



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 1712 OF 2015**

**VICTOR OCHIENG OKOLA.....CLAIMANT**

**VERSUS**

**WILLIAM (K) LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant brought this suit on 25<sup>th</sup> September 2015 alleging that he was employed by the respondent from 1998 to 26<sup>th</sup> September 2012, when his services were terminated. He averred that the termination was unfair because the reason for termination was not explained to him and he was not accorded any hearing. He therefore prayed for the following reliefs:

- (a) A declaration that his dismissal from employment was unlawful, unfair and inhumane.
- (b) A declaration that he is entitled to payment of his terminal dues and compensatory damages as pleaded.
- (c) An order for the respondent to pay him his due terminal benefits totalling to Kshs.264,780/=.
- (d) Interest on (c) above from date of filing suit until full payment.
- (e) Costs of the suit plus interest thereon.

2. The respondent filed defence on 12<sup>th</sup> November 2015 admitting the employment relationship with the claimant but denied the alleged unfair termination of the same. She averred that the claimant was dismissed for his negligence that caused loss to the company including loss of his staff identity card. She further averred that the issue was discussed during a hearing accorded to the claimant by the Human Resource Manager before the separation.

3. She also averred that the claimant acknowledged receipt of the termination letter, did clearance and signed a discharge voucher after receiving his full and final terminal dues. She therefore prayed for the suit to be dismissed with costs.

4. Both parties tendered evidence during the hearing but only the claimant filed written submissions after the hearing.

**Claimant's Evidence**

5. The claimant testified as CW1. He stated that he was employed by respondent in 1998 as a casual employee but on 1<sup>st</sup> June 2003, he was given a written contract appointing him as a Supervisor. His salary was Kshs.22,065 per month. His duties included planning of shifts.

6. On 26<sup>th</sup> September 2012, he reported on duty at 6 am and did his shift planning and at 8.30 am he received a call from the Assistant Human Resource Manager, Beatrice telling him to see her in the office. On arrival the Manager served him with termination letter dated the same date and asked him to read and sign. Thereafter he did clearance as required save that he had lost his staff card which he accepted to be surcharged.

7. He denied any wrong doing and contended that no reason for termination was cited. He further contended that he was not served with any show cause letter or prior termination notice or accorded any disciplinary hearing before the termination. He however admitted that the termination letter offered one month salary in lieu of notice. He further admitted that he was paid terminal dues less deductions. He however prayed for the relief sought in the suit.

8. In cross examination he admitted that his written statement was not correct in stating that on 26<sup>th</sup> September 2012 the Human Resource Assistant told him that his services were not good and his Supervision role were not as per his contract of service. He maintained that all what the Human Resource Assistant did on that day was to give him a termination letter which he found ready for collection. He further maintained that the issue of loss of his staff card onlony arose during the clearance after being served with termination letter.

### **Defence Evidence**

9. Mr. Vitalis Owira Osodo, the Group Human Resource for East Africa Growers which consists the respondent testified as RW1 herein and stated that he joined the company on 15<sup>th</sup> December 2017. He further stated that he became familiar with the facts of this case by perusing the claimant's records of employment. He relied on the certificate of service to prove that the claimant worked for the company from 1<sup>st</sup> June 2003 to 25<sup>th</sup> September 2012.

10. He further stated that on 26<sup>th</sup> September 2012 the claimant admitted in writing that he lost his staff card and accepted to be surcharged KShs.500 for the lost card. He further contended that the claimant was served with termination letter dated 26<sup>th</sup> September 2012 and he signed the same. He further stated that on 22<sup>nd</sup> October 2012, the claimant was paid his final dues amounting to KShs.2,335 and signed a discharge voucher.

11. On cross examination, RW1 contended that the claimant was dismissed because items were being lost on daily basis including his staff card. He however admitted that he had no knowledge of any investigations done on the alleged loss or any report being made to police. He further admitted that the claimant was never served with show cause letter or warning letter before the dismissal and no disciplinary hearing was accorded to him. He however confirmed that the claimant was dismissed for the losses he caused to the company including loss of his staff card.

### **Issues for Determination**

12. There is no dispute that the claimant was employed by the respondent as a Supervisor until 26<sup>th</sup> September 2012 when his services were terminated by the respondent. The issues for determination were: -

- (a) Whether the termination was unfair and unlawful
- (b) Whether the claimant is entitled to the reliefs sought.

### **Unfair Termination**

13. Under Section 45(2) of the Employment Act, termination of employee's contract is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that fair procedure was followed. Valid and fair reason must relate to the employee's conduct, capacity and compatibility or based on the employee's operational requirements. Fair procedure on the other hand involves, but not limited to, affording the employee a hearing before the separation.

14. In this case the reason for terminating the services of the claimant according to RW1 was his negligence which allegedly caused loss of the respondent's items on daily basis including the claimant's staff identification card. RW1 further admitted that the claimant was not served with a show cause letter or accorded any disciplinary hearing before the separation.

15. In view of the foregoing admission by RW1 that the claimant was dismissed for misconduct without being accorded a chance to defend himself, I return that the claimant has proved on balance of probability that his contract of service was unfairly terminated by the respondent. Although the respondent had concealed the fact that she was terminating the claimant's contract for a cause, she let the cat out through her pleadings in the defence and the testimony of the RW1.

16. It follows that, the respondent was bound to explain to the claimant the reason for which termination of his employment was being considered and accord him an opportunity to defend himself before the termination was decided. That was not done as it is clear from the evidence that when the claimant was called to the office by the Human Resource Assistant, the termination letter was ready for his collection. I, therefore return that the dismissal of the claimant was unfair.

17. On the other hand, the validity of the alleged reason for the separation was not proved herein as required by Section 43 and 45 of the Employment Act. The alleged daily loss of items was not proved. The allegation by the claimant that his dismissal had nothing to do with the loss of staff card has not been rebutted by the defence. I therefore, find merit in his contention that the employer only learnt about the loss of his staff card during clearance process and after the dismissal letter had already been served on him.

### **Reliefs**

18. In view of the foregoing matter, I make declaration that the dismissal of the claimant from employment was unlawful and unfair. I however return that he is not entitled to any award of damages because he signed a discharge voucher acknowledging that all his rightful dues had been settled and he had no further claim against the respondent. It is now trite that unless the settlement agreement is impugned for being executed through a vitiating factor, such settlement constitutes a binding contract between the parties and the court has no jurisdiction to set it aside. For emphasise I rely on *Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR* where the Court of Appeal held that: -

***“In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would***

*absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties..."*

19. In the end the suit succeeds to the extent of prayer (a) of the claim and for that reason the claimant is awarded costs plus interest at court rate from the date of filing suit.

**Dated, signed and delivered at Nairobi on this 24<sup>th</sup> day of January 2020**

**ONESMUS MAKAU**

**JUDGE**