



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1496 OF 2017

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

KENNETH K. KITHEKA.....CLAIMANT

VERSUS

TILE AND CARPET CENTRE.....RESPONDENT

JUDGMENT

1. The Claimant instituted this suit vide the Memorandum of Claim filed on 1/8/2017 seeking the following reliefs-

- i. A declaration that the Respondent's action of allocating the Claimant's workstation to someone else and withholding his salary amounts to constructive dismissal.*
- ii. A declaration that the termination of the Claimant's employment by the Respondent was unfair and unlawful.*
- iii. An award of KShs. 2,010,000.00 equivalent to the Claimant's 12 months gross salary as damages for wrongful termination.*
- iv. An award of KShs. 167,500.00 equivalent to 1 months' salary in lieu of notice of termination.*
- v. An award of Kshs. 837,500.00 equivalent to 10 years' service at the rate of 15 days pay per year.*
- vi. A positive certificate of service.*
- vii. Any other appropriate relief as this Honourable Court may deem fit to grant.*
- viii. Interest on (ii) above until payment in full.*
- ix. Cost of the suit.*

2. The Claimant avers that he was employed on 1/5/2006 as a store supervisor under permanent and pensionable terms and was earning a gross salary of Kshs. 25,000.00. This salary was subject to review from time to time and which was gradually increased to a gross salary of KShs. 167,500.00.

3. It is the Claimant's case that his employment was terminated on 13/4/2017, without any justifiable cause. He avers that when he sought a formal explanation for his dismissal, the Respondent issued him with a backdated letter dated 13/4/2017. The letter indicated that he had been suspended for colluding with colleagues to steal 'Duravit Starck 3 WC Pan: White 2141090000 code BWHDRSTA14116'.

4. The Claimant states that when he reported to work on 20/4/2017, he found that his workstation had been allocated to someone else. It is his position that this made his work intolerable thereby breaching his employment contract. Further, one of the directors, Mr. Chirag, informed him that he had been dismissed and should collect a formal letter on 24/4/2017. However, it is his case that at the time of filing this claim, the Respondent had not furnished him with the said letter. It is further averred that his salary was withheld and had not been paid at the time of filing the suit.

5. It is averred that the termination of Claimant's employment was irregular as he was not given a fair hearing or the opportunity to explain himself in the presence of a representative of his own choice. As such, his dismissal was unlawful.

6. The Claimant avers that he was never charged with a criminal offence. It was his testimony that the correct purchase procedure as required by the Respondent was followed.

7. During cross examination, it was his testimony that he signed the credit note after verifying return of goods. He testified that on 4/4/2017, a client returned some seat covers on the ground that they could not fit properly. Upon verifying that the grounds were genuine, the Claimant unsuccessfully tried to raise a credit note. When he enquired from the sales manager where the problem was, he was informed that he could not raise a credit note as he had raised a similar credit note before. He maintained that he had no knowledge of previous credit notes.

8. When questioned about the suspension letter of 13/4/2017, he conceded that there was no evidence that he had received it on 19/4/2017 but maintained that that was the day he had received it.

9. The Respondent filed a Memorandum of Response on 28/8/2017. They aver that various factors contributed to the Claimant's salary increment and not his performance alone. They deny withholding the Claimant's salary or reallocating his work station.

10. It is averred that the termination procedure was lawful and procedural as the Claimant was granted an opportunity to be heard but he declined. Further, the Claimant also declined to respond to the letter of invitation, in writing. As such, the Claimant is not entitled to the reliefs sought.

11. Lorraine Namasaka testified as RW1. She stated that on 20/3/2017, the Claimant reported that a client had returned the goods and that he needed to do a credit note. The client came back on 4/4/2017 complaining about her seat cover and denied returning goods before. It was her testimony that the items returned on 27/3/2017 did not reflect in the system. Investigations were done and the Claimant was suspended on 13/4/2017.

12. During cross examination, she testified that there was an error in paragraph 6 of her statement as she intended to state that the client and not the Claimant had written to deny return of goods. She had no evidence that other staff were suspended.

13. It was her testimony that the Respondent had a termination letter but which was not in Court. She conceded that there were no minutes for the hearing that was to take place on 18/4/2017. Further, that there was no written report of the investigation that was carried out.

14. Upon re-examination, she stated that there were no minutes of the meeting as there had been no meeting. It was her evidence that the matter was never reported to the police because of the working relationship that the Claimant had with the company.

The Claimant's Submissions

15. In his submissions filed on 23/10/2019, the Claimant submits that the termination of his employment was premeditated. No hearing took place hence a violation of Section 41 of the Employment Act. As such, the termination of his employment was unfair and unlawful. He relies on the cases of **Moses Kaunda Moro vs. CMC Motors Group Limited [2013] eKLR** and **Rashid Jeneby vs. Prime Bank Limited [2015] eKLR**.

16. The Claimant submits that he is entitled to 12 months' salary compensation for the unlawful termination of his employment which he has proved was unfair. He relies on the case of **Moses Kaunda Moro vs. CMC Motors Group [2013] eKLR**.

17. On the claim of service charge, the Claimant submits that he is entitled to the same as the Respondent failed to demonstrate that NSSF funds were remitted regularly. As such it cannot be presumed that the same was remitted. He relies on the case of **Elijah Kipkoros Tonui vs. Ngara Opticians T/A Bright Eyes Limited [2014] eKLR**.

18. He urges that he be issued with a positive certificate of service to alleviate his chances of obtaining future employment. He also urges this Court to invoke its discretion under Section 12 (4) of the Employment and Labour Relations Court Act and grant him costs as a successful litigant.

Respondent's Submissions

19. In their submissions filed on 13/12/2019, the Respondent submits that the Claimant has not demonstrated any treatment from the Respondent that would lead this Court to conclude that he was constructively dismissed. To buttress this position, they rely on the cases of **Kenneth Kimani Mburu & Another vs. Kibe Muigai Holdings Limited [2014] eKLR**, **Milton M. Isanya vs. Aga Khan Hospital [2017] eKLR** and **Joseph Aleper & Another vs. Lodwar Water & Sanitation Company Limited [2015] eKLR**, amongst others, which outline the circumstances that lead to constructive dismissal.

20. The Respondent submits that the Claimant's termination was done within the confines of the law as all the disciplinary procedures prior to his termination were lawful. Additionally, the Claimant was given an opportunity to be heard but opted not to exercise it.

21. It is submitted that the Respondent has met the threshold set out in section 45 (2) of the Employment Act. They rely on the case of **Thomas Sila Nzivo vs. Bamburi Cement Limited [2014] eKLR**.

22. The Respondent submits that the Claimant is not entitled to the reliefs sought, for failing to adduce evidence to prove a case for unlawful termination. He has not pleaded or particularized the claim for damages. The Respondent also submits that service pay is not due to him as the Respondent remitted NSSF payments on his behalf.

23. I have examined all the evidence and submissions of both Parties herein. From the evidence of the Claimant, he was never issued with any termination letter though his workstation was allocated to someone else and his salary stopped. This position is confirmed by the Respondent's RW1 that there was no termination letter issued to the Claimant.

24. The Respondent's insisted that the Claimant was terminated within the confines of the law. The Respondent had alluded to the fact that the Claimant was terminated for valid reasons.

25. The reasons the Respondent avers were valid were never tested through any disciplinary hearing. The Claimant was never asked to respond to the said reasons if any.

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".

26. Indeed the Respondent has a duty to not only have reason to terminate an employee but the reason must also be valid.

27. The Respondent in my view has not established the validity of the reason leading to the Claimant's termination if at all.

28. On the other hand, even if the Respondent had valid reasons to terminate the Claimant, there still was need to subject the Claimant to a disciplinary hearing 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".

29. The Respondent indeed failed to prove this aspect of a disciplinary hearing too and I therefore find that the termination of the Claimant was unfair and unjustified as envisaged under Section 45(2) of the 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".

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

1. 1 month salary in lieu of notice = 167,500/=

2. 10 months' salary as compensation for the unfair and unlawful termination = 10 x 167,500 = 1,675,000/=

TOTAL = 1,842,500/=

Less statutory deductions

3. Claim for service pay is rejected as Claimant was a member of NSSF.

4. Issuance of a certificate of service.

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:

Miss Lwila for Claimant – Present

Ochika for Respondent- Present