



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.52 OF 2015

CHRISPINUS WABWIRE.....CLAIMANT

VERSUS

SPINKNIT LIMITEDRESPONDENT

JUDGEMENT

The claim is that the claimant was employed by the respondent as a machine attendant on 1st May, 1009 at a wage of ksh.11,863 per month until 25th October, 2014 when employment was terminated.

The claim is that there was unfair termination of employment for the reasons that there was no notice or a fair hearing and the respondent failed to pay terminal dues. at the time the claimant's wage had been increased by 7% under the collective bargaining agreement (CBA) to Ksh.12,694.

The claimant is seeking the following terminal dues;

- a. 4 months' notice pay ksh.50,776;
- b. Days worked and not paid Ksh.10,155;
- c. Leave days not taken ksh.9,309;
- d. Travelling allowance ksh.2,623;
- e. Severance pay ksh.115,092;
- f. Compensation;
- g. Certificate of service; and
- h. Cots.

The claimant testified that he was employed by the respondent in the year 1996 as a casual labourer and was issued with a contract in the year 1998 as a machine operator a position he held until his summary dismissal from employment on 12th

September, 2014. At the time he was representative of workers for the union and the workers wanted to change the bank where their wages were being paid at. Unitas came to the workplace and talked to them for the change of banks and the shop steward asked him to take minutes for the meeting.

On 13th September, 2014 upon reporting to work in the dyeing section and using the spinning machine at around 1045am power/electricity went off and he took the minutes he had been taking to the shop steward. It took about 7 minutes and power was back. At 1230 the human resource called him and directed him to change work clothes and was issued with letter of suspension. That he had been found spreading Unitas information while required to be at work. That he had been going from department to the next sharing information about Unitas. This was not true as the claimant had just left his work station after power went off and by the time it was back he had returned to his work station.

The claimant replied to the letter by the respondent and denied the allegations made and submitted it on 15th September, 2014.

The suspension was to end in 14 days and the claimant was called for a disciplinary hearing on 26th September, 2014. Suspension was extended to 10th October, 2014 and at the hearing nobody could tell what malicious information the claimant was spreading about Unitas. He did not incite anybody as alleged but the respondent proceeded and dismissed the claimant on 14th October, 2014.

The claimant also testified that he worked for the respondent for 16 years. He had several warnings. He was allowed annual leave and paid travelling allowance. He was a member of the union but upon dismissal the union did not file suit on his behalf.

The defence is that the claimant was employed on 2nd May, 1998 in the dyeing department and later deployed to spinning department and by the time of exit he was earning Ksh.15,594 per month.

On 13th September, 2014 the claimant was on duty in the first shift when he was spotted going round the department giving false information about Unitas which is a financial institution that wanted to talk to the respondent's employee hence causing tension among the employees. For this misconduct, the human resource manager issued the claimant with a notice to show cause why his employment should not be terminated over his misconduct. The claimant replied on 15th September, 2014 and denied knowledge of the said misconduct and for which he was suspended in accordance with the CBA for 14 days and put on half pay to report back on 1st October, 2014.

The claimant was invited for a disciplinary hearing on 10th October, 2014 when the claimant admitted meeting Mr Kamau outside his work station and in order to confirm the same the hearing was adjourned for Mr Kamau to attend on 14th October, 2014 and who explained that he did not find the claimant at his place of work between 9 to 10am and hence he alerted the team leader about this absence. The claimant conceded to the fact that he did not seek permission to be away from his duty station and that he had asked the shop steward about the meeting with Unitas and which was cancelled causing panic among the employees.

The defence is also that on 25th October, 2014 the claimant was dismissed from his employment for giving false information to employees with regard to Unitas hence causing a commotion and tension within the factory. The respondent had invited representatives from Unitas to talk to the employees but the claimant went ahead to distort the information and during the hearing of his case he was not remorseful.

The claimant had a history of indiscipline. On 11th March, 2014 the claimant was dismissed from employment for remaining out of work without permission but after several meetings with the union this was lifted and instead reinstated.

The dismissal from employment was for valid reason and the claimant was given a hearing but failed to give satisfactory reasons for his conduct of inciting workers and creating tension and commotion. The claims made should be dismissed.

John Kamau Kihika testified that he was a supervisor and the claimant worked under him. On 13th September, 2014 the claimant was on duty and while he was going round the claimant was not at his assigned work station. He was traced and found at a different work station unrelated to his assigned duties and when questioned he alleged to have gone to collect cones but this was not the case as where the claimant was the cones were not allocated there.

Mr Kihika also testified that upon this incident, he was called by the human resource manager and questioned about the claimant and indicated he had been absent from his duty station about which the office had been alerted, which was confirmed to be true.

Mr Kihika also testified that he was later called to attend at a disciplinary hearing with regard to the claimant's conduct.

At the end of the hearing, both parties filed written submissions.

By letter dated 13th September, 2014 the claimant was required to show cause why his employment should not be terminated for the reasons that;

... during first shift you have been going round the department giving false information to workers in regard to Unatas. This has caused tension on the ground and production had adversely been affected. ...

The claimant replied thereto that;

... I stayed [in my shift] until the time I went to the shop steward to give him the minutes I wrote during the meeting with Unatas people. But concerning the letter received from HR I don't [do not] understand because I did not talk to anybody about Unatas.. And if there is any please let him/her come and say what I told him/her. thanks.

On his reply the claimant was suspended vide notice dated 15th September, 2014.

He was invited for disciplinary hearing which proceeded on 10th and 14th October, 2014.

By letter dated 25th October, 2014 the claimant's employment was terminated through summary dismissal on the grounds that;

... in the year 2013 on the 11.3.2013, you were summarily dismissed forthwith for gross misconduct. ...

In the year 2014 (13.09.2014) you created commotion to employees by giving them false information in regard to Unitas. This caused a lot of tension in the factory. The management invited Unitas to come to the ground and sell their policy to the employees, you went ahead to distort the information from Unitas. ...

In his reply to the notice to show cause why his employment should not be terminated the claimant maintained that he had left his duty station to share minutes following the meeting with Unitas with the shop steward. Mr Kihika testified to this fact that when he was going round supervising employees he did not find the claimant as his assigned duty station. During the disciplinary hearing, the court reading of the entire minutes revolved around the claimant being absent from his duty station when questioned whether he was aware whether *there were rumours of tension in the factory*, his response was that he was not aware of such matter.

This is captured as follows;

... shop steward – I was with him in the morning bringing me the minutes at 7.40am

Chrispinus – after I left I don't [do not] remember stopping anywhere with any employee to discuss Unitas. Monica Wangari is my witness.

Ndegwa – on behalf of Kamau – you were found by Kamau while loitering in the department. It that ... [the record ended at this point.]

From these proceedings, the matter put across to the claimant related to his being absent from his work station and not *creating commotion to employees by giving them false information in regard to Unitas. This caused a lot of tension in the factory.* ...

Where the case was with regard to such conduct of creating a commotion to employees by giving them false information about Unitas, the claimant dared the respondent to call a witness and he offered one Monica Wangari to testify as to what exactly happened.

In the case of Evans Kamadi Misango versus Barclays Bank of Kenya Limited [2015] eKLR where the Honourable Judge had this to say while analysing the provisions of Section 43 of the Employment Act, 2007 held that;

To my mind the burden placed on the employer by Section 43 is to demonstrate that there was a valid reason which would cause a reasonable employer to terminate the employment of an employee. ...

It is not the role of the court to re-enact the internal disciplinary process already undertaken at the workplace. The responsibility of the court is to examine the legality and reasonableness of the action taken by an employer against an employee and if the set of standards are satisfied, then the court will not interfere. ...

Termination of employment is unfair by an employer if the employer fails to prove that the reason(s) for the termination of employment is valid and that the reason(s) for the termination is a fair reason(s). see **Mombasa Cause No. 440 of 2013 Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers versus Mombasa Sports Club** and **Vincent Nyachibwede versus Bob Morgan Services Limited [2018] eKLR**.

In this case, the court finds no evidence with regard to the reasons for which employment terminated. There is a variance on the notice to show cause, suspension and disciplinary proceedings with the ultimate notice of summary dismissal. Even where the claimant may have been of gross misconduct by being absent from his duty station without permission, to allege that he was absent causing a commotion and creating a disturbance at the shop floor is not supported by any evidence. There is no material evidence to support such allegations of *creating commotion to employees by giving them false information in regard to Unitas*.

Without a valid and fair reason leading to termination of employment, the claimant was unfairly treated and under section 45(2) and 49 of the Employment Act, 2007 he is entitled to compensation and notice pay.

In the last payment statement for September, 2014 the claimant's gross wage was ksh.14,763 the basic wage and house allowance. Notice pay is hence Ksh.14,763.

With regard to compensation, section 45(5) of the Employment Act, 2007 requires the court to put into account the work records of which it is not contested that the claimant had a poor record where on 11th March, 2013 his employment had been terminated by summary dismissal for gross misconduct but upon his union's intervention he was reinstated. Further, save for the reason used by the respondent to terminate employment being different from the gross misconduct of the claimant had for being absent from his work station without permission which should have applied to dismiss him from his employment instantly, these matters put into account, compensation is hereby assessed at one (1) months gross wage at ksh.14,763.

On the claim for leave pay earned and not taken, the respondent did not file any work records in this regard. The claims made are not challenged. The claimant is awarded ksh.9,309.

On the claim for leave travelling allowance, this should be on the basis of the CBA but the claimant did not actually take the annual leave for his to justify the travelling allowance. The leave is encashed instead hence without travel.

On the claim for severance pay, such only arise under the provisions of section 40 of the Employment Act, 2007 which was not the case herein.

A certificate of service is due under the provisions of section 51 of the Employment Act, 2007.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

a. A declaration employment terminated unfairly;

b. Compensation at ksh.14,763;

c. Notice pay ksh.14,763;

d. Leave pay ksh.9,309;

e. Certificate of service shall issue under the provisions of section 51 of the Employment Act, 2007;

f. Dues paid above (b), (c) and (d) shall be subject to the provisions of section 49(2) of the Employment Act, 2007; and

g. The claimant is entitled to 50% of his costs.

Delivered at Nakuru this 20th day of February, 2020.

M. MBARU

JUDGE

In the presence of: