



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1312 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

PAUL ODHIAMBO ONYANGO..... 1ST CLAIMANT

CHRISTOPHER KYALO MUSAU.....2ND CLAIMANT

VERSUS

KALU WORKS LIMITED.....RESPONDENT

JUDGMENT

The Claimants are both former employees of the Respondent. The 1st Claimant (Paul Odhiambo Onyango) was employed on 12th May, 2007 in the position of Production Assistant earning an initial monthly salary of Kshs.19,400. The 2nd Claimant (Christopher Kyalo Musau) was employed on 1st September, 2005, to the position of Production Assistant earning a monthly salary of Kshs.26,190.

The Claimants aver that under the terms of their contracts as at the time of their unlawful separation they were both entitled to Kshs.2,350 as benefits and travelling allowance of Kshs.2,150 and leave.

The Claimants contend that they worked for the Respondent diligently and to its satisfaction until 28th October, 2011 when the Respondent in flagrant and blatant breach of the terms of their employment contracts terminated their contracts unlawfully on false allegations that the Claimants had connived and fraudulently obtained a total of Kshs.264,874 from it.

The Claimants further contended that the Respondent in further breach of their terms of engagement made a false report at the Industrial Area Police Station which culminated in their subsequent arrest only to be released without any charges being preferred against them.

The Claimants contended that the termination of their contracts was unfair as it was contrary to the mandatory provisions of Sections 35 (2) and 41 of the Employment Act, 2007.

Aggrieved by the decision of the Respondent to unlawfully terminate their services the Claimants filed the instant Claim seeking the following reliefs:

I. The Claimants dismissal be declared wrongful and unfair.

II. The Claimants be paid be paid their dues as set out in below–

1st Claimant – Paul Odhiambo Onyango

- a). One month's salary in lieu of notice..... Kshs.19,400
- b). Unpaid salary for December 2011..... Kshs.19,400
- c). Allowance for December 2012..... Kshs.4,500
- d). 12 months' compensation for wrongful and unfair termination Kshs.232,800

Total amount due

Kshs.276,100

2nd Claimant – Christopher Kyalo Musau

a) One month's salary in lieu of notice..... Kshs.26,190

b). Unpaid salary for December 2011..... Kshs.26,190

c). Allowance for December 2012..... Kshs.4,500

d). 12 months' compensation for wrongful and unfair termination Kshs.314,280

Total amount due

Kshs.371,160

III. The Respondent be ordered to compensate the Claimants for wrongful dismissal at the equivalent of twelve (12) month's salary each.

IV. Interest on II and III above at Court rates.

V. Respondent to pay costs of this Claim.

VI. This Court do issue orders and give such directions as it may deem fit to meet the ends of justice.

The Respondent in its Memorandum of Defence filed in Court on 3rd August, 2012, admits having engaged the Claimants herein. However, it denies that it unlawfully terminated the Claimants' employment as alleged. It contends that the Claimants were summarily dismissed on reasonable grounds as they had defrauded the respondent of a sum of Kshs.264,874.

The Respondent further contends that the Claimants were accorded an opportunity to make their representation on the issue but failed to avail themselves as evidenced by the Notice to Show Cause letter annexed as R3 in the Response

The Respondent further contends that it was justified to terminate the Claimants services and that it duly followed the law in particular Section 44(4)(g) of the Employment Act, 2007 and therefore the claimant's are not entitled to the reliefs sought in their Memorandum of Claim.

The Respondent avers that it has made calculations of terminal dues owing to the Claimants, that the 1st Claimant is entitled to only Kshs.12,512 which he failed to collect despite being informed of the same. For the 2nd Claimant it is contended that he owes the Respondent the sum of Kshs.16,812 and the Respondent urged this Court to dismiss the claimant's suit herein and enter Judgment in its favour against the 2nd Claimant in the sum of Kshs.16,812.

The matter proceeded to hearing on 6th May 2015, 13th February 2018 and 29th July 2019 with both Claimants testifying on their own behalf and the Respondent calling one witness to testify on its behalf.

Claimants' Evidence

PAUL ODHIAMBO ONYANGO (CW1), in his evidence in chief reiterated the averments made in the Memorandum of Claim. He testified that on 15th October 2011 he was arrested alongside the 2nd Claimant and taken to the Industrial Area Police Station following a complaint by the Respondent that it had lost Kshs.264,874.

