



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 475 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ALEX MWANGI IRUNGU.....CLAIMANT

VERSUS

SAFARICOM LIMITED.....RESPONDENT

JUDGEMENT

The Claimant, Alex Mwangi Irungu filed this claim vide a Statement of Claim dated 25th March 2015 for unlawful dismissal from employment by Respondent, Safaricom Limited. He avers he was employed by the Respondent vide a Contract of Employment dated 8th November 2007 as a Customer Care Representative and that during his employment, he loyally and reliably performed his duties with full responsibility and was without blemish. That he had been promoted from dealing with prepaid customers to dealing with Postpaid (Line 200) customers. That he was also one of the pioneers of the MPesa Corporate Service. Further, that he was once chosen by the Respondent to represent it in a customer awareness program hosted by Inooro FM which is one of the vernacular stations in the country.

He contends that on or about September 2014, the Respondent wrongly, falsely and maliciously accused him of using Not Ready functions NR 711 and NR 712 without authority to prevent calls from being routed to him and was further accused of manipulating working tools and having an unwilling attitude to work. He contends that at no time during his training or the period of his employment did the Respondent explain to him that the Not Ready functions NR 711 and 712 were unauthorised. That since the use of the Not Ready Functions could be detected by his immediate supervisor, the said supervisor should have notified him that the same was unauthorised. He thus denies using it to avoid work at any time but rather for consultation purposes.

The Claimant avers that on 14th October 2014, the Respondent conducted a disciplinary hearing where he was informed of a report showing he had lost the Respondent 37.15 person hours in the months of April and May 2014 which the Respondent translated as five working days. That the said report was never availed to him for scrutiny before or after the hearing and had allegedly been pulled out of the system. That the Respondent summarily dismissed him by a letter dated 5th December 2014 on the ground that he had neglected to perform his work. He avers that due process as required by the law was not followed before termination, with the said disciplinary process being marred with intimidation. That the summary dismissal was therefore unlawful since the Respondent violated the procedural law by:

- a. Failing to particularize the specific instances that the Claimant had wasted the Respondent's time.
- b. Failing to afford the Claimant a proper opportunity to present his defence in view of the non-particularized and non-specific allegations.
- c. Failing to avail the investigation report showing that the Claimant had neglected to perform his duties.

He prays for judgment and orders against the Respondent as follows:

- a) *A declaration that the dismissal of the Claimant by the Respondent is unfair, unjust and unlawful.*
- b) *Pay in lieu of reasonable notice at Kshs.97,000*
- c) *Kshs.1,164,000 as 12 months' compensation for unlawful dismissal.*
- d) *Payment for 12 unpaid leave days.*

e) Payment for the 5 days that were unlawfully deducted.

f) Costs of the claim.

The Claimant further filed his Witness Statement dated 17th October 2018 stating that he was a top performer and had earned salary increments and bonuses for good performance. He annexed a Certificate and letters to that effect in the Claimant's Further Documents dated 17th October 2018. He states that his last role at the Respondent Company was Customer Experience Executive and that his last monthly gross salary was Kshs.97,000. He states that there was no clear training nor a distinction made to him by the Respondent as to the different NR functions. That he thus engaged the default NR function which is what he and other employees knew should be engaged whenever consultations and escalations were to be made.

He states that he clearly gave his explanation in the email of 19th September 2014 annexed in the **Respondent's list and bundle of documents dated 15th October 2018**. That from the way he was intimidated and threatened at the disciplinary hearing, he did not bother appealing. He denies admitting at the hearing to having engaged in unauthorised use of the NR functions. He states that he is aware the problem was with the configuration of NR function whose use the company later stopped. The Claimant feels he was treated in a high handed manner after working for the Respondent for over seven years and that he went on to be unemployed for the next two and half years which led to his young family suffering.

The Respondent filed its Response to Statement of Defence on 15th May 2015 admitting to have employed the Claimant. It avers that the disciplinary hearing was held on 14th October 2014 following investigations by its Ethics and Compliance team on unauthorized use of Not Ready functions NR 711 and NR 712 by the claimant. That the claimant admitted using these codes despite his knowledge that they were unauthorized. That the Claimant further confirmed he was aware that engaging NR 712 would have no effect on one's adherence score as the unavailability to answer calls was likely to be unnoticed. It contends that the Claimant's actions impacted negatively on Call Centre performance. That the Claimant wilfully neglected to perform work as stipulated under his contract of employment.

