



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 617 OF 2015**

**DAVID MUNYIALO MARAKA.....CLAIMANT**

**-VERSUS-**

**BOB MORGAN SERVICES.....RESPONDENT**

**JUDGMENT**

1. The Claimant' suit is contained in the amended memorandum of claim dated 9/9/2019 and it seeks the following reliefs: -

- a. A declaration that his dismissal by the respondent was unlawful, unprocedural and unjustified.
- b. 12 months' salary compensation for unlawful, unprocedural and unjustified dismissal, salary in lieu of notice plus terminal dues equalling to Ksh 471,034
- c. Certificate of service
- d. Costs of the suit

2. The Respondent admitted that she dismissed the claimant from employment on 30/10/2014, but denied that the dismissal was unlawful, unprocedural and unjustified. She averred that she dismissed the claimant for gross misconduct after serving him with a show cause letter and according him a disciplinary hearing. She further averred that the claimant's terminal dues were calculated and his cheque plus certificate of service were written but he refused to collect the same. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 26/11/2019 when both parties tendered evidence and thereafter filed written submissions.

**Claimants Case**

4. The claimant testified as CW1. He stated that he joined the respondent as a security guard in December 2002 and worked well until 30/10/2014 when he was summoned to the office by the respondent's administrator, Mr Dennis Micheka. Upon arrival to the office, he was given an already drafted apology letter to sign, but he declined. Thereafter, he was given a show cause letter citing the gross misconduct of causing disruption at the work place and inciting his colleagues on 28<sup>th</sup> and 29<sup>th</sup> of October 2014, and he responded the same day denying the offence. However, he was dismissed the same day, 30/10/2014 without being given any hearing and he appealed by his letter dated 31/10/2014, but never received any response to the appeal letter.

5. He contended that the dismissal was unlawful, unprocedural and unjustified because he was not served with prior termination notice, the reason for the termination was false and he was not accorded a fair hearing before the dismissal or on his appeal. He therefore prayed for compensation and terminal dues totalling to Ksh 24,012,433.

6. On cross-examination, he admitted that he was a member of a trade union. He denied any knowledge that the union had agreed with the respondent to reduce salaries. He admitted that he never went to the union office to inquire why the salaries were reduced and he never asked the Shop Steward at the shop floor. He further denied knowledge that the reduced salary was to continue under the new CBA.

7. He denied that on 28<sup>th</sup> and 29<sup>th</sup> October 2014, he went to sites not within his site of assignment to incite and call employees to a meeting to discuss the issue of salary reduction. He admitted that he was not the Shop Steward and as such he had no authority to call a meeting of employees. He further denied that he refused to sign a show cause letter.

8. He further admitted that in January 2014, he was served with a suspension letter accusing him of causing disturbance at the respondent's headquarters. However, he denied the said misconduct and contended that he only went there to demand for his delayed salary

9. As regards the reliefs sought, he admitted that in 2014, he took leave of 30 days but contended that the said leave was for 2013. He further admitted that he was entitled to 26 leave days, but he took 30 days. He further admitted that he was a member of NSSF and that only a uniform levy was deducted.

10. Finally, he contended that he was not given any chance to clear at the Head office after the termination and further that his lawyer never told him that the respondent had offered him any cheque.

### **Defence Case**

11. Mr Denis Micheka, the respondent's chief of staff and head of HR testified as RW1. He stated that in 2013, the respondent had financial problems which forced him hold a meeting with the union officials and Shop Stewards and agreed on reducing salaries for the staff. The agreement was signed and registered in court as case number **1788 of 2013** between the respondent and the union and it was to lapse on 31/10/2014.

12. He further testified that the claimant was dissatisfied by the agreement and incited other employees to report any salary instalments. As a result, he was served with a suspension letter for the said offence but on 31/1/2014, the management forgave him after a meeting between him, the claimant and the Shop Steward.