CW1 testified that prior to his arrest he was not accorded an opportunity by the Respondent to make his representation on the loss of funds. He further testified that no charges were ever preferred against him on the alleged theft and/or loss.

He testified that upon his release he reported to work but was denied access. He further stated that his termination letter was sent to him via mail and that he never received any correspondence from the Respondent thereafter.

CW1 contended that he was wrongfully terminated and urged this Court to allow the Claim as pleaded.

On cross examination CW1 confirmed that he received his termination letter by post and that he did not understand the reasons for the same. He further contended that the allegation levelled against him by the Respondent was never proved.

On further cross examination CW1 stated that he was not issued with any letter to show cause. He confirmed that the Respondent did tabulate his terminal dues but he disputed the sum offered by the Respondent.

CHRISTOPHER KYALO MUSAU (CW2) testified that he was employed by the Respondent from 2005 to 2011 as a production assistant and was later moved to accounts, a position he held until his termination.

CW2 further testified that in his termination letter he was accused of fraudulently obtaining money alongside Paul Onyango, the 1st Claimant. He however denied that he stole any money from the respondent. He stated that he asked to be furnished with evidence on the same but none was availed.

CW2 further stated that he was not issued with any notice to show cause prior to the termination as alleged and that on 13th October, 2011 he was actually not on duty. He further stated that all communication from the Respondent was signed for and that he did not sign the said letter to acknowledge receipt.

CW2 stated that he was not invited to any disciplinary hearing prior to his termination and was not paid his terminal dues as well as his salary for October at the time of separation.

On cross examination CW2 stated that the reason for his termination as stated in the letter of dismissal was an allegation that was not true. He stated that he was not questioned about the alleged theft at the Company. CW2 further stated that he was not issued with the letter to show cause and it is not true that he ignored the same.

CW2 urged this Court to allow the Claim as drawn.

Defence Case

MOHAMED KURBAN NOORANY (RW1), the respondent's Senior Accounts Officer who testified on its behalf, relied on his witness statement dated 2nd December 2014 and filed in Court on 5th December, 2014 in which he reiterated the averments made in the Response to the Memorandum of Claim. He testified that discrepancies in the records of the Respondent's staff sales were noted when the 1st Claimant went on leave on 7th August 2011.

He testified that the total amount that was discovered lost was Kshs.264,874.00. That the matter was thereafter reported to the police by the Chief Operations Officer (COO) and both Claimants arrested. RW1 also confirmed that the Respondent did carry out its investigations and noted that there were communications between the two claimants using different names and in code language implicating them in the fraudulent transactions.

RW1 further testified that both Claimants were called in his presence and issued with show cause letters and that they did not respond to the same. That the Claimants were subsequently summarily dismissed. He further testified that terminal dues were not paid to the Claimants as they did not return.

On cross examination RW1 stated that there was no proof by way of delivery notes or reports proving the discrepancies as alleged that lead to the alleged loss of monies at the Respondent Company. He stated that he was not aware how the skype messages between CW1 and CW2 were obtained and that Veronica Mbugua who interpreted them declined to write a statement on the issue. He also confirmed that he had no proof that the said documents were obtained from skype.

RW1 insisted that the notice to show cause was duly served on the Claimants but admitted having no evidence to support this assertion. He conceded that the letters of summary dismissal do not make any reference to the notice to show cause.

Submissions by the Parties

It is submitted on behalf of the Claimants that their termination from employment was unlawful, wrongful and unfair as it was contrary to the provisions of Sections 41 of the Employment Act, 2007.

It is further submitted that the burden of proof that an employee was served with a show cause letter rests with the Respondent and that this was not discharged by the Respondent. The Claimants relied on the Court findings in the case of **Luke Muthengi Kasoni -V- Adix Plastics Limited (2019) eKLR, Kenya Plantation & Agricultural Workers Union -V- Finlays Flowers (K) Limited & Another (2019) eKLR** and **Victor Egesa Oguta -V- Unigroup Transporters Limited (2017) eKLR**.

The Claimants urged this Court to allow their Claim in terms of the reliefs sought.

There is no copy of the respondent's submissions on the court record although on 30th October 2019 when the suit was mentioned for purposes of taking judgment date, Counsel for the respondent had confirmed filing the submissions

Analysis and Determination

There is no dispute that the Claimants were employed by the Respondent as pleaded in the memorandum of claim. There is further no dispute that the two Claimants were terminated on 28th October, 2011. The issues for determination are:

1. Whether the Claimants' termination was valid both procedurally and substantively
2. Whether the Claimants are entitled to the reliefs sought.

Fair Termination

For termination to be fair, an employer must prove that there is valid reason for the termination and that the employee has been taken through fair disciplinary process as prescribed in Section 41 of the Employment Act, 2007. Section 45 of the Act provides that should the employer fail to subject the employee to fair procedure or to prove valid reason for the termination, the resultant termination would be unfair.

In the present case, the Claimants contends that their termination was unfair as they were not accorded a hearing prior to their termination. They further denied having been issued with show cause letters dated 13th October, 2013.

The Respondent on the other hand contends that it did accord the Claimants a chance to make their representation by serving them with the notice to show cause but they failed to respond to the same. The Respondent further avers that it had valid reason to terminate the Claimant's employment being the alleged fraudulent transactions that occasioned it loss of KShs.264,874.

Indeed no proof was given by the Respondent that the Claimants were issued with the said notice to show cause, the claimants having denied receipt of the same. The onus of proof of service of the notice to show cause rests on the Respondent. In this case that burden was not discharged. In the case of **Kenya Plantation & Agricultural Workers Union Vs Finlays Flowers (K) Limited & Another (2019) eKLR** the Court held:

“The Claimant faults the respondent’s allegation at Paragraphs 12 (iii), (iv) and (v) that it issued show cause letters and requested the employees to attend disciplinary proceedings on 7th and 8th December, 2016 in the company of a fellow employee. The Respondent did not offer any proof of service of the purported show cause letter and therefore cannot accuse the grievant of not attending a disciplinary hearing they were not notified of. Evidence of service of the show cause letters is critical in establishing the culpability of the grievant in the matter.”

From the foregoing I find that the termination of the Claimants’ services was unfair for the reason that they were not taken through the disciplinary process as set out in Section 41 of the Employment Act, 2007 as no evidence was availed to the Court to support the respondent’s averments that they were taken through a disciplinary process that was followed prior to the termination.

In the case of **Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

On the grounds of termination, the Respondent contends that it summarily terminated the Claimants services following the alleged loss of funds which it attributed to the Claimants. On the other hand, the Claimants denied any involvement in any loss and further contended no charges had been preferred against them on the same as there was no evidence supporting this assertion. Section 47(5) of the Employment Act provides that –

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

It is not contested that the respondent lost money in staff sales in the sum of KShs.264,874. It is further not contested that the claimants handled the sales in the course of their employment. What is contested is whether there was proof that the loss was occasioned by fraud perpetrated by the claimants. This being the case I find that there was valid reason to take the claimants through disciplinary process. The respondent however failed to prove that it complied with the disciplinary process as set out under Section 41 of the Act as there was no proof of a disciplinary hearing taking place. It further failed prove that the claimants were the ones who caused the loss, making the termination unfair.

The claimants having been unfairly terminated are entitled to one month’s salary in lieu of notice. They are however not entitled to salary and allowances for December 2012 as prayed as their employment was terminated in October 2011.

On compensation, I have considered the years of service, the manner in which the terminations took place and the fact that the claimants were not paid any terminal dues including salary for October 2011 and award them compensation as follows –

1st claimant (Paul Odhiambo) 9 months’ salary..... KShs.174,600

2nd claimant (Chirstopher Kyalo) 9 months’ salary..... KShs.235,710

I thus award each of them the following

Paul Odhiambo Onyango (1st claimant)

(i)... One month’s salary in lieu of notice..... KShs.19,400

(ii)... Nine (9) months compensation KShs.174,600

Total **KShs.194,000**

Christopher Kyalo Musau

(i)... One month's salary in lieu of notice.....Kshs.26190

(ii)... Nine (9) months compensation Kshs.235,710

Total **Kshs.261,900**

The amounts are subject to statutory deductions.

The Claimants are awarded costs of the suit and interest shall accrue at court rates.

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

MAUREEN ONYANGO

JUDGE