



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 218 OF 2015

RICHARD OTIENO ONDOO.....CLAIMANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant lodged a claim against the Respondent by way of a Memorandum of Claim filed on 2nd July, 2015, seeking a declaration that the Respondent's refusal to pay him terminal dues and benefits is unlawful, unfair and inhumane. The Claimant further seeks a declaration that he is entitled to payment of his terminal dues and compensatory damages as pleaded and costs of the suit and interests thereon.
2. The Respondent filed a response to the claim on 11th March, 2016 wherein, it admitted having employed the Claimant but denied the claim of unfair termination. It is the Respondent's assertion that they fairly and lawfully terminated the services of the Claimant for gross misconduct.
3. The Claimant testified in support of his case. The Respondent presented one Philip Dawo, its Human Resources Officer to testify on its behalf.
4. The Claimant put in submissions to buttress his positions.
5. Although the Respondent sought time to file submissions and which request was granted by the court, the submissions were not filed within the stipulated time line and were thus not considered in this judgment.

The Claimant's Case

6. The Claimant's case is that he was employed by the Respondent on 1st December, 2009 as a production supervisor earning a monthly salary of Kshs. 21,480/=.
7. It is the Claimant's case that he worked continuously and with due diligence until 7th June, 2013, when his services were terminated without any justifiable cause. The Claimant states that the Respondent's allegation that he absconded duty is false.
8. The Claimant states that his termination is unlawful, unprocedural and ill motivated, as no ground or justification was given for the termination.
9. The Claimant avers that he was invited to a disciplinary hearing on the 7th September, 2013, but that he was not given an opportunity to defend himself against the preferred charges.
10. It is the Claimant's assertion that the Respondent has refused, neglected and/or declined to rescind his termination. He seeks that the court awards him one month's salary in lieu of notice, payment in lieu of unutilized leave days, damages for unfair termination and damages for loss of employment.
11. On cross-examination, the Claimant told the court that he did not hear of any lost bags while in the employ of the Respondent. He further stated that he was not in-charge of stores and that his work was only to ensure that the machine was running.

The Respondent's Case

12. The Respondent's case is that the Claimant was employed as a casual labourer in the year 2009 and rose through the ranks to the position of production supervisor, earning a daily wage of Kshs, 717 per day.

13. It is the Respondent's position that the Claimant was in charge of production of packaging bags and that it was his duty to record the number of bags produced in a production register.

14. The Respondent states that the Claimant was terminated on the ground of gross misconduct. It further states that on the 5th June, 2013, the Claimant fraudulently allowed an unauthorized consignment of bags belonging to the Respondent to leave the premises without authority. The bags according to the Respondent, were intercepted at the Respondent's gate on their way out.

15. The Respondent states that on various dates between 18th March, 2013 and 18th May, 2013, a total of 259 bags were packed according to the readings of the packing machine but were never recorded in the production registers. The Respondent further states that on 4th and 11th June, 2013, 700 and 767 bags respectively, were packed as per their machine, but recorded in the record book as 598 and 609 respectively.

16. It is the Respondent's case that upon investigation, 2295 bags were confirmed missing between January and June, 2013. The Respondent avers that the Claimant and a Mr. Richard Otieno conspired to maintain marching individual records of packaging material to conceal the theft.

17. It is the Respondent case that the Claimant was given an opportunity to make representation through an invitation to a disciplinary hearing and terminated upon being found to have been part of the fraudulent conduct.

18. The Respondent states that it paid the Claimant his terminal dues which dues, included accrued leave. The Respondent further states that it contributed to the Claimant's NSSF.

19. The Respondent further states that it issued the Claimant with a certificate of service.

The Claimant's Submissions

20. It is submitted for the Claimant that the charges against him were not clearly spelt out and were thus difficult for him to respond. According to the Claimant the minutes presented in evidence do not clearly show what the Claimant's response to the issues raised were.

21. The Claimant submitted that the Respondent's failure to present the alleged investigation report, proved that the Respondent did not have valid reasons to justify his termination as required under *Section 45(2) of the Employment Act, 2007*. He sought to rely on case of **Mary Chemweno Kiptui V Kenya Pipeline Company Limited (2014) eKLR** to buttress this position.

22. It is further submitted for the Claimant that there was no proof of compliance with *Sections 41, 43 and 45(2)* in the termination of the Claimant and hence his termination according to him, is unfair and unlawful.

23. The issues for determination are:

- i. Whether the Claimant was unfairly and unlawfully terminated
- ii. Whether the Claimant is entitled to the reliefs sought
- iii. Who bears the costs of the suit

Whether the Claimant was unfairly and unlawfully terminated

24. A determination of whether or not an employee's termination is unfair, is depended on the twin issues of procedural fairness and substantive justification. These aspects are determined by examining the employer's adherence or otherwise to *Sections 41,43, 45 and 47 of the Employment Act, 2007* and *Article 47 of the Constitution*.

25. The Claimant confirmed to this court that he was invited to attend a discipline panel. It was the Claimant's evidence that though he attended the hearing, he was not given an opportunity to defend himself. *Section 41 of the Employment Act* provides as follows:

"41. (1). 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 employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation."