The respondent contends that the summary dismissal was lawful since it was acting reasonably. That it carried out proper investigations using the relevant procedures, gave the Claimant reasons as to why he was being dismissed and paid him his final dues in accordance with the terms of his contract. The Respondent avers that the Claimant was accorded a fair opportunity to be heard and also given a chance to appeal to appeals@safaricom.co.ke within ten (10) days of receipt of his dismissal letter. It denies that the Claimant is entitled to the reliefs sought in the statement of claim and prays that the claim be dismissed with costs.

The Respondent also filed a Witness Statement dated 15th October 2018 signed by its Human Resource Manager, Odhiambo Ooko who states that the "Not Ready" status (NR 711 and NR 712) is among such statuses which the Claimant was trained on prior to commencement of his employment with the Respondent. That on or about 16th September 2014, the Respondent's Call Centre Operation department discovered unauthorized engagement of the said NR 711 and NR 712 status by its Customer Experience Executives and escalated a request to the Respondent's Ethics & Compliance department for further investigations. That the investigations revealed that during the months of April and May 2014, the Claimant without authorization deliberately unplugged his headset equipment from his work computer thereby automatically activating the NR 711 status and that on various other occasions he keyed in the NR 712 status thereby preventing calls from being routed to him. That the Respondent found the cumulative duration of 37.15 person-hours translating to approximately five (5) working days of no work, to be tantamount to absence from work without authority or leave.

He states that on or about 9th October 2014, the Respondent's Human Resource Operations department summoned the Claimant for a disciplinary hearing and informed him of his choice to be accompanied by a colleague to the hearing. That the Claimant was informed of his right and avenue to appeal against the decision to summarily terminate his employment but which right he did not exercise.

On the hearing date Mr. Odhiambo Ooko was not available and the respondent called DAMEL MWENJA NDABA, a Senior Manager, litigation, who testified on its behalf adopting the averments in Mr. Odeko's witness statement.

Claimant's Submissions

The Claimant submits that the Respondent did not avail evidence to demonstrate it had other functions to be used for consultation or escalation of queries by line 200 employees in addition to the NR function or evidence showing it had trained employees on the use of the NR function. He urges this court to take judicial notice of the fact that the Respondent is an established and profitable employer that would have easily availed tangible evidence of the same. He emphasizes that his high use of the NR function was only for the months of April and May 2014 when he had been moved to the line 200 skillet and which demonstrates that having been away from the line 200 skillet for 2 years, he needed to consult or escalate issues more in the initial stages.

He submits that the Respondent was punishing employees for its own flawed system and was engaged in unfair labour practices of overworking an employee and then terminating him on the ground of poor performance. That **RW1** conceded in cross-examination that the use of the NR function when one went on a bathroom break would make it appear like an employee was not at work. That the Respondent upon realising that the system was flawed, decided to alter it and thus the reason for terminating his employment cannot be said to have been valid, fair and just in the circumstances. The Claimant relies on the case of **Grace Gacheri Muruthi v Kenya Literature Bureau** where the court stated that:

"To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance

management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."

It is further submitted by the Claimant that the disciplinary process was a cosmetic procedure with a pre-determined end result which is the reason why the *show cause letter* at **page 14 of the Respondent's documents** was issued in September 2014 before the *investigation report* which was prepared in October 2014. He submits that the Respondent also failed to avail before the Court a record or minutes of the disciplinary hearing to controvert his assertions. That the Respondent therefore failed on the ground of procedural fairness as required by *inter alia* **Section 41 of the Employment Act**. The Claimant submits that the Respondent did not controvert his claim for 12 untaken leave days in his final year of employment by way of records.

Respondents' Submissions

The Respondent submits that owing to the nature of call centre representatives, their performance is measured by the number of calls picked, the quality of calls, and the number of hours served. That their availability to pick and attend to calls is therefore critical. That RW1 testified that during shift hours, the Representatives have designated break periods being one hour lunch break and a 15 minutes break and that if a representative is not on break, they ought to attend to the Respondent's customers' calls routed to them.

It submits that the Claimant states at paragraph 35 of his witness statement that he continued working until 10th December 2014. That it was during this period that it was considering the outcome of the disciplinary hearing. That instead of the Claimant exercising his right to appeal as was advised in the letter of summary dismissal, he brought this suit. That it is he who thus flouted procedure. That the respondent has throughout the course of dealing with the Claimant's matter followed due procedure and subjected him to fair practice and it cites the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** where Mbaru J. held:

"Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical Incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow (or an appeal to such an employee within the Internal disputes resolution mechanism and with due application of the provisions of section 5(7)(c) of the Employment Act. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only."

