



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1706 OF 2015

(Before Hon. Justice Hellen S. Wasilwa 10th February, 2020)

PHARES OLUOCH OLANG'O.....CLAIMANT

VERSUS

MASTERMIND TOBACCO (K) LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant, Phares Olouch Olang'o filed a Statement of Claim on 24/09/2015 dated 5th September 2015 for unfair and unlawful termination of his employment against the Respondent, Mastermind Tobacco (K) Limited.

2. He avers that he was first employed by the Respondent as a Marketing Management Trainee in October 2009 and that after three years, he was promoted to a Sales Representative with an increased basic pay. That on 22/10/2012, the Respondent wrongfully and unfairly terminated his employment without any notice, warning or valid reason and that it also disregarded the procedures set out in the Employment Act.

3. He avers that demand and notice of intention to sue was given and that the Respondent has refused/neglected to pay the outstanding salary and benefits and has further refused to rescind the unlawful and unfair termination.

4. He prays for judgment against the Respondent for:-

a. Full unpaid salary for the

month of September 2012

Kshs. 37,450.00

b. One (1) month's salary in lieu of notice

Kshs. 37,450.00

c. Accrued leave days not taken, up to month of September 2012

(33 Days x Kshs.1,872.5 per day)Kshs.61,792.50

d. Unpaid house allowance (Kshs.5,617.5 x 12 months x 3years)

Kshs. 202,230.00

e. 12 months' salary as damages for unfair termination

(12 months x 37,450)

Kshs. 49,400.00

f. General damages

g. Interest on (a), (b), (c), (d), (e) and (f) at court rates from the day each payment fell due and payable until payment in full.

h. Certificate of service

i. Costs of this suit

5. In his Statement, the Claimant states that he was earning a gross salary of Kshs. 37,450/= per month and that his last salary was paid in August 2012. That his employment was terminated without the Respondent giving him an opportunity to be heard and he believes the

Respondent fundamentally breached his contract of employment and the law. That the Respondent did not pay him house allowance as is prescribed under law and contends that the abrupt termination of his employment has occasioned him a lot of suffering since he is married with a school going child.

6. The Respondent filed a Reply to Claim on 06/01/2016 dated 23rd November 2015 admitting to have employed the Claimant from 21/10/2009 but denies he was promoted as alleged. That the Claimant was only transferred from the Nairobi premises to the Nakuru premises in the same capacity of Marketing Management Trainee. It denies that it unlawfully dismissed the Claimant averring that it lawfully effected summary dismissal against him because he was involved in a robbery with violence activity where property was stolen from the Respondent Company's premises in Nakuru.

7. It avers that such criminal and unlawful acts of the Claimant are unacceptable and fall under grounds for summary dismissal and it thus denies the allegations set out in the Claim and further prays that the same is struck out with costs.

8. CW1, the Claimant adopted his filed statement and documents as his evidence and testified that he was never involved in any criminal activities as alleged by the Respondent.

9. Under cross-examination, he stated that he has never appeared before any court over the alleged incidence and report filed by Respondent in court and that he was questioned by the police on 21/09/2012 but over a different matter.

10. That he disputed the reason given in the dismissal letter and raised the issue with his employer when he went to claim his dues and that his contract of employment did not state his basic salary or any allowances to be earned.

11. In re-examination, he stated that he was not even present when armed robbers entered the company premises on 21/09/2012 and that he was later questioned, arrested and charged but was found innocent when the court found that the wrong people had been charged. He stated that he was never paid any dues as indicated in the summary dismissal letter.

Claimant's Submissions

12. The Claimant submits that summary dismissal which is provided for under **Section 44 of the Employment Act** is a form of terminating a person's employment which is drastic and radical and that employers have been warned to reconsider such a decision. That summary dismissal can only be valid where substantive fairness under **Sections 43 and 45 of the Act** and procedural fairness under **Section 41 of the Act** are considered. He cites the case of **Jaffar Mohamed –v- Ready Consultancy Co. Ltd [2015] eKLR** where the Court held:-

“The said provisions of the law (Section 41) require in mandatory terms that before an employer dismissed an employee for misconduct under Section 44 of the said Act, he shall accord the employee a hearing in a language he understands. The employee is entitled to be accompanied by a fellow employee or shop floor union representative of the accused employee's choice. During the hearing the employer is bound to explain to the employee the reason for which a dismissal is contemplated and then invite the employee and his companion to respond before the decision to dismiss is made.”

13. He submits that the Respondent did not follow due process in summarily dismissing him and that the court should note that the letter dated 22/10/2012 did not explain to him he would be heard nor clearly give the grounds within which he was dismissed. As for substantive fairness, he submits that it is the responsibility of the Respondent to prove the reasons for termination, to further prove that the said reasons are valid and fair and to finally justify the grounds for termination. The Claimant submits the reason given in the dismissal letter is vague and does not specify the criminal offence he is alleged to have committed and leaves this Court to guess the reason for dismissal and interpret for itself the justification.

14. Further, that the Respondent did not present any witnesses to justify terminating his employment and that this court should thus find that no valid reason was given to warrant his termination. That he has established he was unfairly and unlawfully terminated from employment but the Respondent has not sufficiently justified his reasons for terminating the said employment as required under **Section 47(5) of the Employment Act**.

15. It is submitted by the Claimant that he is therefore entitled to 12 months' salary as damages for unfair termination and since he was not paid his September 2012 salary when he was dismissed, he is entitled to the same. That he is entitled to one month' salary in lieu of notice by virtue of **Section 36 of the Employment Act** and that the Respondent should pay him accrued leave days as the same was not rebutted. That since his contract did not mention any consolidation, he is entitled to house allowance prayed for and that **Section 31(2) (a) of the Act** provides:-

“(2) This section shall not apply to an employee whose contract of service:—

a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation;”

Respondent's Submissions

16. The Respondent submits that the Claimant ought to have substantiated his allegations on a balance of probabilities for this Court to grant him the reliefs he seeks. That the law is clear that where an employee is involved in criminal acts against the employer's organization, its property, agents and employees, this amounts to a ground for summary dismissal.

17. That Section **107(1) of the Evidence Act** provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. It submits that it has ably demonstrated it acted on the information that the Claimant was involved in criminal acts against it and that it had a valid reason to summarily dismiss him.

18. That the Claimant on the other hand has not tendered any evidence to prove the Respondent's unlawful or unfair conduct and it invites this Court to consider the decision of Odunga J in **Linus Nganga Kiongo & 3 others –v- Town Council of Kikuyu [2012] eKLR** wherein he cited a myriad of cases while discussing the consequences of a party failing to adduce evidence to the effect that the other party's case stand uncontroverted and unchallenged while the claims made by the party who failed to adduce evidence remain unsubstantiated.

19. That in the case of **Meshack Auta Ongeru v Nyamache Tea Factory Company Limited [2019] eKLR**, the court opined that where the claimant fails to discharge the burden of proof by failing to demonstrate there was unfair termination, then the claim stands dismissed.

20. That the Claimant in the instant case has similarly failed to explain why he never appealed or challenged its decision to dismiss him and that in the case of **Lucia Nduku Nzioka v Mt. Laverna Girls' Secondary School [2019] eKLR**, the Court in dismissing the claim held that the claimant could not claim unfair termination since the termination was as a result of her own doing.

21. It is submitted by the Respondent that as at the date of termination of the Claimant's employment, he had not submitted any request to proceed for leave and that he has not demonstrated that he sought for leave and was denied the same by the Respondent.

22. That it fully paid the Claimant's salary for September 2012 and that the issue of notice pay should fail since it summarily dismissed him without notice under **Section 44(4) (e) of the Employment Act**.

23. That the Claimant pleads to be paid house allowance but has failed to prove he deserves the same and the Respondent asserts that the Claimant's salary was all inclusive and prays that this court finds the salary was inclusive and that the contractual terms will be honoured. It cites the case of **Michael Homas Opondo Were v Maths Trading Company Ltd [2016] eKLR** where the Court stated that where there is a contract of service and a salary is paid, save where the same is stated to be below the minimum wage, the contract amount is to be respected.

24. I have examined all the evidence and submissions of both Parties. The issues for this Court's determination is:-

1. Whether there are any valid reasons to warrant dismissal of the Claimant

2. If there was due process before dismissal of the Claimant

3. Whether the Claimant is entitled to the remedies sought.

25. On the first issue, the Claimant was dismissed vide a letter dated 22.10.2012 in which the Respondent indicated the reasons for termination as being involved in criminal activities while discharging his duties as a Sales Representative II in Nakuru Depot.

26. The Respondent reiterated that indeed there was a robbery with violence incidence at their premises on 15/3/2011 at 7.20 am as per their report Exhibit 2.

27. There is however no mention of how the Claimant was involved in the robbery at the said report.

28. The Respondents aver that they acted on the information that the Claimant was involved in criminal acts against the Respondent and the Claimant was indeed arrested on 21/9/2011 and criminal proceedings instituted against him. He was thereafter dismissed on 22/10/2012.

29. The Claimant has admitted that he was indeed arrested and charged in a criminal Court but that the Court found that wrong people had been charged.

30. The criminal Court proceedings were not produced in this Court for this Court to understand the reasoning of the trial Court in the criminal trial. The Respondent were therefore justified based on the fact that the Claimant was facing serious criminal charges to consider dismissing him.

31. That notwithstanding, the Claimant was still entitled to an interdiction but not outright dismissal without an internal disciplinary hearing. For this reason, the dismissal of the Claimant was unfair and unjustified as per Section 45(2) of Employment Act 2007 which states as follows:-

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*".

32. As for remedies, I find for Claimant and award him as follows:-

1. *1 month salary in lieu of notice = 37,450/=*

2. *6 months' salary as compensation for the unfair and unlawful termination = 6 x 37,450= 224,700/=*

3. *Unpaid salary for September 2012 = 37,450/=*

4. *Leave not taken upto September 2012 (33 days) = 37,450 x 33/30 = 41,195/=*

5. *Unpaid house allowance for 3 years = 37,450 x 0.15 x 36 = 202,230/=*

TOTAL = 509,025/=

Less statutory deductions

6. *Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.*

Dated and delivered in open Court this 10th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Thuita holding brief Miss Kiama for Respondent – Present