



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 312 OF 2015

DANIEL MUIRURI.....CLAIMANT

VERSUS

MAHEE FLOWERS LTDRESPONDENT

JUDGEMENT

1. The Claimant filed his Memorandum of Claim on 22nd, December, 2015 contending that he had been unfairly terminated by the Respondent. The Claimant prays for the following remedies: -

- a) A declaration that the termination of the claimant on the 20th February, 2013 by the Respondent was unlawful, irregular and the same contravened the Employment Act.**
- b) A declaration that the claimant is entitled to payment for salary arrears for the month of February, 2013 amounting to Kshs. 12,109.**
- c) A declaration that the claimant is entitled to be given three-month salary in lieu of Notice amounting to Kshs. 36,324/-.**
- d) A declaration that the claimant is entitled to payment for wrongful termination as per section 49(1)(c) of the Employment Act for 12 months amounting to Kshs. 145,308.**
- e) A declaration that the claimant is entitled to be paid 15 days service pay for 15 years amounting to Kshs. 90,817.50.**
- f) Interest on (b), (c), (d) and (e) above at Court rates from date of filling suit.**
- g) Costs and interest at court rates of the suit to be borne by the Respondent.**
- h) Any other relief that this Honourable Court may deem fit to grant.**

2. The Respondent entered appearance and filed a response to claim on the 9th February, 2016 contending that the claimant was first employed by them on 8th May, 2005 and dismissed lawful due to gross misconduct.

Claimant's Case

3. The claimant avers that he was employed by the Respondent in the year 1998 as mason and later his contract was reduced to writing and he was offered the position of senior mason commencing 8th May, 2005. The contract was revised on 24th May, 2007 and his gross salary was increased to Kshs. 7,087 per month.

4. The claimant avers that he worked faithfully and diligently for the Respondent and on 20th February, 2013 he received a notice to show cause letter requiring him to give reasons why disciplinary action should not be taken against him for alleged alteration of receipt to hike the cost of goods from Kshs.600 to Kshs.900. That he gave an explanation and denied ever forging the said receipt.

5. On 21st February, 2013, he was denied entry into the Respondent premises and later the claimant received a termination letter from the respondent dated 20th February, 2013 on the basis that the claimant benefitted from the forged receipt that purportedly hiked the cost of red-oxide from Kshs.600 to Kshs.900.

6. He avers that he was not subjected to any hearing neither was he given notice of the said termination, therefore the termination was unfair in the circumstances. He was not paid his terminal dues

7. He also averred that his NSSF was never paid by the Respondent.

8. The Claimant testified as CW-1 adopted his witness statement dated 12.10.2015 and in addition testified that he was not subjected to any disciplinary hearing on the allegation of theft neither was he reported to the police.

9. On cross examination by Wachira Advocate, he maintained that he never altered the receipt as alleged and on re-examination he stated that the letter in response to the Notice to Show cause of 21st February, 2013 was written by the Respondent' and he was directed to sign and that he never understood the contents of the letter as he could not read.

Respondents case.

10. The Respondent avers that the claimant was employed on 8th may, 2005 and later was promoted to be the senior mason and a supervisor who was tasked with the supervision of the other employer in the construction department.

11. It is stated that on 20th February, 2013 the Claimant was send by the firm manager to purchase red-oxide to be used in the firm however after purchasing the claimant altered the receipt given of Kshs.600 to Kshs.900 and pocketed the balance of Kshs.300. The Respondent carried out investigation and affirmed that indeed the receipt had been altered.

12. On the same day the Respondent issue the claimant with a show cause letter on the basis of the altered receipt and loss of Kshs. 300 and required a response within the same day. However, the claimant did not respond till the next day on 21st February, 2013 which he denying altering the receipt.

13. The Respondent alleged to have subjected the claimant to disciplinary hearing and then dismissed him from employment vide the letter of termination dated 20th February, 2013.

14. During hearing the Respondent called one witness, **Vitalis Osodo**, the Respondent's Human Resource Manager as RW-1. The witness adopted her witness statement dated 15.5.2021 together with document dated 5.2.2016.

15. Upon cross examination, she testified that they carried out investigation but the investigations could not confirm whether the receipt was altered by the claimant or any other employee at the Respondent. She conceded that they never reported the matter to the police.

16. RW-1 testified that the Respondent issued the claimant with a notice to show cause who conceded to stealing the Kshs. 300 and promised to refund.

Claimants Submissions.

17. It was submitted for the claimant that the duration in which the claimant was asked to respond to notice to show cause was so short that he was not able to mount a good defence. Further that in the said letter there was no indication of hearing date. It was then argued that the claimant was not subjected to any hearing as envisaged under the employment Act and therefore the procedure for termination was flawed.

18. On whether the reason for dismissal was valid, it was submitted that the allegation that the claimant altered the receipt from Citi link hardware was never substantiated as the claimant was not subjected to hearing to unearth the truth. In this he cited the case of **Fredrick Kariuki Kaniaru V Bank of India[2015] eklr.**

19. It was then submitted that the claimant was unfairly terminated and they urged this Court to allow the claim as prayed.

Respondent's Submissions.

20. The Respondent on the hand submitted from the onset that this suit is incompetent having been verified by an affidavit which was had the full names of the claimant as his signature, when the claimant testified in Court that he does not know how to read and write.it was argued then that the affidavit tendered is a false document which the claimant ought to be penalized for uttering the said false document. In this they cited the case of **Issac Nyamosi Nyangau V Gilanis Supermarket [2016] eklr.**

21. The Respondent then submitted that the claimant was dismissed from employment on account of his fraudulent actions which action he admitted as captured in the letter of termination dated 20th February, 2013 and even promised to refund. Further that he was subjected to hearing as evidence by the letter to show cause dated 20th February, 2013 therefore that procedural and substantive fairness was served and therefore the termination was fair.

22. The Respondent then urged this Court to dismiss the claim with costs.

23. I have examined the evidence and submissions of the parties herein. The claimant was dismissed vide a letter dated 20th February, 2013 on account of gross misconduct vide Section 44 (4) (e) of the Employment Act.

24. Prior to the dismissal the claimant was issued with a show cause notice dated 20/3/2013. He was expected to explain why disciplinary action should not be taken against him for forging a receipt. The response was expected the same day before 4pm. It is not clear what time the show cause letter was served upon the claimant in order to enable him respond by 4pm.
25. The claimant however responded to the show cause letter on 21/2/2013 denying forgery of the receipt.
26. The claimant was however dismissed before he even responded to the show cause notice.
27. What I notice is that from the time the notice was issued to the response time, the time was not adequate.
28. The claimant was finally dismissed on the same day of 20th February, 2013 without being subjected to any hearing. The reason for the dismissal were never verified. The RW1 admitted that the claimant was never subjected to any hearing and it was not verified whether the forgery was committed by the claimant or by other people.
29. RW1 indicated that the claimant conceded to forging the receipt which is also not true.
30. Given the fact that the respondent never established the validity of the reason for dismissal and in that no disciplinary hearing was ever conducted against the claimant, I find the claimants dismissal unfair and unjustified as exemplified under Section 45(2) of the Employment Act 2007 which states as follows;

“45. (1).....

(2) A termination of employment 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”.

31. As for the remedies, the claimant having served the respondent and having been dismissed unfairly, I award him as follows;

1. 1 month salary in lieu of notice = 12,109/=

2. Salary for the month of February up to 21st February, 2013

= $21/30 \times 12,109 = 8,476/=$

3. 10 months salary as compensation for the unfair & unlawful dismissal

= $10 \times 12,109 = 121,090/=$

4. Service pay equivalent to 15 days salary for each year worked

= $\frac{1}{2} \times 12,109 \times 8 \text{ years}$

= 48,436/=

GRAND TOTAL = 190,111/=

Less statutory deduction

5. The respondents will pay cost of this suit plus interest at court rates with effect from the date of the Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 7TH DAY OF DECEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wachira for respondent – present

Chepngetich for claimant – present

Court Assistant - Fred