

h) Costs of this suit.

The Respondent filed an Amended Statement of Response dated 24th April 2015 admitting to have employed the Claimant and avers that the Claimant's contract of employment was also subject to the terms of the staff standing instructions, code of conduct for staff and consultants. It further avers that once the Claimant was confirmed to his position, he started absconding work and exhibiting hostile behaviour towards the management. That **Clause 3 of the contract of employment** allowed for summary dismissal without notice and that it was justified to terminate the contract given the gross misconduct and insubordination exhibited by the Claimant. The Respondent further particularises the Claimant's misconduct to include: fighting with his colleagues, attempting to access and control the company's petty cash without direct authorization of the General Manager and intimidating the authorized persons handling the petty cash.

The respondent further avers that two warning letters dated 28th February 2013 and 18th March 2013 were issued to the Claimant advising him to desist and refrain from further acts of gross misconduct. That despite these warnings, he persisted in his acts of gross misconduct. That in a meeting with the General Manager held on 15th March 2013, the Claimant was given an opportunity to respond to the allegation of misconduct but he was arrogant and dismissive of the Respondent's concerns, which compelled it to issue him with a Notice to Show Cause dated 27th March 2013 requiring him to show cause why he should not be summarily dismissed. That since he was summarily dismissed, he was not entitled to any benefits. The Respondent denies that he is entitled to judgment as claimed or at all. It prays that the Claimant's suit is dismissed with costs to the Respondent.

The Respondent also filed a Witness Statement of its Director, Dorcas Muthoni who states that the Show Cause Letter issued to the Claimant instructed him to provide a written explanation to the Respondent before close of business on 26th March 2013 and thereafter attend a hearing of his disciplinary case on 28th March 2013 at the company's boardroom. She states that after the hearing, the Claimant was summarily dismissed for reasons of gross misconduct and fundamental breach of his obligations arising under his contract.

The Claimant then filed an Amended Reply to the Respondent's Response dated 9th September 2015 denying that he absconded work or exhibited hostile behaviour after he was confirmed. He further denies all particulars of misconduct alleged by the Respondent averring that the same are an afterthought since they were not stated in the termination letter and neither was he issued with a warning in that regard. He avers that he was not issued with any warning letter or notice to show cause as alleged and that the said letters are defective, erroneous and tailor made for these proceedings. He also denies that there was a meeting with the General Manager. He avers that his termination of employment was unjustifiable and unlawful. He prays that the Respondent's Response be struck out and judgment be entered as prayed in the Memorandum of Claim.

Evidence

The Claimant, testified that on 28th March 2013, he reported to work as usual, worked until 1 pm and at 2 pm, he was given the letter of termination which did not disclose what directive he did not comply with or any regulation he was said to have ignored. He stated that he was no longer pursuing reinstatement and in reexamination, he stated he did not work on Saturdays.

RW1, DORCAS MUTHONI GACHARI stated that she wished to rely on her Witness Statement and the list of documents filed in court.

Under cross-examination, she confirmed she was the one signed the claimant's dismissal letter. That the grounds of dismissal are failure to comply with instructions based on several letters she had given him and poor performance and confirmed that the issue of absenteeism is not in the letter of dismissal. She stated that she subjected the Claimant to a disciplinary hearing before issuing him with the dismissal letter and that the hearing took place on 28th March 2013 with herself and the claimant being present. That she did not have any minutes of the disciplinary hearing and insisted that it is the Claimant who refused to sign all the warning letters and was hostile. She admitted she did not pay the Claimant salary for March 2013 because he did not clear.

In re-examination, she stated that the Claimant started failing to attend work on Saturdays without permission.

Claimant's Submissions

The Claimant submits that summary dismissal is a drastic measure which should only be exercised sparingly and with sufficient/ reasonable grounds. That for summary dismissal to take place, there must be gross misconduct stipulated under Section 44(4). He submits that the dismissal letter dated 28th March 2013 does not disclose any grounds of gross misconduct known in law as the reasons are not particular. That even though RW1 tried to introduce other reasons for his dismissal in her testimony, the law of evidence is clear that contents of written documents cannot be substituted by oral evidence. That the Respondent failed to demonstrate there were reasonable and sufficient grounds to summarily dismiss him and so the dismissal was wrongful as was held by the court in **Bamburi Cement Limited r William KHonzi [2016] eKLR**.

He submits that the Respondent was duty bound to ensure that the correct procedure was followed by informing him of the reasons for termination and according him a hearing but which it did not do. That RW1 confirmed that the meeting she had with him was not in the presence of a union official or a fellow employee. That neither did she convene the Respondent's board of directors or the company internal disciplinary mechanism to hear his case. That the upshot is that he was condemned unheard.

He prays for payment of his March 2013 salary together with interests. He concludes by praying that the court finds the dismissal was wrongful and offer maximum compensation equal to 12 months' pay as provided under Section 49 of the Employment Act together with three months' notice pay.

Analysis and Determination

The issues for determination are whether the Claimant was wrongfully and unlawfully terminated from his employment and whether the Claimant is entitled to the reliefs sought.

Section 41 of the Employment Act provides for fair procedure while **Section 43** provides for proof of reason for termination as follows:-

41. Notification and hearing before termination on grounds of misconduct

(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.

(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 employee within subsection (1), make.

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) 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.

Section 45(1) and (2) of the Employment Act further prohibits unfair termination and provides as follows:-

45. Unfair termination

(1) No employer shall terminate the employment of an employee unfairly.

(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.

It is the Claimant's case that he was not heard by a properly constituted disciplinary committee of the Respondent before he was dismissed while the Respondent has argued that it afforded him a meeting and followed due procedure under the law. There is a letter on record dated 27th March 2013 inviting the claimant for a disciplinary hearing on 28th March 2013. The claimant admitted having met with RW1 on 28th March 2013 following which he was served with the letter of dismissal.

The claimant submitted that the hearing was without the union and the respondent did not convene a Board of Directors. The Employment Act does not prescribe the composition of a disciplinary committee or even the manner in which a disciplinary hearing should be conducted. All that is provided for is that the employee be heard and be given an opportunity to prepare and to be allowed to bring along with him a representative of his choice if he so wishes.

In the present case there was a disciplinary hearing as admitted by the claimant though it may not have been in the manner prescribed as the claimant was not informed of his right to be accompanied by a fellow employee of his choice.

I find that there was valid reason for discipline of the claimant and he was taken through a disciplinary process, though the process was not in strict compliance with Section 41 as already explained.

For the foregoing reason I reduce the summary dismissal of the claimant to normal termination with the result that I award him three months' salary in lieu of notice. He is also entitled to withheld salary for March 2013.

For the flaws in the disciplinary process, I will award him compensation equivalent to one month's salary.

I thus enter judgment for the claimant against the respondent as follows –

1. I reduce the summary dismissal to normal termination.

2. I award the claimant the following -

(i.) 3 months' salary in lieu of notice..... Kshs.120,000

(ii.)..... Withheld salary of March 2013 Kshs.40,000

(iii.)..... One month's salary as compensation Kshs.40,000

Total Award Kshs.200,000

The respondent shall pay claimant's costs for the suit. Interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE