



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 336 OF 2016

(Before Hon. Justice Mathews N. Nduma)

PAUL ODUNDOCLAIMANT

VERSUS

MAYFAIR HOLDINGS LIMITEDRESPONDENT

JUDGMENT

1. The suit was filed by the claimant on 14/11/2016. The claimant prays for maximum compensation for unlawful dismissal and payment of terminal benefits to wit: -

- a. One month salary in lieu for notice.
- b. Payment in lieu of 5 years untaken leave days.

2. The Claimant testified under oath and adopted a written statement dated 8/11/2016 as his evidence in chief. CW1 stated that he was employed on 1st July 2011 by the respondent as cooler man at a monthly salary of Kshs. 16,847.

3. CW1 added that he worked diligently until the 3rd September 2016 when he was served with a letter of dismissal by a director of the respondent. That he had no warning or notice of the dismissal and was not given any hearing before the dismissal.

4. CW1 stated that he was not paid terminal benefits upon dismissal. CW1 added that he had become a loader at the time of termination because the cooler was affecting his health.

5. CW1 said his salary was reduced from kshs. 16,847 to Kshs. 14,000 upon becoming a loader. That he was suspended in mid-August after a quarrel with a driver.

6. That on 27/9/2016 he went to work to follow upon the matter and he was given a letter of summary dismissal date 3/9/2016.

7. CW1 testified that he was paid Kshs. 41,086 which was tabulated in a document at page 11 of the claim.

8. CW1 wrote a demand letter through his advocates which was not responded to hence the suit.

9. CW1 stated that he had received two previous warnings for absenteeism and for loss of a basket.

10. That he was deducted salary in respect of those incidents.

11. The claimant was cross examined by Mr. Yogo for the respondent and he admitted that he had been paid final dues contrary to his averments in the statement of claim and in the written statement filed before court.

12. CW1 also admitted that he had signed a letter of discharge which he produced himself acknowledging payment of the terminal dues in full and final settlement of the claim.

13. CW1 admitted that he was literate and understood the document before signing it.

14. CW1 also admitted having received a letter dated 23/8/2016 stating that he had abused colleagues at work. CW1 admitted that he was given opportunity to explain the incident. CW1 also admitted that he had lost Kshs. 65,000 in the course of duty. He explained that he had been attacked by robbers at Oyugis with his colleagues and the matter was not reported to the police. That the respondent made an insurance claim in respect of the lost money.

15. CW1 also admitted that he had previously absented himself from work for 3 days but stated that he had permission to be away.

16. CW1 was non responsive when it was put to him that he had committed himself not to make any further claims against the respondent upon payment of the terminal dues.

17. The respondent called RW1 Abdul Majid Mohammed. RW1 adopted a written statement dated 31/11/2017 as his evidence in chief. RW1 also produced exhibits '1 to 4'. RW1 testified that the claimant had many issues of misconduct whilst he worked for the respondent.

18. That the respondent deducted money from CW1 for losses made in the course of duty. RW1 stated that CW1 was suspended on 25/8/2016 pending further investigations. That a disciplinary hearing was held in respect of the case and no minutes were kept.

19. That CW1 was issued a letter of dismissal on 3/9/2016 because he had already received several previous warnings. That CW1 was a sales man selling bread in Kisii and Eldoret.

Determination

20. The issues for determination are:-

- i. Whether the summary dismissal was for a valid reason and followed a fair procedure.
- ii. Whether the claimant is entitled to the reliefs sought.

21. The court has carefully evaluated the testimony by CW1 and that by RW1 and has arrived at the following conclusion of facts:-

- i. The claimant was initially employed as a cooler man but later became a loader in a truck that distributed bread in Kisii and Eldoret.
- ii. That the claimant worked for the respondent from 1/7/2011 until the 3/9/2016 the effective date of a letter of summary dismissal issued to him.
- iii. The claimant was suspended from work on 25/8/2016 pending investigations regarding use of abusive language by the claimant against his colleagues and in particular the driver of the truck in which he worked.
- iv. The claimant had previous records of misconduct and had received two previous warnings upon being surcharged for loss made in the course of duty.
- v. The claimant was given opportunity to respond to the charges made against him and admittedly the claimant had responded to the charges explaining his case. The claimant was also called to a meeting together with the Union steward and had opportunity to explain his case. The respondent was not satisfied with the explanation given by the claimant and summarily dismissed him from work.
- vi. The claimant was paid terminal benefits upon dismissal in the sum of Kshs. 67,989 including salary for August 2016, bonus for August 2016, off days worked in the year 2016, and payment in lieu of leave days not taken for the period 2014 to 2016.
- vii. The claimant received net payment of Kshs. 41,086.25 and signed a discharge letter in which he acknowledged receipt of the terminal dues in full and final settlement and that he had no further claims against the respondent. The respondent testified that he was literate and understood the terms of the discharge letter.
- viii. The court is satisfied that the claimant willingly and voluntarily signed the discharge letter.

2. The claimant came out as a untruthful witness because the contents of the written witness statement dated 8/11/2016 contradicted his testimony before court in material respects. CW1 had denied initially having been paid any terminal benefits. This was demonstrated to be untrue during cross examination. The claimant had not even disclosed in the written statement that he had willingly and voluntarily signed a letter of discharge acknowledging receipt of the money in full and final settlement.

23. The Court is also satisfied that due process was followed in investigating and disciplining the claimant before he was summarily dismissed for use of abusive language against his colleagues.

24. The Court is also satisfied that the claimant had several previous warnings for misconduct and therefore his record at work was not good.

25. In the final analysis the court is satisfied that the respondent had a valid reason to summarily dismiss the claimant and in doing so the respondent satisfied the provisions of section 41,43,44 and 45 of the Employment Act 2007, by giving the claimant a notice to show cause to which he responded and according him opportunity to present his case together with a union official prior to the dismissal.

26. Accordingly, the claim for unlawful and unfair dismissal by the claimant lacks merit and is dismissed.

27. Similarly the court is satisfied that the claimant was paid all terminal dues owed to him by the respondent at the time of summary dismissal. The claim for payment of further terminal benefits by the claimant lack merit and is also dismissed.

28. The claimant had signed a letter acknowledging payment of the terminal benefits and absolving the respondent from any further claims.

29. Each party to bear their costs of the suit.

Ruling Dated, Signed and Delivered at Nairobi this 16th day of July 2020.

Mathew N. Nduma

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, this ruling has been delivered to the parties online with their consent. 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, this 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 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this 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.

Mathews N. Nduma

Judge

Appearances

Mr. Ouma for Claimant

Mr. Odego for Respondent

Chrispo: Court Clerk.