



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 575 OF 2015

CHRISTOPHER GARO NYAWADE.....CLAIMANT

VERSUS

H. YOUNG & COMPANY (E.A) LTDRESPONDENT

JUDGMENT

Introduction

1. The Claimant filed this suit on 13/04/2015 alleging that he was unlawfully dismissed and unfairly from his employment by the respondent and prayed for the following reliefs: -

- a) One month salary in lieu of Notice being Kshs. 127,701.20
- b) 12 months' salary for unlawful termination.
- c) Accrued Leave equalling to Kshs. 117,500.00
- d) Pension dues as per the RBA Rules
- e) Costs and interest.

2. The Respondent filed defence on 14.5.2015 denying the alleged unlawful dismissal of the claimant and averred that the dismissal was lawfully done for gross misconduct and after following a fair procedure. She further averred that after the dismissal she computed the claimant's terminal dues and they are ready for his collection. She therefore prayed for the entire Claim to be dismissed with costs.

3. The suit was heard on 11.7.2019 when the claimant testified but the respondent never tendered any evidence. After the hearing, only the claimant filed written submissions.

Claimant's evidence

4. The Claimant testified as CW1 and adopted his Statement and the exhibits annexed thereto and briefly stated that he was employed by the respondent as a Stores Manager in charge of stocks earning Kshs. 127701.20 per month. His duties involved receiving and giving out stocks at the site.

5. He further testified that on 24.2.2015, a report was made by Mr. Wachira, the Site Manager that there was loss of cement at the site between 20th and 24th February 2013. Investigation was then done by the Material Controller, Mr. Lorono by checking the records and the physical stocks. Thereafter the Security Officer the Head Quarters, Mr. Patrick Muriuki was also brought in.

6. The claimant denied any loss of cement from the main store and contended that once he gave out cement to site plant, it was no longer under his custody but it was kept in a container which was the temporary store for the plant. He explained that he used to issue cement to consumers at the site upon request by filling in a Request Form and upon the same being approved by the Site Manager.

7. He contended that the alleged lost cement was 13180 kg equalling 263 bags of 50 kg each. He however contended that no Audit report was prepared to establish the alleged loss of cement. He further contended that he was not given fair hearing before the dismissal but only interviewed while connected to a Polygraph machine. He contended that the dismissal vide the letter 25.3.2015 was unfair and prayed for terminal dues plus compensation as prayed herein.

Claimant's Submissions

8. The Claimant submitted that the respondent filed defence but failed to attend court to tender evidence. He therefore urged that the entire claim is not opposed and it should be allowed as prayed in addition to accrued leave which was not pleaded. He relied on **Geoffrey Mwakio v The Kenya Broadcasting Corporation [2015] e KLR** where the Nduma J awarded the claimant Kshs.3000,000 general damages in lieu of reinstatement.

Analysis and determination

9. The issues for determination are:

- a) Whether the reason for dismissing the claimant was valid and fair.
- b) Whether a fair procedure was followed.
- c) Whether the Claimant is entitled to the reliefs sought.

Whether the reason for dismissing the claimant was valid and fair.

10. The claimant contended that the reason cited for his dismissal was unfair because the investigation done was not proper and no audit report was done. He further contended there was no loss of cement from the main store and explained that once he handed over cement for the site use it was kept in container as a temporary store.

11. Under section 43(1) and 45(2) of the Employment Act, in any legal proceedings challenging termination of employment, the employer has the burden of proving a valid and fair reason for the dismissal. A valid and fair reason is one that relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. In this case the employer never tendered any evidence to rebut the claimant's evidence. I therefore return that the respondent has failed to discharge his burden of proving the reasons for dismissing the claimant.

Whether a fair procedure was followed.

12. Under section 45(2) of the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reason(s) and that it was done after following a fair procedure. Fair procedure on the other refers, but not limited to, according of a fair hearing to the employee before termination.

13. The claimant contended that a fair procedure was not followed because he was not accorded any hearing before the termination. The said evidence was not controverted by the respondent because she did not tender any evidence. Section 41 of the Employment Act provides as follows:

"41(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct ... 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 ...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, make."

Whether the Claimant is entitled to the reliefs as prayed in the Memorandum of Claim.

14. In view of the finding that the respondent did not prove that the reason for dismissal the claimant was valid and fair and the fair procedure was followed, I make a further finding that the dismissal was unfair within the meaning of section 45 of the Employment Act. Accordingly, under section 49 of the Act, I award the claimant one month salary in lieu of notice plus 6 months gross salary compensation for the unfair dismissal. In awarding the said compensation I have considered the claimant's service of about 5 years without any disciplinary issues. I have also considered the fact that he never contributed to the termination through misconduct. The claimant computed the claim based on a salary of Kshs. 127,701.20.

15. The claim for pension was not prosecuted and therefore dismiss it for lack of evidence.

16. The claim for salary accrued leave raised during submission is dismissed because it was not pleaded. It is now trite that parties are not permitted to travel beyond their pleadings and the court ought to decline any invitation to determine matter which are not covered by the pleadings.

Conclusion and disposition

17. I have found that the claimant's employment was terminated by the respondent unfairly and the claimant is entitled to compensatory damages. Consequently, I enter judgment for him against the respondent in the following terms:

