



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.461 OF 2016

CONSOLIDATED WITH

CAUSE NO.463 OF 2016

CAUSE NO.493 OF 2016

CAUSE NO.462 OF 2016

CAUSE NO.498 OF 2016

JAMES GITAU WAWERU.....CLAIMANT (461)

ANTHONY KIRWA.....CLAIMANT (462)

ISAAC NYAMOSI NYANGAO.....CLAIMANT (463)

JOSPHAT KIARIES MUGO.....CLAIMANT (498)

VERSUS

CHINA RAILWAY NO.10 ENGINEERING GROUP COMPANY.... RESPONDENT

JUDGEMENT

The suits herein were consolidated under the provisions of Rule 24 of the Employment and Labour Relations (Procedure) Rules for hearing and disposal as the same relates to the same respondent and similar claims.

Under the Order for consolidation **Cause No.497 of 2016** was included but the details for this claimant were not included. This file is hereby removed and shall be addressed separately.

The respondent entered appearance and filed defence on 24th May, 2017 the hearing dates were allocated in court by consent on 8th October, 2019. On the due date, 4th February, 2020 both parties attended and time allocated for 12 noon but the respondent did not attend.

Where the court has issued hearing directions and a party fails to attend, the court is allowed to proceed as directed. See **Moses Mwangi Kimani versus Shammi Kanjirapparambil Thomas & 2 others [2014] eKLR;**

Claim

Joseph (Josphat?)Kiarie Mugo testified for and on behalf of all the claimants.

Joseph Kiarie Mugo was employed on 15th September, 2015 as a Tipper driver until 13th October, 2016 earning Ksh.850 per day which was increased to Ksh.973 per day when he was accused of high fuel consumption and wastage of project materials without proof or being allowed an opportunity for a hearing to defend himself and hence this led to unfair termination of employment and seek the following dues;

a) Salary for 13 days worked from 1st to 13th October, 2016 Ksh.13,572;

b) Underpayment for 11 months Ksh.64,020;

- c) Underpayment for 3 months Ksh.6,390;
- d) House allowance Ksh.60,576;
- e) Salary for 1680 hours overtime worked Ksh.141,120;
- f) 3 months' notice pay Ksh.93,960;
- g) General damages for unlawful and wrongful termination;
- h) Certificate of service.

In defence to Joseph (Josphat) Kiarie Mugo the respondent's case is that the claimant was not diligent in his duties and was issued with 3 warnings. His employment was terminated due to the high consumption of diesel and waste of material for the project. He was not entitled to notice pay as his case terminated due to summary dismissal but he declined to collect his terminal dues and the claims made are without merit and should be dismissed with costs.

The respondent filed the three warning notices issued to the claimant.

In the letter terminating employment dated 13th October, 2016 the respondents noted that the claimant as a tipper driver was found from the records to be in high consumption of diesel and waste material for the project, he had been issued with three warnings and this resulted in his summary dismissal.

It is trite that, even where the employer is justified in effecting summary dismissal for gross misconduct, section 44 of the Employment Act, 2007 (the Act) requires adherence to the provisions of section 41(2) of the Act where the employee must be given a hearing whatever the reason(s) leading to termination of employment. The claimant was not allowed an opportunity to defend himself despite the three warnings issued. There is a statutory obligation to hear the employee before effecting summary dismissal where the misconduct is not otherwise admitted.

In this regard, termination of employment was procedurally unfair.

On the claims made and the records filed, there is no evidence that the claimant was paid for 13 days worked in September, 2016 and this is due based on the last daily wage paid all at Ksh.12,649.

Notice pay is due following unprocedural termination of employment at Ksh.25,298.

On the claims for underpayment at 11 months and 3 months, the basis of these claims is not pleaded and or given a basis. As a tipper driver, the due daily minimum wage at September, 2016 was ksh.744.10 whereas the claimant was last paid ksh.973 per day over and above the minimum wage.

On the claim for house allowance, with the daily wage paid above the legal minimum each day, to pay for a house allowance would be unjust enrichment.

The overtime hours though asserted as 1680 hours the basis is not given. The description of the work the claimant did are not indicated to justify the claim for overtime pay.

In a case for unfair termination of employment, the remedy due under section 49 of the Act is not general damages. Payment of damages is not due where there is no constitutional or statutory violations. The lapse in procedure is not addressed by a claim for payment of general damages.

Certificate of service shall be issued accordingly.

The claimant is awarded Notice pay at ksh.25, 298 and pay for 13 days at ksh.12,649.

James Waweru Gitau was employed as a Mixer operator from 22nd May, 2015 working at Njoro Turn off construction site and earning ksh.650 per day for 14 months. The daily wage was increased to ksh.800 per day and then to Ksh.973 per day. The terms of employment were oral.

Claimants worked until 12th October, 2016 when employment was terminated on the basis that there was damage to the project motor vehicle. There was no truth in these allegations, the claimant was not allowed a hearing to defend himself and this led to unfair termination of employment and is seeking the payment of the following dues;

- a) Underpayments for 14 months ksh.163,800;
- b) Underpayment for 4 months Ksh.8,040;

- c) 3 months' notice pay ksh.93,600;
- d) House allowance at 20% Ksh.72,252;
- e) General damages Ksh.374,400; and
- f) Certificate of service.

In defence to James Waweru Gitau's case the respondent's case is that he was employed on 22nd May, 2015 as a Mixer operator working at Njoro turn off construction site where he was issued with four (4) warning letters relating to damage or project vehicle assigned to him and which led to summary dismissal for wilful damage of project property.

The defence is also that on 28th September, 2016 the claimant accepted liability and paid the respondent Ksh.21,000 with regard to damage he had occasioned the respondent's property and the claims made are without basis and should be dismissed with costs.

The respondent filed the work records with regard to the claimant.

Summary dismissal of an employee by the employer is allowed under the provisions of section 44(3) and (4) of the Employment Act, 2007 particularly where the employee admits to putting the employer's property to waste and is found to be negligent occasioning the employer loss and damage. Section 44(4)(c) that;

(c) an employee wilfully 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 it was his duty, under his contract, to have performed carefully and properly;

By letter dated 28th September, 2016 the claimant admitted to damaging the respondent's motor vehicle Registration No.KBQ 690C and was sanctioned to pay Ksh.21,000 for the damage.

Such warranted summary dismissal.

On the claims made for underpayment for 14 and 4 months, the claimant has not explained how these underpayments arose for a total of 18 months and the breakdown for the court to appreciate how the assessments were done or arose.

From the pleadings the claimant's case was that he was earning Ksh.650 per day which increased to Ksh.800 and then Ksh.973 per day. The applicable timelines for such payments are not addressed.

A mixer operator working in Njoro area in September, 2016 under the Wage Orders was earning Ksh.655.80 daily wage. Where the claimant last earned Ksh.973 per day, this was way above the minimum wage applicable to his position. there is no underpayment.

On the claim for 3 months' notice pay, this is not due under the provisions of section 35 of the Act and on the basis summary dismissal was justified.

On the claim for payment of house allowance at 20%, on the paid daily wages, this is over and above the minimum wage due and on the due 15% house allowance, the claimant was adequately compensated.

On the claim for general damages, this case does not stand out as one due for such a remedy. There is no constitutional or statutory violations cited for the court to be invited to assess damages.

The respondent has offered to issue the Certificate of Service.

Isaac Nyamosi Nyanga'o was employed as a Steel Mixer on 15th March, 2016 earning ksh.400 per day until 10th September, 2016 when he was summarily dismissed on alleged absence from work without lawful authority.

The claim is that the claimant fell sick and asked for some days off duty to seek medical attention which permission was granted but when he reported back after medication he was shocked to learn that he had been summarily dismissed through letter dated 10th September, 2016. That the reasons given were baseless as he had been absent from work for a lawful cause and the termination of employment was unfair and he is claiming the following;

- a) Underpayments for 180 days ksh.24,840;
- b) House allowance Ksh.11,880;
- c) 3 months' notice pay Ksh.48,420;
- d) General damages Ksh.193,680;
- e) Certificate of service.

In defence to the claims by Isaac Nyamosi Nyanga'o the respondent's case is that upon employment on 15th March, 2016 as a steel mixer operator he was deployed at Njoro Turn off construction site but he was not diligent in his duties and was found drunk and sleeping on duty which amounted to gross misconduct leading to summary dismissal. The claimant had been issued with several warning letters due to misconduct.

The defence is also that the allegations that the claimant reported to work while on medication is not true, there were no documents given to prove such sickness or any report that the claimant had been sick and the noted gross misconduct justified the summary dismissal. The claims made are without justification and should be dismissed with costs.

No work records were filed.

The claimant on the one hand asserts that his employment was terminated following his sickness and when he was found under medication while at work. He has not produced any record of indisposition, sickness or requirement from a medical practitioner to be on medication. Where the claimant attended for treatment and reported to work while still under treatment, section 31 and 34 of the Act gave him a right to seek medical attention and upon submissions of the requisite certifications be allowed out of work while recuperating. See In **BIFU versus Barclays Bank of Kenya Ltd & another [2014] eKLR**;

Sickness is a serious occurrence that can happen suddenly to any employee while at work or outside the workplace the is likely to affect the work and duties of such an employees. When such sickness happens, section 30 of the Act apply and is important to quote here; ...

... even in a case of sickness, an affected employee has a duty that is mandatory to bring to the attention of the employer as soon as is reasonably practicable of any absence due to sickness or illness. Where the absence is caused by sickness or illness such an employee is required to produce a certificate as to the medical condition from a qualified medical practitioner. This a find a fair and basic requirement of the employee as indeed where one is sick or ill and unable to attend work, then as a matter of good faith, due diligence and good practice, such an employee should attend to the subject issue causing sickness or illness and have a certification by a medical practitioner. As apart from such sick off there are other compassionate leave and annual leave days that an employee can take to commiserate if there is persistence in sickness or illness that is not addressed by a medical practitioner.

In this regard the claimant has not complied.

On the other hand the respondent's case is that the claimant was found drunk and asleep while at work. This being gross misconduct there was summary dismissal.

Being found asleep and drunk at work there are cases where summary dismissal is allowed. The defence by the claimant that he was under medication following sickness as analysed above is found wanting and the defence found plausible on a balance of probabilities. The summary dismissal of the claimant is found justified.

On the claims made, the alleged underpayments for 180 days is not outlined. The claimant as a steel fixer operator was paid a wage which was over and above the due minimum wage. To claim beyond such wage is without justification.

Notice pay and general damages are not due in a case where summary dismissal is found justified.

Certificate of service is due.

Anthony Kirwa was employed in May, 2015 as an excavator Operator earning a gross wage of ksh.35,771 per month until 10th September, 2016 when he was summarily dismissed over alleged theft and gross misconduct. that the summary dismissal was without the claimant being given an opportunity to defend himself contrary to the rules of natural justice and this led to wrongful termination of employment and is claiming the following;

- a) Unpaid salary for August, 2016 Ksh.37,771;
- b) Unpaid salary for 10 days in September, 2016 Ksh.11,923;
- c) Notice for 3 moths ksh.107,313;
- d) General damages for unlawful termination; and
- e) Certificate of service.

In defence to Anthony Kirwa's claims the respondent's case is that upon his employment he was dismissed on the grounds of theft of company fuel and misconduct of assaulting a senior staff at the site. The claimant had been warned on three (3) occasions due to various cases of misconduct . the reasons for the summary dismissal were stated in the letter dated 10th September, 2016 and warranted summary dismissal as stealing f fuel and assault to a senior officer is criminal conduct. These matters were reported to Baraka Police station and as such there was no need of hearing pending a trial in court. there is no case of wrongful termination of employment and the claims made are not justified and should be dismissed.

The respondent is willing to issue the claimant with a Certificate of Service.

The respondent filed work records with several warning letters issued to the claimant.

By letter dated 10th September, 2016 the respondent summarily dismissed the claimant from his employment on the grounds that he had been issued with several warning letters relating to loss of fuel of the machine he was assigned as an excavator operator. That on 8th September, 2016 he confronted his supervisor when he was caught trying to steal fuel a matter which was reported to the police station but he engaged his supervisor in a physical fight, snatched his phone and this led to summary dismissal.

The reasons leading to summary dismissal of the claimant have not been challenged save that he claims he was not allowed a defence to urge his case.

In the defence, the respondent's case is that the claimant was not allowed a defence as the matter was reported to the police and he filed the instant suit. This was a serious lapse as even where the employee has grossly misconducted himself, section 41(2) of the Act requires such an employee be taken through the due process of the law particular internal disciplinary hearing by the employer at the shop floor.

In **Regent Management Limited versus Wilberforce Ojiambo Oundo [2018] eKLR** the Court of Appeal held that;

It is also settled that the institution of criminal proceedings is not a bar to civil proceedings on similar facts. See this Court's decision in Geoffrey Kiragu Njogu vs. Public Service Commission & 2 others [2015] eKLR. With the foregoing in mind we concur with the majority decision of this Court in Attorney General & another vs. Andrew Maina Githinji & another [2016] eKLR. ... any criminal proceedings that may be mounted concurrently with internal disciplinary processes that may culminate in the impugned dismissal before challenging such a dismissal. Consequently, we find that the learned Judge did not err in entertaining and determining the respondent's suit during the pendency of the criminal proceedings.

The rationale is aptly captured in the case of **Thomas B. Miningwo versus Egerton University** that;

The purposes and objectives of a criminal trial are different from disciplinary proceedings within the employment relationship. Different legal principles apply.

In this case there was a procedural lapse. Even where the respondent had genuine and valid grounds necessitating summary dismissal of the claimant, the mandatory provisions of section 41 of the Act were not adhered to.

Notice pay is due at Ksh.37,771.

On the claim for general damages, such claim is not similar to remedies available to an employee found to have been unfair termination in his employment in the court reading of section 45 and 49 of the Act. such remedy must be based on the provisions of section 12 of the Employment and Labour Relations Court Act, 2011 which is not the case here.

On the claim for unpaid salary for August, 2016 and for 10 days worked in September, 2016 there is no evidence of payment. This is not addressed in the records filed by the respondent. for work done, the claimant is entitled to pay and is awarded Ksh.37,771 and 11,923 respectively.

Certificate of service shall be issued accordingly.

For the claims herein, the court orders as follows;

- a) **JAMES GITAU WAWERU, the claimant in Cause No.461 of 2016 his claims are hereby dismissed;**
- b) **ANTHONY KIRWA, the claimant in Cause No. 462 of 2016 he is awarded notice pay at Ksh.37,771; and pay for days worked Ksh49,694.**
- c) **ISAAC NYAMOSI NYANGAO, the claimant in Cause No.463 of 2016 his claim is dismissed;**
- d) **JOSEPH (JOSPHAT) KIARIE MUGO, the claimant in Cause No.498 of 2016 is awarded Notice pay at ksh.25, 298 and pay for 13 days at ksh.12,649;**
- e) **Each claimant shall be issued with a certificate of service;**
- f) **Each party shall bear own costs.**

Dated and delivered electronically this 27 April, 2020 at 1200 hours.

M. MBARU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in reference of the directions issued by his Lordship the Chief Justice on 15th March, 2020 and on given consent, the Judgement herein is delivered via e – mail;

Issued electronically this 27^h April, 2020.

M. MBARU

JUDGE