



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2296 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JAMAL AKBARALI HUSSEIN.....CLAIMANT

VERSUS

BOBMIL INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

Vide his Statement of Claim filed in Court on 23rd December, 2015, the Claimant avers that his employment was unfairly and unlawfully terminated by the Respondent on 8th October, 2015 without being accorded an opportunity to respond to the allegations against him.

Aggrieved by the decision to terminate his employment the Claimant filed the instant Claim seeking for the following reliefs:-

- i. A declaration that the dismissal of the Claimant from employment was unfair.
- ii. Unpaid dues of Kshs.13,333
- iii. Damages of Kshs.480,000 for unfair termination.
- iv. Costs of the suit.

The Respondent in its Memorandum of Response filed in Court on 21st March, 2016, admits engaging the Claimant in the position of Supervisor – Dispatch Polythene Production with effect from 14th October, 2014 a position he held until 8th October, 2015 when his services were summarily terminated.

The Respondent avers that there were instances in the course of the Claimant's employment when he was consistently arrogant and disrespectful to his superiors prompting it to issue several warning letters. That on 18th July 2015, the respondent demanded a written apology from the Claimant who apologised and promised to change.

The Respondent contends that the termination of the Claimant's employment was lawful and procedural as it followed due process as set out in the Employment Act and his employment contract.

The Respondent further contended that the Claimant was paid all his terminal dues at the time of separation and therefore there is no claim against it.

It is on the basis of the foregoing that the Respondent avers that the instant Claim is devoid of merit and urges this Court to dismiss the same in its entirety with costs to the Respondent.

Evidence

The claim was heard on 30th October 2019 and 4th February 2020 with the Claimant testifying on his behalf and the Respondent calling two witnesses to testify on its behalf.

Claimant's Case

In his evidence the Claimant adopted his witness statement filed in Court on 23rd December 2015 as his evidence in chief. In his statement he reiterates the averments made in the Statement of Claim.

The claimant testified that he was issued with a transfer letter dated 19th June 2015, which contained allegations against him, which he maintained were not true. He testified that on inquiry he was issued with the suspension letter dated 19th September 2015.

The claimant further testified that he was not accorded a hearing prior to his termination and that his termination was unlawful and unfair. He therefore urged this Court to allow his claim as prayed.

On cross examination, the claimant confirmed having received the letter of internal transfer and that the reason as stated in the transfer letter was inconsistencies in his duties, which allegations he maintained were not true.

The claimant stated that he was not accorded a disciplinary hearing and was asked to sign in receipt to his termination letter on 8th October 2015. He further confirmed receiving his terminal dues comprising of 1 month's salary in lieu of notice, salary up to 8th October 2015 and leave days earned. He signed a discharge voucher.

On further cross examination the claimant stated that his September 2015 salary was deducted for the period he was under suspension and therefore sought for payment of the amount.

He stated that the apology letter dated 8th July 2015 was done only after the Respondent insisted that the same be done. He insisted that he was not drunk and in fact worked the entire day without any complaint being raised by the Respondent on his work on the material day.

On re-examination the claimant testified that there was no disciplinary hearing as alleged by the Respondent on 7th October 2015 and that he was only called and issued with a termination letter.

Respondent's Case

RW1, DAVID WEKESA, the Respondent's Human Resource Manager, adopted his witness statement dated 30th May 2018 and filed on 4th June, 2018 as his evidence in chief. In the statement RW1 stated that the Claimant on 18th July, 2015 reported to work drunk and was warned against such behaviour and was required to make an apology in writing, which he did.

RW1 further stated that the Claimant was invited for a disciplinary hearing on 19th September 2015 following his failure to follow lawful direction by signing in acknowledgment of the Respondent's letter of internal transfer.

RW1 testified that the Claimant did attend a disciplinary meeting in the company of two witnesses' one Jackson Mailu and Michael Ngui. He further maintained that the Claimant refused to respond to any of the queries raised at the disciplinary hearing and as a result he was suspended until 5th October 2015.

RW1 stated that upon resuming duty, the Claimant was invited to yet another disciplinary hearing on 7th October, 2015, which invite he did honour and attended the hearing in the company of the same two witnesses. RW1 further stated that the Claimant failed to respond to any of the queries raised and that as a result he was summarily dismissed in accordance with the provisions of Section 44(1)(d) of the Employment Act and Clause 19 (e) of the CBA. He further confirmed that the Claimant was paid all his terminal dues at the time of his separation with the Respondent.

RW1 urged this Court to dismiss the Claim in its entirety with costs to the Respondent.

On cross examination RW1 confirmed that the Claimant's salary for September as paid did not include the suspension period.

RW2, CHARLES MAKANA, a Supervisor Labour Outsourcing Section with the Respondent similarly adopted his witness statement dated 30th May 2018 and filed on 4th June 2018 as his evidence in chief wherein he reiterates the averments made in the Memorandum of Response.

On cross examination RW2 confirmed that the Claimant was given an opportunity to make his representation on two separate disciplinary meetings and that his termination was therefore lawful and justified.

RW2 further confirmed that the Claimant was paid all his dues at the time of separation and that he has no claim as against the Respondent.

Submissions by the Parties

The Claimant submitted that his employment with the Respondent was unlawfully and unfairly terminated without notice, justification or following procedure as provided under the Employment Act. That the termination was unfair and unlawful.

The Claimant further submitted that the Respondent failed to establish that it accorded him a disciplinary hearing prior to his termination. He maintained that the discrepancies between the evidence adduced in Court by the Respondent's witnesses and the documents they relied on was a clear indication that no disciplinary hearing took place.

The Claimant urged this Court to find that his termination was unfair, unjust and inequitable as the Respondent failed to comply with the mandatory statutory requirements as provided under sections 41 and 45 of the Employment Act, 2007.

The Claimant further urged this Court to find in his favour and allow his Claim in terms of the reliefs sought therein relying on the provisions of Section 49 and 50 of the Employment Act, 2007.

Respondent's Submissions

The Respondent submitted that the allegation of unfair and unlawful termination is baseless as the Claimant has failed to demonstrate how his termination was unlawful or unfair.

The Respondent further submitted that the Claimant's behaviour of being repeatedly disrespectful, abusive and arrogant amounted to gross misconduct and led to the respondent terminating the Claimant's employment summarily in accordance with the provisions of Section 44 of the Employment Act, 2007. The Respondent relied on the case of **Clouston v Corry (1906) 3 ALL ER 988** where the Court stated that there is no fixed rule of law defining the degree of misconduct which will justify dismissal from service. The Court went on to state that the misconduct has to be inconsistent with the express or implied terms of service.

The Respondent further submitted that the Claimant was duly invited for a disciplinary meeting on 19th September, 2015 and 7th October, 2015 and was given an opportunity to make his presentation thus fulfilling the Respondent's obligations under Section 41 of the Employment Act, 2007. The Respondent relied on the cases of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Limited (2013) eKLR** and **Nicholas Otinyu Muruka v Equity Bank Limited (2013) eKLR**.

The Respondent further submitted that the Claimant's Claim of unpaid claims and terminal dues is unsupported in evidence as the Claimant was paid his terminal dues amounting to Kshs.57,263 and acknowledged receipt of the said amount in cross examination. The Respondent relied on the case of **Daniel Kioko Pius v Athi River Steel Plant Limited (2017) eKLR**.

In conclusion the Respondent urged the Court to dismiss the instant Claim in its entirety as the same is baseless, unmerited and an abuse to the Court process.

Analysis and Determination

Having considered the facts of this cause, evidence adduced by the parties, submissions and authorities cited, I find that the issues for determination are:

1. Whether the termination of the Claimant's employment was valid both procedurally and substantively
2. Whether the Claimant is entitled to the reliefs sought

Unfair termination

Under Section 45(2) of the Employment Act termination of an employee's contract of service is unfair where his employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employee's conduct, capacity or compatibility and that while arriving at the decision to terminate the services of such an employee fair procedure was followed.

The statutory burden for a complaint of unfair termination of employment or wrongful dismissal is contained in section 47(5) of the Employment Act. The section provides that –

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

An employee therefore has the burden of proving that an unfair termination of employment has occurred while the employer's burden is justify the reasons such termination.

Reason for termination

The reason cited for the termination of the Claimant's employment was gross misconduct for allegedly reporting for duty while drunk behaving in a disrespectful, abusive and arrogant manner. The Respondent further contends that the Claimant was accorded a hearing having been invited for two meetings on 19th September, 2015 and 7th October, 2015.

The Claimant on the other hand contended that his termination was unlawful and unfair as the same was not based on a valid reason.

He further contended that due process as provided under Section 41 of the employment Act, 2007 was not adhered to by the Respondent as he was not required to give his representation at the alleged disciplinary hearing but was only asked to pick his termination letter.

Having reviewed the evidence and documents on record specifically the minutes to the disciplinary meeting, I agree with the respondent that the Respondent had a valid reason to subject the Claimant to a disciplinary hearing and subsequently terminate his employment on account of

gross misconduct.

Further it is clear from the minutes that the Claimant was represented by two representatives at both disciplinary hearings and cannot therefore claim that he was not accorded any hearing as he claims.

In the circumstances I find that the claimant has not proved that the termination of his employment by the respondent was unfair.

Whether the Claimant is entitled to the reliefs sought

Having found that the Claimant's termination was valid, he is not entitled to a declaration that he suffered an unfair termination of employment.

Unpaid dues of Kshs.13,333

The Respondent maintained that the Claimant's terminal dues amounting to Kshs.57,263 was paid to him at the time of his separation, a fact that was not disputed by the Claimant in cross examination. The Claimant is therefore not entitled to any compensation under this head.

Compensation for 12 months' salary for unlawful termination

Having found that the Claimant's termination was lawful and valid he is not entitled to any compensation under this head.

In conclusion the Claim fails in its entirety and is accordingly dismissed.

Each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JULY 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