26. The Respondent's letter inviting the Claimant to attend the hearing stated as follows:

"kindly take notice that a hearing will be held in respect of the allegations below:

Found involved in fraudulently passing unauthorized consignment out of the gate, caught on 5th June, 2013

By signing this notice you confirm that you have been advised of the following

- 1. You are entitled to be assisted at the hearing by a fellow employee***
- 2. You are entitled to have an interpreter, if requested prior to the inquiry..***
- 3. You are entitled to personally or through your representative to question the employer's witnesses***
- 4. You are entitled to call a witness, furnish evidence and argue the question of whether the allegation has occurred***
- 5. If employer finds the allegations to be proven, you are entitled to furnish evidence and argue in mitigation..***
- 6. Should you fail to attend the hearing, the hearing will be held in your absence."***

27. The question for this court, is whether the contents of this invitation letter and the subsequent hearing met the requirements of *Section 41 of the Employment Act*. The Claimant contends that though he attended the hearing as advised in the invitation letter, he was not given a chance to question the allegations levelled against him.

28. The Minutes of the disciplinary hearing portray the hearing to have been a one man's show. There was no word from the Claimant, other than the plea of not guilty. The rest of the minutes were a record of the discussions by management and the chairman of the meeting. The Claimant did not participate in the discussions according to the minutes produced before this court.

29. The Respondent's evidence is that the Claimant was taken through a disciplinary process hence the termination was fair and lawful. In the case of *Mary Mutanu Mwendwa v Ayuda [2013] eKLR* the Court held that the Employment Act has made it mandatory by virtue of section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated by the employer and is entitled to have a representative present. In a further case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2013] eKLR* the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing, is a sacrosanct right.

30. In the opinion of this court, an invitation to attend a hearing is not enough. The employer must demonstrate that indeed the employee was invited to the hearing and that he made representation in response to the charges levelled against them. To attend a disciplinary hearing and proceed to listen to the employer's case without opportunity to respond, is not a hearing per Section 41 of the Employment Act, 2007.

31. I find and hold that the hearing subject of this matter fell short of the mandatory tenets of procedural fairness. The hearing failed the fairness test.

32. On the question of substantive justification for termination, the employer has a legal and evidential burden of proof of reasons for termination where an employee alleges that termination lacked sound legal justification per Sections 43, 45(2) and 47(5) of the employment Act, 2007. The Court of Appeal in the case of *Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR* held:

".... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5)),...." By these provisions, the employer is required to establish the validity or correctness of the reasons for termination and this is a requirement that never shifts to an employee.

33. The Respondent's evidence is that the reason they dismissed the Claimant is that he was involved in fraudulent passing of an unauthorized consignment out of the gate and was caught on 5th June, 2013. On cross-examination, the Claimant told the court that he had not at all heard of lost packing bags that the Respondent was attributing to his termination.

34. The Claimant's assertion is that he was not in-charge of stores and that picking of packing bags from the stores was the role of operators. The Claimant further avers that loaders were responsible for taking the bags back to the stores and that his job was limited to ensuring that the machine continued to run.

35. The Respondent's letter terminating the services of the Claimant states in part ***"..on Wednesday 5th June, 2013, you knowingly in the company of another employee ensured unauthorized removal of more than 259 bakers flour packing bags from the company precincts. Following this act of dishonesty, the management no longer has faith in you.... You are hereby dismissed."***

36. The Respondent's reasons for terminating the Claimant is lost packing bags as stated in the termination letter. The said loss, the court was told, was discovered from discrepancies in registers used by the Respondent. No register or record for that matter was produced in evidence to proof the alleged losses or the discrepancies alluded to.

37. The court concludes that the termination of the Claimant was procedurally and substantively unfair.

Whether the Claimant is entitled to the reliefs sought

38. The Claimant's prayers to this court, are that he is awarded one month's salary in lieu of notice, payment in lieu of untaken leave, damages for unfair termination and damages for loss of employment.

One-month salary in lieu of notice and payment for untaken leave

39. The Claimant signed a final settlement confirming payment of all monies due to him from the Respondent at the time of termination. The settlement agreement indicated that the payment thereof included leave and that the Claimant had no further compensation arising out of the termination. The Claimant did not claim coercion or force in him signing of the final settlement agreement and the court has no reason not to believe the same to be a genuine acknowledgement of payment on the part of the Claimant.

40. The payer for payment in lieu of notice and unutilized leave days fails and is dismissed.

Damages for unfair termination and damages for loss of employment.

41. The Employment Act, at Section 49 provides for compensation for unfair termination/dismissal. The court having determined that the Claimant's termination was unfair, returns that he is entitled to compensation. Taking into account the years the Claimant served in the employ of the Respondent and the limited chances that the Claimant might be able to secure comparable employment, I award him 6 months' salary equivalent in compensation for unfair termination.

42. In whole, Judgment is entered for the Claimant against the Respondent in the following terms:

- i. 6 month's salary equivalent as compensation for unfair termination at Kshs. 128,880/= (21,480 X 6)
- ii. Costs of the suit and interest until payment in full.

43. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 2ND DAY OF DECEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Atieno Present for the Claimant

Mr. Ouma Present for the Respondent

Ms. Christine Omollo- C/A