



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 48 OF 2018

JOANARY WACHIRA MWAL.....CLAIMANT

VERSUS

CONSOLATA HOSPITAL MATHARI.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent his erstwhile employer and sought relief for the alleged unfair and unlawful termination of employment. The Claimant averred that he was employed by the Respondent as a driver in 1997 and that he was earning Kshs. 20,734/- per month at the time of the exit. The Claimant averred that he was unlawfully and unfairly terminated from employment. He averred that the termination was without giving him an opportunity to defend himself against the unsubstantiated allegations. The Claimant submitted that the Respondent failed to discharge its common law duties to him as his employer. He averred that at the time of the dismissal he was owed compensation for the unlawful and unfair termination – Kshs. 240,000/-, one month's salary in lieu of notice – Kshs. 20,000/-, house allowance for the period of employment – Kshs. 60,000/-, underpayments for the period worked – Kshs. 247,000/-, annual leave for the last year worked – Kshs. 15,000/-, risk allowance for the month of November – Kshs. 3,000/-, gratuity for 20 years worked – Kshs. 200,000/-, damages for breach of the MOU between the Respondent and Barclays Bank with respect to the Claimant and damages for discrimination. He sought interest on the sums claimed as well as costs of the suit. Attached to his claim were documents in support and his statement in which he stated that he worked for the Respondent for 20 years as a driver and that he would drive the hospital ambulance and running hospital errands among others. He stated that he had no disciplinary issues during his service to the Respondent. He stated that on 23rd November 2017 he received a letter from the Respondent's human resource officer terminating his services. He stated the termination was based on untrue accusations of fraud on fuel management. He stated that he has never committed any fraud in his life let alone in the course of his employment neither had he ever been charged nor found guilty of an offence of fraud by a court of law. He stated he was never reported to any Police Station by the Respondent in respect of the alleged fraud and that the allegations of fraud by the Respondent were just a way of eliminating him from service so that the management could bring in a person of their own choice. He stated that the Respondent never gave him an opportunity to defend himself and even the meeting the Respondent referred to have taken place on 6th November 2017 was never held. He stated that the Respondent could not even furnish his advocate with the minutes of such a meeting as sought in the demand letter. He stated that he was a victim of circumstances and thus sought the relief he prayed for be granted.

2. In the defence filed, the Respondent averred that the Claimant was given a fair hearing before being served with termination notice. The Respondent averred that the Claimant had been severally warned on his actions of stealing in collusion with the petrol station attendants. The Respondent averred that the Claimant's dues were paid shortly after his termination. The Respondent denied that there was any MOU between the Hospital and Barclays Bank of Kenya Limited in respect of the Claimant. The Respondent averred that the Claimant was always paid way above the provision of the minimum wages as promulgated every 1st of May each year. The Respondent averred that the Claimant was paid house allowance of Kshs. 2,359.60 and added that the Claimant was paid Kshs. 24,000/- as one month in lieu of notice. The Respondent urged the dismissal of the suit. To the defence the Respondent attached documents and the statement of the human resource manager Evelyn Wambui. She stated that the Claimant was their former employee and that he was assigned hospital van No. KAL 748C on 23rd October 2017 to go and refill and he brought back an invoice No. 20679 reading the fuel cost was Kshs. 6,634/- while the pump read the actual fueling cost was Kshs. 5,300.35 and the hospital suffered a loss of Kshs. 1,333.65. She stated that on 24th October 2017 he was assigned the hospital ambulance No. KCM 269S to go and refill and brought back an invoice No. 20712 indicating fueling cost of Kshs. 5,710/- while the pump indicated the actual refiling cost as Kshs. 2,000/- and that the hospital lost Kshs. 3,710/- under his watch. She stated that the Claimant was summoned to a disciplinary committee on 6th November 2017 for a fair hearing and to respond to the charges. She stated that the Claimant acknowledged and accepted the charges and accepted to pay for the loss incurred. She stated that the Claimant's termination was not malicious as indicated but it was due to the evidenced fraud and a competitive and procedural interview was done to replace the driver and the best candidate who met all the required criteria was engaged.

3. The Claimant testified while the Respondent did not call any evidence. He stated that he worked for the Respondent for 20 years and was dismissed. He said that he was paid Kshs. 15,000/- a month and that he was not paid his terminal dues upon dismissal. He stated that no notice was given prior to dismissal and that he was sacked without any reason. He testified that there was no truth in the theft of fuel allegations and that there was no evidence. He stated that he would have been taken to the Police. He said that he did not get a chance to

defend himself. In cross-examination he testified that he was paid Kshs. 15,000/- a month and that he had been issued with a letter of appointment. He admitted that it was not part of his evidence. He testified that if there was indiscipline he would be liable for the loss. He stated that he did not know why he was dismissed. He denied being involved in theft and stated that he was not called to a meeting of the Board and that he was not paid the final dues. He stated that he got a salary at the end of the month of Kshs. 20,000/-, the Kshs. 5,000/- for overtime for the month and that there was no payment. He stated that he was forced to sign the document and that he was told if he did not sign the document he would be dismissed without pay. He testified that he was not paid his dues and that he wrote a letter seeking payment. He stated that he did not have the letter seeking the dues. He said he was not notified why he was dismissed and that they made up the story to dismiss him. He testified that they only gave him a letter and a gift voucher and that the fact he got a gift voucher meant they did not have a problem. He stated that there is no letter that shows he was not entitled to continue working. He testified that he got the gift voucher and that the dismissal was not expected since the month was not over. He said that he was paid his salary. In re-examination he stated that the sum of Kshs. 20,000/- was not sufficient for the 20 years of service.