13. RW1 further testified on 31/10/2014 the remedial agreement was extended by consent because the company had not improved financially. However, the claimant was again displeased and went round respondent's assignment sites inciting other employees to down their tools from 2/11/2014 and go to the head office to protest the extension of the salary reduction. As a result, his supervisor summoned the claimant to the office on 30/10/2014 and served him with a show cause letter, but he declined to acknowledge receipt by signing.

14. However, RW1 confirmed that the claimant responded to the show cause letter on the same day, 30/10/2014 and was called for a disciplinary hearing the same day in the presence of the Shop Steward. After the hearing, the claimant was dismissed and he filed an appeal. The appeal was considered, but found to be without merits, therefore dismissed.

15. He contended that the claimant had 16 leave days outstanding and was entitled to ksh 3500 being refund on uniform levy. He contended that the claimant never went for his cheque for terminal dues and certificate of service. Finally, he contended that the salary reduction in 2013 and 2014 was lawful

16. On cross examination, he reiterated that the claimant caused disturbance in the office on 10/1/2014 for which he was suspended, but on 31/1/2014, a meeting was held and the suspension was lifted. He further reiterated that the claimant went to Pacis Insurance and other assignments and incited other guards to down tools and go to the head office to protest salary reduction.

17. As a result, the claimant's supervisor called him to the office where he received a show cause letter, but refused to sign acknowledgment. He did not remember the guards who reported that the claimant had gone round inciting them to down tools. However, he contended that inciting workers to down tools exposed the respondent's clients and the respondent's business.

### **Claimant's Submissions**

18. The claimant submitted that the burden of proving valid reason for terminating services lies with the employer under section 43(1) of the Employment Act. He further relied on **George Onyango Asuti v G4S Security Services Ltd [2013] eKLR**, where the court held that section 47(5) of the Employment Act puts the burden of proving unfair termination on the employee while the burden of justifying the grounds of the termination lies with the employer. In addition, the court held that under section 45 the employer has the burden of proving that the termination is grounded on valid and fair reason and that fair procedure was followed.

19. He further submitted that under Article 50(1) of the Constitution, every person has a right to a fair hearing on any dispute. Therefore, he urged that the respondent has not produced any evidence to prove that there was a valid reason to justify his summary dismissal. He further urged that the principles of national justice were contravened. He relied on **Ben Julius Achila v Kima International School of Theology [2013] eKLR**, where the court held that failure to accord an employee a hearing before terminating his service is unfair.

20. In conclusion, the claimant contended that under section 49 of the Employment Act, he is entitled to compensation plus terminal dues sought in his amended claim.

### **Respondent's Submissions**

21. The respondent submitted that the dismissal of the claimant was fair both substantively and procedurally. She contended on 28<sup>th</sup> and 29<sup>th</sup> October 2014, he visited business assignments and incited his fellow employees to down their tools and attend a meeting on 2/11/2014 to protest salary reduction. She further submitted that a fair procedure was followed because the claimant was accorded an opportunity to defend himself by being served with a show cause letter and thereafter accorded a disciplinary hearing.

22. As regards the reliefs sought, she submitted that the uniform levy was deducted from the claimant's salary once after employment and was refundable after returning the uniform. She further contended that the claimant is not entitled to the said refund balance as he never returned the uniform upon the dismissal. She also contended that the claim for service pay is not available to the claimant because he admitted evidence that he is a member of the NSSF.

23. She opposed the claim for Ksh 2470 per month from November 2013-October 2014 being salary reduction and contended that the salary reduction was lawful because it was founded on the agreement between her and the claimant's union to safeguard loss of jobs due to an economic downturn. She further denied the claim for salary in lieu of notice contending that the claimant was dismissed summarily for misconduct.

24. As regards the claim for leave, she contended that the claimant had 16 days which were paid for by the cheque produced as "appendix 5". She further denied the claim for off days contending that the claim lacks particulars and evidence. Finally, she contended that the claimant was served with the certificate of service produced as "appendix 6". Therefore, she prayed for the suit to be dismissed with costs.

### **Issues for Determination**

25. There is no dispute that the claimant was employed by the respondent from December 2002 to 30/10/2014 when he was summarily dismissed. The issues for determination are: -

- a) Whether the dismissal was grounded on valid and fair reason.
- b) Whether fair procedure was followed
- c) Whether the reliefs sought ought to be granted.

### **Valid and Fair Reason**

26. Section 43 and 45 (2) of the Employment Act provides that in any legal proceeding challenging the termination of employment of an employee, the employer has the burden of proving that there existed a valid reason justifying the termination and in default the termination is unfair. In this case, the reasons for the termination cited in the dismissal letter dated 30/10/2014 were "sabotage of the company operations" and "refusing to acknowledge receipt of show cause letter by signing". The alleged sabotage was done by visiting various sites of the respondent's assignments to incite other employees to down their tools and attend an unauthorised meeting to protest salary reduction.

27. The claimant denied the alleged offence vide his reply to the show cause letter and also in his testimony herein and demanded to know the names of the witnesses who saw him commit the offence. The respondent did not call any eye witnesses or the claimant's supervisor. Also the respondent did not call the HR officer who allegedly witnessed the claimant refuse to sign the show cause letter. It follows, that the evidence by RW1 on the alleged reasons for the dismissal was nothing more than hearsay and therefore, I return that the respondent has failed to prove on a balance of probability that the reasons cited for the dismissal were valid and fair.

### **The Procedure Followed**

28. Section 41 of the Act requires that before dismissing an employee for misconduct, the employer shall explain the reasons to the employee in a language he understands and thereafter accord him a chance to air his defence. The said provision also requires that during the said proceedings the employee is entitled to be accompanied by a fellow employee or shop floor union official of his choice. The claimant denied that he was accorded any hearing after responding to the show cause letter, and even on his appeal after the dismissal.

29. Section 41 of the Employment Act, 2007 provides that: -

**"41. (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."**

30. RW1 contended that he accorded the claimant a hearing in presence of the shop steward. No minutes of the hearing were produced as an exhibit and the shop steward was not called as a witness to confirm that such a disciplinary hearing occurred on 30/10/2014 as alleged by RW1. I therefore return that the respondent has also failed to prove that the dismissal of the claimant was done following a fair procedure.

### **Reliefs**

31. In view of the finding herein, that the respondent has failed to prove that the dismissal was grounded on a valid reason and that fair procedure was followed, I make declaration that the dismissal was unfair, unlawful and unjustified as prayed. Accordingly, under section 49(1) of the Employment Act, I award the claimant 3-months' salary in lieu of notice plus 8-months' salary as compensation for the unjustified and unlawful dismissal. In awarding the said compensation, I have considered the claimant's long service of over 10 years.

32. The claim for service pay fails because the claimant admitted in evidence that he was a member of the NSSF. Under section 35(6) of the Employment Act, a beneficiary of the NSSF is disqualified from claiming service pay.

33. The claim for refund of salary reductions under the remedial agreement between the respondent and the claimant's union is dismissed

because the same was consensual and further sanctioned by the court.

34. The claim for leave for 2014 lacks particulars and as such I allow the 16 days admitted by the respondent. The claim for overtime also lacks particulars and evidence and is dismissed.

**Conclusion and Disposition**

35. I have found that the summary dismissal of the claimant was unfair, unlawful, and unjustified. I have further found that the claimant is entitled to some of the reliefs sought and I enter judgement for him as follows: -

a. Payment in lieu of notice	Ksh 49200
b. Compensation for unfair, and unjustified dismissal	Ksh 131200
c. Leave payment	<u>Ksh 10092.30</u>
<b>Total</b>	<b><u>Ksh 190492.30</u></b>

The said sum is subject to statutory deductions but in addition to costs plus interest at court rates from the date hereof.

**Dated, signed and delivered in open court at Nairobi this 29th day of April, 2020.**

**ONESMUS N. MAKAU**

**JUDGE**