



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 81 OF 2018

PATRICK NGUGI MWAURA.....CLAIMANT

VERSUS

OXIDE MASTERS LIMITED.....1ST RESPONDENT

SUSHMA SHAH.....2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents for relief in regard to issues he framed as his unfair and unlawful dismissal from employment, wrongful termination and non-payment of salaries, terminal dues and compensatory damages. The Claimant averred that the 1st Respondent was a limited liability company and that the 2nd Respondent was a male adult of sound mind and the principal officer and or agent of the 1st Respondent. He averred that he was employed by the Respondents in the year 2015 as a packaging and mixing personnel at a monthly salary of Kshs. 14,740/- and that the sum was not inclusive of house allowance. He averred that he was entitled to Kshs. 4,900/- as house allowance which he claimed. He averred that sometime in August 2017 he was undertaking his normal duties of mixing and packing paints when the 2nd Respondent instructed him not to report to work the next day. He averred that this was without explanation and that his persistent demands to know what had led to the verbal dismissal by the 2nd Respondent he was told not to get into the 1st Respondent's premises. He averred that the abrupt dismissal amounted to unlawful dismissal without notice and without following due process. The Claimant thus sought August 2017 salary – Kshs. 14,740/-, one month's salary in lieu of notice, house allowance for 2 years at Kshs. 4,900/- per month – Kshs. 106,128, leave pay for 2 years – Kshs. 29,480/- and service pay for 2 years – Kshs. 14,740/-. He also sought compensation for the unlawful dismissal at the maximum 12 months – Kshs. 176,880/- plus costs of the suit together with interest therein.

2. The Respondents filed a defence in which it admitted that the Claimant was their employer having employed him on 1st September 2016 as a general worker earning Kshs. 13,000/- and a house allowance of Kshs. 1,950/- monthly. The Respondents denied that the Claimant was dismissed in the manner pleaded in his claim and that he was dismissed for failing to attend a mandatory meeting on 22nd July 2017 and absented himself from employment from 24th July 2017 until 31st July 2017 when he appeared in the afternoon to collect his salary when his employment was summary terminated in accordance with the law. The Respondents denied that the dismissal was unlawful and invited strict proof to the contrary. The Respondents averred that the Claimant had been paid all his terminal dues and that he had taken up his leave days contrary to the claim. The Respondents averred that the Claimant had lodged a complaint at the Thika Labour Office and the dispute was heard and determined in the Respondent's favour. The Respondents denied the jurisdiction of the court and reserved their right to seek the transfer of the suit to a court with geographical jurisdiction. The 2nd Respondent sought to be expunged from the proceedings as a party that was wrongly enjoined to the suit as he had no contractual relation or otherwise with the Claimant. The Respondent prayed that the suit be dismissed with costs.

3. The Claimant filed a reply to the defence and averred that there was never a meeting on the date suggested by the Respondents. He averred that he was never given any dismissal letter nor reasons offered for his verbal dismissal. The Claimant averred that he has never been guilty of insubordination and has never disobeyed lawful orders by the Respondent and that the Labour Office meeting never took place but was surprised by a letter from the Labour Office regarding his case issued to the Respondents but not to him. The Claimant averred that the defence was laced with mere denials and unsubstantiated innuendos and should be dismissed with costs.

4. The Claimant testified as did the Respondents' witness Purity Mumbi Ndung'u. The Claimant testified that he was engaged as a mixer earning Kshs 14,740/- and was not paid house allowance. He stated that he was dismissed without notice. He said that he worked and would leave at 1.00pm on Saturdays and that he left before the meeting on that day. He stated that he was told not to report to work as he left. He testified that he had not been notified of the meeting and that they were all dismissed. He stated that on Monday the watchman told them not to enter and that they would be called. He stated that after a week of repeatedly offering himself for work he got no work. he testified that he did not get a notification of the intent to dismiss or any payment while he was out of work. He stated that he received a payment of Kshs. 700/- which is what the Respondents said they owed him. He testified that he was not heard or given an opportunity to give an explanation before the dismissal. He stated he was not paid a salary or pay in lieu of notice. He said the dismissal was unlawful as he just told to leave.

He thus sought salary for August 2017 and the dues per the claim before court and costs of the suit. In cross-examination he testified that he was employed in 2015 and that the signature on the document on the Respondents' bundle was fake. He stated that the handwriting was questionable and reiterated that he is not the one who had signed it. He stated that he knew Silverstone Masters and that he worked there before the name change to Oxide Masters in 2016. He testified that Silverstone terminated the employ per the letter presented in court but they did not terminate his contract. He stated that he did not sign the letter. He said that he did not receive the certificate of service. He was referred to the bundle of documents containing the muster roll and denied going on leave. He stated that the muster roll would show absence and the days one was present at work. He testified that he worked on Monday and Tuesday 21st and 22nd but from then he was not indicated as present. He testified that he did not receive a call and that there is indication of leave in July. He stated he did not work from July 25th and that he had summoned them to Labour and the Respondents wrote a letter indicating they would call Labour Office. He testified that he sought legal assistance after the Respondents failed to comply and that he was not given the letter in the Respondents' bundle. In re-exam he testified that the record by the Respondent indicates he was absent from 28th July and that he was told to sign at the gate. He denied knowledge of the muster roll. He admitted the receipt of Kshs. 700/- but did not sign acknowledgement.

5. The Respondent's witness testified that she worked for the 1st Respondent and knew the 2nd Respondent who was a director. She admitted knowing the Claimant who was a former employee. She produced the Claimant's contract of employment dated 1st October. She stated the Claimant was not employed in 2016 and that he earned Kshs. 13,000/- plus house allowance which is 15% of basic pay making a total of Kshs. 14,950/-. She was referred to the salary voucher and she noted there was overtime pay of Kshs. 500/- in addition to the basic and house allowance. She stated that the Claimant stopped working in July 2017 and that the employees would sign at the gate on the attendance register. She testified that the abstract before the court of the book indicated the sign in by employees and that it was from an exercise book and did not have a letterhead. She stated that the Claimant last signed on 22nd July and from then on he was absent as per the record. She testified that the Claimant did not communicate absence to his seniors and that permission must be sought prior. She said the termination was not unfair and stated that the Claimant did not attend the meeting that had been called and was thus dismissed on 31st July. She stated that the Claimant had taken his leave days in September and November 2016. In cross-examination she testified that the register showed that the Claimant worked from 1st September to July 2017. She stated that the register was in the handwriting of Jane an employee in charge of the records and the signatures are from the employees. She stated the initial A means absent and L indicates leave. She stated that the Claimant did not report between 24th and 29th July. She said that if you cannot report to work the next day you call the boss. She stated that the Claimant worked at times and was off on other times as leave was a choice. She testified that the days there was no power there were no operations and they would be on leave. She said it was verbal and that it was not forced leave. She testified that Claimant was dismissed summarily for insubordination and abstaining from work. She stated that the other employees attended though there were no minutes of the meeting and that it was not a casual meeting as could be confirmed by all employees who attended. She testified that there were reasons for the summary dismissal. She said that the Claimant was called for the disciplinary meeting and no minutes were available as there is nothing recorded as per company policy. She stated that the Claimant was called and asked why he was absent and he was given his wages. She stated that the Claimant was not warned but had been warned verbally prior. She testified that there are two registers with one for security at the gate. She stated that there was no facility to check the absence. In re-examination she testified that the 2 companies – Silverstone and Oxide Masters were different entities. She stated that 26th December was a public holiday for all employees and they did not have a medical slip but the Claimant produced one at the Labour Office. She stated that on security side the register at the gate is for safety of the company and that the case before the court was not on safety.

6. The Claimant filed submissions in which he asserted that the dismissal was on non-existent or fabricated charges without being given a hearing nor being informed of the charges. The Claimant submitted that he was surprised by the Respondent's dismissal and that the alleged meeting was not announced and to his knowledge there was no such meeting. The Claimant submitted that it would be expected the Respondent to have the minutes of the meeting as the custodian of the records. The Claimant submitted that he had satisfied the requirements of Section 47(5) of the Employment Act and demonstrated the termination was not only unfair but discriminatory. The Claimant cited Section 45(2) of the Employment Act and the case of **Donald Odeke v Fidelity Security [2012] eKLR** where Ndolo J. held that an employee facing a disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them. The Learned Judge further held that it does not matter what offence the employee is charged of, if the employee is not heard, the termination is *ipso facto* unfair. The Claimant relied on the case of **Kenya Petroleum Oil Workers Union v Kenya Shell Limited [2014] eKLR** and submitted that the Respondent acted with malice. The case of **Daniel Mutisya Masesi v Romy Madan & Another [2013] eKLR** was relied on for the proposition that the Employment Act 2007 does not bar the directors and companies from being joined in the same claim. The Claimant submitted that the doctrine of corporate separateness is not inviolable particularly in labour law. The Claimant submitted that the court should find the 1st and 2nd Respondent jointly and severally liable.

7. The Respondents' submissions were that the Claimant had conceded that he was initially employed by Silverstone and received a certificate of service upon termination and thereafter joined the 1st Respondent on 1st September 2016. It was submitted that the Claimant admitted the 2nd Respondent was only a director and was not his employer and that there was no documentary evidence of the employment relationship with the Claimant. The Respondents submitted that the Claimant was not entitled to service pay as he was a contributor to NSSF and in terms of Section 35(6) of the Employment Act barred from getting service pay. The Respondents cited the case of **Elijah Kipkoros Tonui v Ngara Opticians t/a Bright Eyes Limited [2014] eKLR** where it was held that employees do not enter into retirement without social security and that service pay is only payable to employees who are not covered under the different social security mechanisms under Section 35(6). The Respondents submitted that the Claimant was properly dismissed for gross misconduct and failing to show cause for his absence. The Respondents cited the case of **John Ngoko Isov v Nyansiongo Tea Factory Co. Ltd [2017] eKLR** on summary dismissal and stated that the 1st Respondent had reason for the summary dismissal of the Claimant. The Respondents submitted that an employer has a right to summarily dismiss the employee for gross misconduct and that this was a proper case of summary dismissal. The case of **Francis Nyongesa Kweyu v Eldoret Water and Sanitation Company Limited [2017] eKLR** was also cited to bolster the argument. The Respondents urged the court to disallow the claim with costs as against the 1st Respondent and similarly as against the 2nd Respondent as he had not produced an iota of evidence against her and the claim against her should fail *ab initio* as well.

8. The Claimant was dismissed for allegedly missing a meeting and absenting himself from work. In any claim where unfair and unlawful dismissal are in contention, the provisions of Sections 43 and 45 of the Employment Act come into play. The law provides as follows under Sections 43 and 45:-

43.(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 (2) of the Act provides that:

45.(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 (underline mine)

9. The Claimant was required to prove an unlawful termination took place and it was the Respondents' duty to show there was justification for the same. Absence at work and failure to obey lawful commands fall in the range of misconduct covered by the Employment Act and for which dismissal may ensue. The law requires that prior to dismissal for misconduct an employee be heard and his representations considered. The Respondents assert the Claimant was heard but avail no proof by way of minutes or notes at the alleged disciplinary hearing. The failure to produce the minutes of the alleged meeting clearly indicates there was no adherence with Section 41 of the Employment Act thus rendering the dismissal unlawful and unfair as the employer failed to prove there were reasons and that it followed fair procedure as provided for under the Employment Act. The Claimant did not prove that he never went on leave or that he was entitled to service. The Claimant sued the 1st Respondent who is the employer and the 2nd Respondent a director in the company. Whereas there is a growing body of precedent on the suits against employers as defined in Section 2 of the Employment Act, it is not necessary to sue each director alongside the company. Why was the 2nd Respondent singled out? Was she the supervisor? As there was no plausible reason as to why she was joined the 2nd Respondent's name is struck off the proceedings herein with no order as to costs. In the final analysis I enter judgment for the Claimant against the 1st Respondent for:-

i. One month's salary in lieu of notice – Kshs. 14,740/-

ii. 3 month's salary as compensation – Kshs. 44,220/-

iii. Certificate of service to be collected

iv. Costs of the suit.

v. Interest at court rates on i) and ii) above from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 24th day of February 2020

Nzioki wa Makau

JUDGE