



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1126 OF 2015

(Before Hon. Justice Hellen S. Wasilwa 5th February, 2020)

JOSEPH MAGERIA NGENYE.....CLAIMANT

VERSUS

OSHWAL EDUCATION RELIEF BOARD.....RESPONDENT

JUDGEMENT

1. The Claimant, Joseph Mageria Ngenye filed a Memorandum of Claim dated 30th June 2015 for unfair and unlawful dismissal and non-payment of terminal dues against the Respondent, Oshwal Education & Relief Board.
2. He avers that he was employed by the Respondent as a Driver from January 1999 until 13/03/2015 and worked diligently in the different branches of the Respondent and that he rose through the ranks of Driver, Job Evaluation Commissioner up to the position of Transport Supervisor. That his salary was computed at Kshs. 47,266 per month and that at the time of his dismissal, he was the head of the Respondent's transport docket.
3. He avers that on 24/01/2015, he was on duty driving the Respondent's vehicle KBU 833G until late in the night and had to park the vehicle at the Respondent's Senior High School.
4. That he later picked the vehicle from the Senior High School to go rescue his son who had been involved in a road traffic accident along Thika Road and took him to hospital the following day.
5. That on 09/02/2015, the Respondent's School Business Manager demanded for an explanation concerning the said vehicle, to which the Claimant replied via a letter on the same date and that he was thereafter told to resume his duties. That the Respondent dismissed him on 13/03/2015 on the unfounded allegations of using motor vehicle KBU 833G for personal use and was not afforded a hearing.
6. He contends that his actions did not amount to gross misconduct and that the punishment by the Respondent did not fit the alleged crime given he had been out with the said vehicle for only 3 hours i.e. from 14.28pm to 4pm on 25/01/2015. That he had previously handled cases of staff alcoholism, misuse of Respondent's vehicle and even theft whereby the staff concerned were only given warning letters.
7. The Claimant continues to aver that he appealed against the dismissal via a letter dated 17/03/2015 explaining how his actions were not criminal as per the sections of the law relied upon by the Respondent which strictly related to criminal actions.
8. That the Respondent replied to his appeal via a letter dated 25/03/2015 and a consequent letter dated 02/04/2015 whereby an appeal panel was constituted on 08/04/2015 but he was not allowed to appear or give audience before the said panel. That the Respondent thereafter upheld his dismissal via a letter dated 16/04/2015 alleging that his actions had amounted to theft.
9. He avers that the termination was malicious because the Respondent was well aware that his son had been in a road traffic accident and he had not stolen or tried to steal the vehicle. That the dismissal was thus unlawful, unfair and calculated at denying him his terminal dues and that despite various meetings and demand by himself and his Union, the Respondent refused to make good the claim.
10. Further, that the Respondent was extremely harsh considering he had served it continuously for 16 years without blemish. He contends that the Respondent breached the mandatory provisions of the Employment Act, the principles of natural justice and the constitutional right to fair labour practice in that: his explanation was not considered before the decision to dismiss him; the reasons given for the dismissal were unjustified; and due process was not adhered to. He thus claims his terminal benefits as follows:-

i) Three months' salary in lieu of notice

as per the CBA being.....Kshs. 141,798/=

ii) Unpaid salary for 13 working days being

1st March to 13th March 2015...Kshs.20,482.93

iii) Gratuity as per the CBA being

iv) (15 working days x 16 years)...Kshs.378,128/=

v) Compensation for the abrupt, unfair and wrongful termination from employment and abrupt loss of income and trauma and inability to meet continuing obligations being (Kshs.47,266 x 12)Kshs. 567,192/=

11. The Claimant prays for judgment against the Respondent for:

a) A declaration that the Respondent's termination of the Claimant's employment was unfair and unlawful and the Claimant is entitled to payment of his due terminal benefits and damages.

b) An order for payment of due terminal benefits and compensatory damages totalling to Kshs. 1,107,600.93

c) Costs of this case plus interest thereon.

12. The Claimant also filed a Witness Statement dated 08/10/2019 stating that upon dismissal from employment, the Respondent only paid him Kshs. 21,863/= as shown in the letter dated 09/07/2015 (*document no. 22 on the list of documents*).

13. He annexes **Documents Nos. 1 – 26** in support of his Claim, including copies of his payslips pre-2002 as well as his January 2015 payslip, letter from the Medical Center that treated his son, warning letters for other colleagues and vehicle movement registers among others.

14. The Respondent filed an Answer to Memorandum of Claim dated 1st September 2015 averring that it employed the Claimant on or about 01/09/1999 until it dismissed him for being wayward, errant, insubordinate and on grounds of committing a criminal offence to the detriment of the Respondent's property.

15. It denies that the Claimant was an industrious employee as he had been given several warnings during his period of employment and avers that it paid him his monthly dues on time.

16. It avers that the Claimant parking the vehicle in question at the Senior High School was contrary to the Respondent's Policy, which is that at night the vehicles are parked at the Primary Campus.

17. That the Claimant then took the vehicle on 25/01/2015 for his own personal errands without its authority and that he did not communicate his predicament to anyone. That to conceal his actions, he neither entered the trip on the vehicle log book nor record the mileage as was required of him and that the vehicle registration movement for 25/01/2015 does not indicate how long the vehicle was out but only the time it left the compound.

18. It avers that the Claimant was made aware of the day, time and place of his appeal hearing and was accorded an opportunity to be accompanied by a representative of his own choice.

19. That the Claimant's actions amounted to stealing and handling stolen property and thus warranted summary dismissal pursuant to **Clause 15(g) of the CBA** and **Section 44 (4) (g) of the Employment Act**. That he is thus not entitled to the prayers sought in his Memorandum of Claim and it prays that the same is dismissed with costs.

20. The Respondent annexes **Annexures 1 to 5** in support of its case and which include copies of the summary dismissal letter, warning letters issued to the Claimant and letters issued to Claimant prior to the appeal hearing among others.

21. The Respondent also filed two Witness Statements made by its Assistant HR Manager, Ronald Otieno Ooko on 05/12/2018 and another made by its HR Clerk, Wilson Inonda Angatia on 01/08/2019. Both witnesses state that before the Claimant was summarily dismissed, he was given an opportunity to show cause why he should not be dismissed and that the Respondent also met with the Claimant.

Evidence

22. CW1, the Claimant testified that he wished to adopt his statement dated 08/10/2019 and also rely on documents marked *JMM 1 to JMM 24* filed together with the Memorandum of Claim as his evidence in Court. That as per the CBA, **clause 15.2 (b)** under which he was terminated states about the warning system to be exhausted and that the system is explained in clause 14 and was not followed at all.

23. Under cross-examination, he confirmed he had been given warnings before but stated they had expired and that he did not have a record

of misconduct. He denied there being a policy that he must park a vehicle where he collected it, stating that he could park at any of the Respondent's institutions.

24. That on 25/01/2015, he called Yunis Assanali who used to do logistics of the vehicles about his emergency and states that the said Yunis refused to be his witness. He confirmed appearing before the panel with a union representative stating that he presented evidence of his son being involved in an accident and further confirmed that he was informed of the results of the appeal.

25. RW1, Wilson Angatia testified that he wished to adopt his written statement as his evidence and further produced the documents filed by the Respondent as exhibits in this case. He stated that employees worked on Sundays when requested to do so and that they even signed an overtime sheet and are then paid.

26. Under cross-examination, he stated that the Claimant committed a criminal offence but has not been charged in any court. That with the other warnings having lapsed, the notice to show cause was therefore a first warning and that if it was so, then procedure as per the CBA is to be followed. That **clause 15(2) (h) of the CBA** was not followed.

27. In re-examination, he stated that there were 6 weeks after the show cause before the Claimant was dismissed during which time investigations were taking place.

Respondent's Submissions

28. The Respondent submits that under **Section 44(3) of the Employment Act**, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations under the contract of service.

29. That the Claimant taking away its property without prior authority amounted to theft and that this is backed in the case of **Anthony Omari Ongera –v- Teachers Service Commission [2018] eKLR** where the Court held:-

“The admission by the claimant that on 19th December, 2012 he accessed the respondent premises and therein took the property of the respondent for his personal use, whatever the rationale and need that existed, such was not with the consent of the employer and this was outside work hours to allow for supervision as to what exactly the claimant took away from his employer. The defence that the claimant was allowed access by the police and the contracted security guards is neither here or there. Such are not the employees of the respondent who had supervisory authority over the claimant to allow such conduct.

Taking away of the employer's property without prior authority amounts to theft. Such cannot be justified in any other manner.”

30. It further submits that fair and just cause for the dismissal of the Claimant existed as his conduct violated an essential condition of his employment contract and was inconsistent with his obligations to the Respondent. That the Claimant was also afforded procedural fairness as provided in **Section 41(1) of the Employment Act** because it issued him with a show cause letter and after the dismissal, he was allowed to appeal the decision.

31. That it produced *minutes of the appeal committee in the Respondent's List of Documents dated 06/08/2019* and that further, **Clause 15.1 of the CBA** provides that nothing in the clause shall prejudice the right of either party to terminate employment summarily for a lawful cause or gross misconduct.

32. That the Claimant has not proved any allegations that he was unfairly and unlawfully dismissed and that the summary dismissal of the Claimant was therefore fair in substance and on procedure.

33. It is submitted by the Respondent that none of the Claimant's claim is payable since he was summarily dismissed and that for notice pay this position is supported in the case of **Katembe Kirongo Mtumwa & another v Steel Makers Limited [2015] eKLR** where the court held:-

“The Claimants were summarily dismissed for an act of gross misconduct. Summary dismissal under Section 44 [1] of the Employment Act 2007 means termination without notice, or with less notice than that to which the Employee is entitled by any statutory provision or contractual term. Acts of gross misconduct are punishable by summary dismissal under Section 44 of the Act, and in the case of the Claimants, similarly punishable under their CBA. Although entitled to be heard as concluded above, they were not entitled to have notice of termination or pay in lieu thereof, having been involved in an act of gross misconduct. Notice pay is not a benefit due to them under Section 18 of the Act and under the CBA. The claim for notice pay is rejected.”

34. That the Claimant is not entitled to 13 days' unpaid salary as he was paid his monthly dues on time until the time he was summarily dismissed. That as for gratuity, **Clause 17(b) of the CBA** provides that where an employee terminates or is terminated other than summarily dismissed, he shall be paid gratuity but since the Claimant in this case was summarily dismissed, he is not entitled to gratuity.

35. The Respondent finally submits that the Claimant is also not entitled to compensation as he was fairly dismissed.

36. I have considered all the evidence and submissions of both Parties. The issues for this Court's determination are as follows:-

1. Whether there were valid reasons to warrant Claimant's dismissal.

2. Whether due process was followed before the termination of the Claimant.

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

37. On issue No. 1, the Claimant is said to have been dismissed by the Respondents vide a letter dated 25th March 2015 in which the reason for the dismissal were said to be using the school van for his personal errands on a Sunday without authority.

38. He was dismissed as per the CBA, Clause 15.2 Section Employment Act 2007, Clause 44 Section 4(a), Section 44(4) of Employment Act states as follows:-

“(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property”.

39. The Section envisages committal of a criminal offence to warrant summary dismissal. There is however no criminal offence that the Respondent indicated was committed by the Claimant that led to his dismissal. No criminal charges were ever preferred against him.

40. It is indeed not clear why the Respondent opted to dismiss him as if he had committed a criminal offence when he had not done so.

41. Clause 15.2 of the CBA on the other hand was not displayed to the Court by the Claimant’s on the Respondents. However, given the explanation by the Claimant that he rushed to attend to his son who had been involved in an accident, the action of summary dismissal on this account was harsh and unwarranted.

42. On the second issue, the Claimant has submitted that the Respondent did not follow due process before dismissing him.

43. He contends that after the accident involving his son, he hurriedly took the Respondent’s vehicle and rushed to the scene. 15 days later, he was served with a Notice to show cause to which he responded to and apologised and was allowed to resume duties.

44. He was then dismissed on 13.3.2015 without an opportunity to be heard. It is true from this letter, the Claimant was dismissed after “investigations” but was never accorded an opportunity to be heard as envisaged under Section 41 of Employment Act 2007 which states as follows:-

1) “Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

45. He even appealed the dismissal but it was still rejected without any hearing.

46. It is my finding that the Claimant was denied a right to be heard and therefore his dismissal 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”.

47. In terms of remedies, I find for the Claimant and I award him as follows:-

1. 1 month salary in lieu of notice = 47,406/=

2. Unpaid salary for 13 working days – 1st March to 13th March 2015 = $13/30 \times 47,406 = 20,542.6$

3. Gratuity as per the CBA being 15 working days for each completed year of service = $\frac{1}{2} \times 47,406 \times 16 = 379,248/=$

4. 10 months’ salary as compensation for the unlawful and unfair termination = $10 \times 47,406 = 474,060/=$

TOTAL = 921,256.6/=

Less statutory deductions

5. 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 5th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties