tanks and had done it severally.

That Robert told him to make sure the seats went to kakamega and be assembled. Edwin his assistant supervisor did the supervision on his behalf. That he was coerced before the disciplinary committee and had just lost his mother the last parent. That he has 3 siblings who asked him to apologize to Peter his boss. That it was days after he had buried his mother.

That he got his certificate of service. He studied upto "O" level and did not attend college. That he was 29 years.

The Defence case

14. The Respondent entered appearance and filed its response by way of memorandum of defence dated 25th July, 2018, witness statement of Francis Odhimabo dated 25th July 2018 and list of documents dated 25th July 2018.

15. The defense statement relies on the notice to show cause and states that the Claimant was summarily dismissed after hearing for negligence and gross misconduct in accordance with the Employment Act and in accordance with the Respondent's Human Resource Policy which the Claimant had knowledge of and of which the Claimant was aware of. That the proceedings were fair and lawful.

Legal analysis and findings

16. Issues for determination

- i. Whether the Claimant's dismissal from employment by the Respondent was lawful and fair
- ii. Whether Claimant is entitled to the relief sought.

THE RELEVANT LAW

17. Section 45(I) of the Employment Act provides that no employer shall terminate the employment of the employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove:-

- (a) 'That the reason or 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) Bases on the operational requirements of the employer was that the employment was terminated in accordance with fair procedures:’

18. Section 45 (4) of the Employment Act further states,

‘A termination of Employment shall be unfair for the purposes of this part where :-

‘(a) The termination is for one of the reasons specified in section 46 or

(b) it is found that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment.’

19. The Procedure for termination of the employment of an employee is defined under Section 41 of the Employment Act.

“ An employer shall before terminating the employment of an employee, on grounds of misconduct, prior 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 employee shall be entitled to another employee or a shop floor union representative of his choice present during his explanation.’

20. The court of Appeal has held the provisions of section 41 of the Employment Act to be couched in mandatory terms. The court of Appeal in *Postal cooperation of Kenya -vs- Andrew K . Tanui (2019)* the court pronounced itself on procedural fairness as herein under:-

(i) Four elements must thus be discernable for the procedure to pass muster:-...

(ii) The reason or which the employer is considering termination

(iii) Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made and

(iv) Hearing and considering any representation made by the employee and the person chosen by the employee.’

It is against the above legal criteria this court proceeds to determine the instant claim.

ANALYSIS OF ISSUES AND FINDINGS

iii. Whether the Claimant's dismissal from employment by the Respondent was lawful and fair

21. The reasons for the dismissal are stated in the letter by the Respondent dated 28th June, 2017 (exhibit No. 4). The Reasons are stated as follows:-

(a) Taking OAF property out of office . You acknowledged to have taken 30 OAF plastic chairs without permission to your home for personal functions. This is misuse of authority and against OAF conflict of interest policy.

(b) Negligence: You failed in your duty as a supervisor during the cleaning of KHQ water tank , when you failed to supervise this work as required leading to the work being repeated and OAF losing monies as he had to pay again for a 2nd cleaning service.

You failed to verify the seat consignment meant for Kakamega office and went a head and agreed on a price quotation with the vendor leading to OAF paying for semblance costs that could have been much cheaper for OAF since there was already a support person coming from the company to complete the semblance work”.

The Respondent in its letter stated the above was in violation of their policy. That the Claimant was given opportunity to justify himself through letter to show cause and his response and the disciplinary hearing he attended on 22nd Jun, 2017.

22. The Claimant submits that on the reason of taking OAF property out of office, the Claimant testified it was the norm for the Respondent employees to take plastic chairs in case they had a funeral of their loved ones spouse or children.

23. The Claimant submits that he was categorical that the only requirement was to sign with the security at the gate on taking out the said chairs and the reason and then sign in a letter returning the same. That the Claimant lost his mother, and indeed signed for the said chairs and returned them on the same date after the funeral service. The Claimant submits that taking the chairs the Claimant was not going to have any personal gain as described in exhibit No. 6 of the Respondent's policies and procedures manual on the submission that the said chairs are furniture which the employees as norm were allowed to use and return the same in case of funeral.

24. The court refers to the testimony and notes that the Claimant told the court that he did not have to write to borrow chairs and this was a

favour from his supervisor Robert Kearns who he asked permission. That they never asked for permission in writing and it was verbal.

25. The Claimant did not produce his response to the notice to show cause. On this issue the court looked at the Advocates demand letter exhibit 8 and on the issue of taking chairs, it is written “ that our client admitted to having taken the office chairs on 15th August, 2015 which he duly signed for with the security guards at the gate and the chairs were returned on same date as such there was no loss to the company”.

At the disciplinary proceedings, the Claimant produced the record as exhibit No. 5 where it is recorded that Alvine collected 30 chairs from KHQ he said he didn't request permission from anyone, Alvine sent someone at the gate, Alvine called the guard to let that person get 30 chairs from headquarters and to Alvine's home for function of thanks giving to guys who helped him and at 3.00 pm the same Piki guy returned the same chairs after the function. Alvine said that security recorded/booked the list of the chairs he took”.

It is recorded that Alvine said when M& E people had function they could go pick plastic seats from headquarters to the M&E.

26. The Claimant produced the record of the employer. There is no record that he asked for permission from the supervisor. He submits it is not conflict of interest as there was no personal gain. The Claimant did not call a witness even in court to support the allegation that it was the norm to pick the company's chairs for personal functions like one he had. The court finds that he took the chairs without permission which was property of the Respondent for personal gain which need not to have led to loss to the company. It was use of company property for personal activity without permission of employer. That violated the provisions of Human Resource manual and procedures for the employer hence a valid reason or dismissal.

27. On the reasons of negligence the Claimant submits that he was not a supervisor but a manager as per exhibit No. 1. . That his responsibilities included managing all cleaners.

The Claimant submits at the proceedings before the disciplinary committee the Claimant indicated the supervisor was one Carolyne Mmbone who as at Kakameka and while he was at Bungoma. That the said Carolyne was to file a report to the Claimant and further she was not called to explain at the disciplinary hearing hence that is not a valid reason.

28. During cross examination it is recorded that the Claimant told the court that he was aware of the policy, that he had an assistant on cleaning of tanks, that he wrote to her on her duties. That he did not supervise on daily basis. That he was her manager and that he was not present at the site when the tanks were cleaned and that he did not go to see what had been done. In re-examination he told the court that Carolyne was in-charge of supervising the plumber when cleaning tanks and had done so severally.

29. In the demand letter the Claimants repeats Carolyne was the supervisor for cleaning of tanks. In the proceedings it is recorded that the cleaning of tanks had been delegated to Carolyne who further delegated to other staff as she was not available. The Claimant said he did not supervise and needed to delegate. The Claimant in his statement stated that the said Carolyne Mmbone was to supervise the cleaning of water tanks as such was responsible for any loss as no report was ever made to him by the said Carolyne. The Respondent accused the Claimant of failing to supervise the work. Carolyne was reporting to the claimant who admitted he did not get a report on the cleaning of the tanks yet the plumber was paid .

The court finds that this was a valid reason to dismiss the Claimant

30. On the last reason of chair assembling the reason is valid because the Claimant confirmed he did not verify the seat consignment before issuing quotations. These reasons were related to operation requirements of the employer and capacity of the employee.

31. The Claimant's submission that failure to call the said Carolyne, Robert Kerns and Joseph Ochari is not persuasive to find the reasons did not exist. On whether the procedural test was met, the Claimant submits that he was not accompanied by fellow employee to the disciplinary proceedings and to buttress his argument relies on the decision in *Kenya union of Commercial food and Allied workers - vs-Merin North Farmers Sacco Limited (2013)* where it was held that the right to be awarded a hearing and be accompanied by fellow employee or union representative during the hearing was sacrosanct right which opportunity was never accorded to the Claimant herein as evidenced by the proceedings.

32. The court finds that Section 41 (1) of the Employment Act is couched in mandatory terms that the employee shall be entitled to have another employee or shop floor Union representative of his choice present during his explanation.

33. The Claimant did not produce the letter to show cause hence the court was left in the dark as to whether he was informed of the right. The issue was not raised in the demand letter. The proceedings produced by the Claimant are parts of the record of the disciplinary proceedings. To this end the court looks into the Respondent's list of documents where the show cause letter dated 13th June, 2017 is annexed which summoned Claimant to the hearing annexed. The letter did not state that the Claimant had a right to be accompanied by another employee or union representative. That was a violation of the provisions of Section 41 (1) of the Employment Act. The proceedings do not disclose the right was complied with. To that extent the process did not muster procedural fairness which process was upheld in the Court of Appeal Postal *Corporation case* (supra)

Consequently, for that reason the court finds that the procedure of dismissal was unlawful and unfair.

34. *On whether the Claimant is entitled to the relief sought?*

The court found that the reasons for termination were valid but the procedure for dismissal unlawful. The Claimant sought redress by way of damages of Kshs. 9,050,316/-. The court has considered the circumstances of the termination and the fact that the employee contributed

to the dismissal. He was paid all outstanding dues. Section 49 of the Employment Act caps the damages payable for wrongful termination to 12 the months gross salary. The applicable gross monthly salary is kshs. 32,791/- as per the Claimant's witness statement. He did not attach the payslip. The Respondent dispute the gross monthly salary amount and hence the court will treat kshs. 32,791/- as gross monthly salary for purpose of the award of damages.

35. Considering the circumstances of the dismissal the court findsman award of 3 months salary is adequate compensation for the unlawful dismissal from employment of the Claimant.

CONCLUSION AND DISPOSITION

36. I have found that the termination of the Claimant's employment contract by the Respondent was unfair and unlawful. I now enter judgment for the Claimant against the Respondent in the following terms:-

a. Compensatory damages for 3 months at gross monthly salary at dismissal of Kshs. 32,791.00 per month x 3months total sum awarded of Kshs.98,373/-

The award in above is subject to statutory deductions.

b. I also award the Claimant interest on the award sum above at court rates from the date of judgment until payment in full.

c. Costs of this suit shall be borne by the Respondent.

WRITTEN, DELIVERED AND SIGNED THIS 8TH DECEMBER 2021 AT BUNGOMA

.....

J.W. KELI

JUDGE

In the presence of:

Court Assistant- Brenda Wesonga

For Claimant- Wamalwa Simiyu Advocate

For Respondent:- Mr. Makokha Advocate