It is submitted by the Respondent that the Claimant admitted in his own email dated 19th September 2014 that one required approval before engaging the NR function. That he further admitted having been advised by his Team Manager that they were not expected to engage the said NR status for escalations. That the Claimant ought to have presented valid reasons as to why he should be exempted from attending to calls without his performance scores being affected but instead acted on his own volition. That a perusal of the Claimant's said email shows that he was fully aware of the functionality of the NR 711 and 712, how and when to engage it and the effects of engaging it to wit, that it would prevent calls from being routed to him without affecting his performance scores.

The Respondent submits that NR 711 and 712 functionalities were not flawed. That the Claimant ought to have told the court the nature of the supposed consultation that warranted him engaging the NR function. That due to its abusive use by the Claimant and others found culpable, the Respondent had to take steps to prevent its further abuse. That RW1 confirmed that the system was not faulty and never had a malfunction of any kind. It relies on the case of **Judicial Service Commission v Gladys Boss Shollei and Another [2014] eKLR** where P.O. Kiage JA, agreed with the decision of the South African Labour Court in **Nampak Corrugated Wapevjlle v Khoza (Ja 14/98) [1998] Zalac 24** in which Ngcobo JA stated;

"The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction composed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it could have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.

...There is a band of reasonableness with which one employer may reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him."

That it found the Claimant's actions to be of such a magnitude and that the loss of 5 working days was inexcusable and warranted dismissal. That the Claimant's termination was procedurally and substantially fair and his prayer for compensation and notice pay ought to fail. That he was paid all his terminal dues upon dismissal.

Analysis and Determination

The first issue for determination is whether the Claimant was unlawfully and unfairly dismissed from employment by the Respondent. The second issue for determination is whether the Claimant is entitled to the reliefs sought.

In the case of **Samsung Electronics East Africa Ltd v K M [2017] eKLR** the Court observed that:

"29. In a claim such as this, the burden of proving there was an unfair termination of employment or wrongful dismissal rests on

the employee, while the burden of justifying the grounds for the termination of employment rests on the employer.

See Section 47(5) of the Employment Act. Whether or not a termination is considered fair will depend on whether the reason(s) for termination and the procedure for dismissal was fair. See CFC Stanbic Bank Limited vs. Danson Mwashako Mwakuwona [2015] eKLR...”

Under **Section 45 of the Employment Act**, the employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure as under **Section 41 of the Employment Act**. In the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**, the court held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. In this case, the Claimant has admitted attending a disciplinary hearing but contends that it was a pre-determined exercise while the Respondent has submitted that it adhered to both procedural and substantive fairness in dismissing the Claimant. However, the Respondent did not tender before court the Minutes of the disciplinary hearing.

Section 107 of the Evidence Act provides that whoever asserts the existence of facts must prove those facts exist and so the burden of proof lies on that person. **Section 108 of the Evidence Act** further provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. On proof of a particular fact, **Section 109 of the Evidence Act** states that such proof lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In this case, the burden of proof of the fact that the Claimant’s termination was warranted lies on the Respondent. I do find that there was valid reason to dismiss the claimant. I further find that the procedure was in accordance with Section 41 of the Employment Act.

I however fault the respondent for taking so long to deal with the issue from April to September 2014. I have also noted from the Investigation report on NOT READY STATUS (NR711 and 712) that there was a system issue which the report recommended to be fixed. Both the claimant and RW1 confirmed that the two functionalities were later withdrawn. From the claimant’s explanation on the use of NR711 and 712 and from the responses of all other employees who are named in the report, it is apparent that the respondent had not properly clarified the use of the two functionalities to the employees as many of them, the claimant included, explained that they did not think it would affect their performance scores.

It is for these reasons that I would reduce the summary dismissal to normal termination. I also reverse the deduction of the 5 working days from the claimant’s terminal dues as he was not absent from work on those days in the manner provided under Section 19(1)(c) of the Employment Act for authorised deductions. The same would amount to double jeopardy as the claimant was already punished for the same by losing his job.

The claimant would thus be entitled to notice and other terminal benefits.

There shall be no orders for costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JUNE 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE