



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 800 OF 2014

EVANS OMONDI NDONGA.....CLAIMANT

VERSUS

DILPACK (K) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 15th May 2014 stating that he was employed by the respondent from 28th November 2012 as a machine Operator and worked until March 2014 when he was told by his Supervisor not report back to work and denied terminal benefits. He therefore prayed for the following reliefs: -

- a. A declaration that the respondent's refusal and /or inordinate delay in recalling the claimant back to work amounts to constructive dismissal of the claimant's employment which dismissal was unfair and inhumane.
- b. A declaration that the claimant is entitled to payment of terminal dues and damages as prayed.
- c. An order for the respondent to pay the claimant his due terminal benefits and compensatory damages totaling to Ksh. 192,800 plus interest thereon.
- d. Cost of this suit plus interest thereon.

2. The respondent file defense on 27th October 2014 admitting that she employed the claimant from 28th November 2012 till 24th March 2014 when she terminated his employment contract. She however denied that the termination was unfair and averred that it was done on account of his negligent performance of his duties which led to loss of revenue totaling to Ksh. 89,528. She further averred that she followed a fair procedure before terminating the employment contract and even treated him leniently by terminating him by notice instead of summary dismissal under section 44(4) (c) of the employment Act. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 17th January 2019 when both parties gave evidence. However, after the hearing only the claimant filed written submissions.

Claimant's case

4. The claimant testified as CW1. He stated that he joined the respondent on 28th November 2012 as a machine operator earning Ksh. 33,000 per month. On 4th March 2014, he reported to work as usual in the evening shift and in the morning, Madam Stella instructed him over the phone to wait for her. By 9.00am she had not arrived and due to fatigue and hunger, he left.

5. At 2pm, he received a call from Mr. Yunus, the overall Production Manager telling him not to report to work in the evening. No reason was given for such instructions and as such he reported to work but he was prevented from entering by security guards. He called Mr. Yunus but the calls were not answered and he went home. Before then he had not been served with any warning letter nor had he been taken through any disciplinary hearing. He denied the minutes of disciplinary hearing allegedly held on 24th March 2014 filed by the respondent, and contended that they did not bear his signature.

6. He therefore prayed for the relief sought in the suit contending that although he was deducted NHIF and NSSF as per his pay slips, the same were never remitted to the relevant agencies. He further contended that he only went for few days leave as per the leave application dated 20th March 2013. He denied taking any leave as per the leave application form dated 30th October 2013 and disowned the signature thereon.

7. On cross examination, he denied ever seeing the termination letter dated 24th March 2014, minutes dated 24th March 2014 and the leave

application form dated 30th October 2013. However, he admitted that he knew how to operate the machine he was assigned. He explained that before starting any production work, he used to set the machine, check the ink and the pressure and thereafter produce a sample to confirm that it was in accordance with the order.

8. He admitted that on 4th March 2014, he was given order No. 0077 to print Fanta Blackcurrant 500ml and on 5th March 2014, he was told not to report back to work. He contended that he understood colour coding and denied that he caused a loss of Ksh. 89,028 to the respondent. He reiterated that he was not accorded any disciplinary hearing before the termination. He contended that on 5th March 2014, when he called Stella to inform her that Yunus had stopped him from reporting to work, she told him that there was a problem with Fanta printing work.

9. He reiterated that his leave application dated 30th October 2013 was unknown to him and contended that as per the leave application for 20th March 2013, he had 21 days and took only 4 and left 17 days. He maintained that he had 28 leave days outstanding. He denied that he was called to collect salary in lieu of notice and other dues and averred that he was dismissed via a phone call on 5th March 2014 and no certificate of service was given to him. He maintained that the termination of employment was unfair.

Defense case

10. M/s Stella Maundu, testified for the respondent as RW1. She stated that currently she is the respondent's Commercial Manager. She confirmed that the claimant was employed by the respondent as a printing Machine Operator from 2012 and he was competent in his job. His salary was Ksh. 33,000 per month.

11. She testified that on 4th March 2014, the claimant was assigned the work of printing labels for Fanta Blackcurrant 500ml, and that before starting the work, he was supposed to do colour matching and seek an okay from the Quality Controller. However, he never followed the said instructions but only did colour matching and proceeded to do the full job without seeking an okay from the Quality Controller.

12. She contended that the color standard came from Coca Cola, and the claimant was familiar with same because he had done the same job before. She contended that the machine was semi-automatic, but once adjusted the printing was automated. She further contended that the shade printed by the claimant was wrong, because it had a visible gear mark and there was ink of the eye mark. She contended that the ink on the eye mark meant that the client's machine would not operate on the label because it would not identify where to cut the label and such the product was rejected and the respondent lost revenue for the wasted 380,000 labels valued Ksh. 89,528.

13. She further testified that the claimant was called to a disciplinary hearing on 24th March 2014 in the company of another employee but he attended alone and after the hearing the claimant was dismissed and called to collect his dues. She contended that dues were computed including salary in lieu of notice and over time among others but the claimant never collected. In conclusion she stated that the claimant utilized all his leave days save for a few outstanding days.

14. On cross examination she contended that the claimant had done similar mistake before. She reiterated that the color mixing was semi-automated and relied on the minutes filed by the respondent as the proof that the claimant was accorded a hearing before the termination.

Claimant's submission

15. The claimant submitted that the reasons cited by the respondent for his dismissal was not true. He submitted that he did not come up with the formula for mixing colors and maintained that he acted on directions given. He submitted that RW1 confirmed in her evidence that Quality Control's okay was mandatory before he proceeded to print any work. Finally, he contended that the alleged poorly printed labels were not shown to him.

16. On the other hand, the claimant submitted that fair procedure was not followed because he was not accorded any hearing as provided by section 41 of the employment Act. He further relied on Esther **Wambui, Karago vs Palbina Travel & Tours limited [2014] e KLR** where the court held that the dismissal of the claimant was unfair because it was done without a valid reason and without following a fair procedure.

17. The claimant urged the court to find that the termination in the stated case was also unfair and proceeded to award him the reliefs set out in the claim.

Issues for determination

18. There is no dispute that the claimant was employed by the respondent as pleaded in the suit. The issues for determination are: -

- a. Whether he was dismissed via a phone on 5th March 2014 or by the letter dated 24th March 2015.
- b. Whether the termination was for a valid and fair reason.
- c. Whether a fair procedure was followed.
- d. Whether he is entitled to the reliefs sought.

Date and mode of termination

19. The claimant contended that he was dismissed verbally by Mr. Yunus on 5th March 2014 when he told him not report back to work that day in the evening. The respondent produced a termination letter dated 24th March 2014 which the claimant denied having been served with the same. After careful consideration of the evidence tendered, I find that the official separation was done by the respondent's letter dated 24th March 2014. In my view, by Mr. Yunus telling the claimant not to report back to work on 5th March 2014 did not per se amount to a termination because it could as well mean a suspension from work.

Reason for the termination

20. The termination letter stated the reason for the termination as negligent performance of duty which resulted to loss of revenue totaling to Ksh. 89,528. The same ground was reiterated in the defense herein and the testimony by the RW1. The claimant admitted that on 4th March 2014 he was assigned the work of printing order numbers 0077 being labels for Fanta Blackcurrant 500ml and contended that he did the job as instructed. The job was, however found to have been poorly done.

21. The claimant admitted that he was competent in the job. He further admitted that before doing the job, he was supposed to set the machine, check ink and pressure then produce a sample for the Quality Controller to confirm if it is okay before embarking on the mass production. In this case however, he did not follow the said procedure resulting to the erroneous production. He did not prove that he secured an okay from the quality controller.

22. Under section 44(4)(c) of the Employment Act, a summary dismissal is justified when: -

“an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature was his duty under his control, to have performed carefully and perfectly.”

23. Having considered all the facts of the case, I am satisfied that the respondent has proved on a balance of probability that the reason for terminating the claimant's contract of service was valid and fair within the meaning of section 44(4) (c) and 45 (2) (a)& (b) of the Employment Act.

The Procedure followed

24. The claimant contended that he was never summoned for any disciplinary hearing and as such the termination of his service was done without according him any chance to defend himself. However, the respondent maintained that she accorded the claimant hearing before the separation. RW1 contended that the claimant was invited to hearing by phone on 19th March 2014 but declined to attend. As a result, the hearing was rescheduled to 24th March 2014 when he attended alone despite being asked to come with another employee.

25. I have carefully considered the minutes produced as the evidence of the disciplinary hearing. The minutes have a place for signing by the claimant which is unsigned. The claimant denied ever seeing the minutes. The minutes are in a narrative form. They give the story of the employer only with no representation recorded from the claimant. The court appreciates that disciplinary proceedings at the work place are not equal court proceedings.

26. However, this court does not take the minutes produced by the respondent as reflection of genuine proceeding of a disciplinary hearing conducted in accordance with the section 41 of the Employment Act. The said provision requires that the employee shall be invited to the hearing in the company of another employee; that the employer shall explain the reason (charge) to the employee; that thereafter the employee and his companion are allowed to air their representation; and finally the employer considered the representation made before the termination is declined.

27. RW1 alleged that the claimant was summoned to the hearing by phone. No evidence of such calls was produced nor did RW1 state the name of the person who made the call and the date when the call was made. Secondly the proceedings do not reflect what representations were made by the claimant. It follows that the claimant was not summoned to any hearing and even if that was done he was not given a chance to air his defense. Consequently, I return that the termination was done without according the claimant a fair hearing and as such fair procedure was not followed as required by section 45 2 (c) of the Employment Act.

Reliefs

28. In view of the finding that the termination of the claimant's employment was done without following a fair procedure, I make declaration that the termination was unfair and the claimant is entitled to damages and terminal dues.

29. Under section 49(1) of the employment Act, I award the claimant one month salary in lieu of notice plus 2 months' salary compensation for unfair termination. In awarding the said compensation, I have considered the short period of service by the claimant and also the fact that he contributed to the termination through misconduct.

30. The claim for service pay fails because the claimant was a member of NSSF. Although he alleged that his deductions for NSSF and NHIF were not remitted to the relevant agencies, he produced no evidence like NSSF statements to prove the alleged non- remittance.

31. The claim for accrued leave is granted. The respondent produced two leave application forms dated 20th March 2013 and 30th October 2013. The claimant admitted that he signed the application dated 20th March 2013 for 4 leave days but denied the other one. I agree with him that the leave form dated 30th October 2013 was not signed by him and as such it is not authentic.

32. The claimant worked from 28th November 2012 to 24th March 2014

equating to 18 months . Under section 28 of the said at, an employee is entitled to 1.75 leave days pe month, hene the claimatn eaned 28 leae days and spent 4 days. Consequently, I award him Kshs. 33,000 x24/26 = Kshs. 30,461.55.

Conclusion and dispostion.

ag. I have found that the termination of the claimant's services was done without following a fair procedure and as such it was unfair within the meaning of section 45 of the Employment Act. I have furhter found that he is entitled to some of the reliefs sought. Consequently, I enter judgment for the claimant as follows:

ah. Notice.....Kshs. 33,000

ai. Compensation.....Ksh.66,000

aj. Leave.....Kshs.30,461.55

Total.....Kshs. 129,461.55

The said amount is subject to statutory deductions,but in addtion to costs and 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