4. The parties filed submissions. In his submissions the Claimant submitted that the Respondent terminated his employment without due regard to his rights and that upon termination he was paid the sum of Kshs. 20,000/- which comprised of his salary for the month – Kshs. 15,000/- and Kshs. 5,000/- being overtime worked. He submitted that the issue for determination was whether the dismissal was fair or lawful. He submitted that from the evidence on record it was clear that the Claimant's employment was terminated on allegations that he had stolen petrol which resulted in the hospital suffering loss. The Claimant submitted that theft is a very serious crime in this country and that he was never reported to the relevant authorities for him to face any criminal charges. The Claimant submitted that in fact save for the statement on record there was no evidence whatsoever that indeed the Claimant was involved in any form of theft. He submitted that the invoices referred to by the Respondent's witness were not availed to the Court. He submitted that in relation to the alleged disciplinary committee held in regards to the alleged misconduct of the Claimant, there is no evidence that the meeting took place as no minutes were availed to court for the Court to satisfy itself that the termination was indeed procedural. He placed reliance on the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** for the proposition that there was no substantive or procedural fairness in the termination. The Claimant averred that the Respondent was thus liable to pay him the relief sought.

5. The Respondent submitted that the Claimant was a driver at the Respondent and was assigned vehicles to refill and upon return it was noted there were some discrepancy's with the invoice presented and the pump readings. The Respondent submitted that this happened on several occasions after which the Claimant was summoned to a disciplinary committee meeting on 6th November 2017 for a fair hearing. The Respondent submitted that the Claimant accepted the charges and agreed to pay for the loss incurred and that was why there were no criminal charges preferred against him. The Respondent submitted that the Claimant's dues were paid as depicted by the certificate of final payment which was filed in the Respondent's bundle. The Respondent submitted that the Claimant was not entitled to the reliefs sought. It cited the provisions of Sections 41 and 47(5) of the Employment Act. The Respondent cited the cases of **Central News Agency (Pty) versus CCWUSA & Another [1991] 12 ILJ (LAC)**, **Nzoia Sugar Company Ltd v Collinsus Fugututi Civil [1988] eKLR** and **Naqvi Syed Omar v Paramount Bank Limited & Another [2015] eKLR** where the court held that *where an Employer suspects the Employee of stealing; or where the Employee carelessly and improperly performs his role; the Employer has the right to summarily dismiss the Employee under Section 44 [4] of the Employment Act 2007*. The Respondent submitted that the Claimant was guilty of theft and the dismissal was thus fair per the Employment Act. The Respondent submitted that the Claimant had failed to demonstrate a case of wrongful or unlawful termination of employment. The Respondent urged the dismissal of the suit with costs.

6. The issues in dispute, as the Court understands them, are:-

- a. Whether the Claimant was unfairly and unlawfully dismissed?
- b. Whether the Claimant is entitled to the relief sought in the claim.

In respect to the claim, it was clear the Claimant was dismissed ostensibly on account of misconduct. It was enumerated in the Respondent's witness statement that the Claimant had been suspected of fraud in regard to fuel maintenance. The law under Section 44(4)(g) of the Employment Act an employee who commits or on reasonable and sufficient grounds is suspected of committing a criminal offence against or to the substantial detriment of his employer can be summarily dismissed. Whereas summary dismissal for such misconduct is permitted the employer is required to observe the dictates of Section 41 of the Employment Act. In such a scenario the employee is to be notified of the intention and reason for the intended termination and the employee is entitled to have at the explanation an employee of his choice. He is entitled to be heard and his explanation and that of his preferred representative considered. Upon the explanation being offered, if it is unsatisfactory the employee is entitled to suffer dismissal but if it is sufficient he is to be retained in employment. The Respondent herein states that the Claimant was invited, heard and ultimately dismissed yet no evidence of the said hearing and evidence of the determination were presented. As there was no satisfaction of Section 43 of the Employment Act, the dismissal was unfair in terms of Section 45 of the Employment Act. As such, the Claimant is entitled to relief for the unlawful dismissal from employment. He asserts that he earned Kshs. 15,000/- and granted that this was his persistent refrain when asked what he earned he will recover on the basis of the earnings he received which he emphasized over and over again to be Kshs. 15,000/-. He did not prove discrimination or the elements of breach of the MOU between the Respondent and Barclays Bank with respect to the Claimant. His gratuity for service for 20 years would be a factor of his salary being 15 days for each completed year of service at Kshs. 7,500/- for each completed year of service. The Claimant failed to prove entitlement to any other relief and in the final analysis I enter judgment for the Claimant against the Respondent as follows:-

- a. Kshs. 30,000/- being 2 month's salary compensation for the unfair termination
- b. Gratuity – Kshs. 150,000/- @7,500/- for each completed year of service
- c. Costs of the suit
- d. Interest on a) and b) above at court rates from the date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 19th day of February 2020

Nzioki wa Makau

JUDGE