



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 2582 OF 2016

SILAS WANDERA.....CLAIMANT

-VERSUS-

THE PRINCIPAL BRISTAR GIRLS HIGH SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant filed a Statement of Claim dated 16th December, 2016 alleging that his employment was unfairly and unlawfully terminated by the Respondent in November 2015 and she failed to pay his benefits. He averred that the termination was substantively and procedurally unfair and prayed for the following reliefs: -

- a. **THAT** the Courts do find the reasons and procedure for termination of the Claimant's services was wrongful.
- b. **THAT** the Court do find that the Respondent's action of continued withholding and failing, refusal and or neglecting to pay the Claimant his rightful terminal benefits and other unpaid dues unlawful and untenable.
- c. **THAT** as a result the Court do Order that the Respondents to pay the Claimant all his terminal benefits and other unpaid dues computed as follows:
 - i. 12 months' salary in compensation for unfair termination
 - ii. 1 month pay in lieu of notice at **Kshs. 9,700**
 - iii. Service pay
 - iv. Costs of this suit
 - v. Any other relief that this Honourable Court may deem fit and expedient to grant.

2. The Respondent filed defence on 1st February, 2017 admitting that she employed the Claimant as pleaded in the Statement of Claim but denied that he was unfairly and unlawfully dismissed from his employment. On the contrary, she averred that it is the claimant who deserted his employment and as such he is not entitled to the reliefs sought in his Claim. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 11/3/2020 when both parties tendered evidence and thereafter filed submissions.

Claimant's Case

4. The Claimant testified as CW1 and basically adopted his written statement dated 6th December, 2016 and the attached 9 documents as his evidence in chief. In brief, stated he was employed by the respondent as a security guard in August 2011 and worked until November 2015 when he was dismissed by the respondent without any justifiable cause or prior notice. He contended that the termination was wrongful and unfair and prayed for compensation plus terminal benefits as set out in the claim. Finally, he stated that his gross monthly salary at the time of the separation was kshs. 9,700.

5. He denied ever being served with the Show Cause letter dated 30.11.2015 and that the allegations of 29.10.2015 as contained therein are not true. He testified that on 29.10.2015, he was on duty with his colleagues Fredrick Wafula, Jackton Juma, Kavagi and their supervisor Mr. Moses Washiali and none of them has recorded any statement as a defence witness herein to prove that he committed any offence. He further

contended that the alleged offence was never recorded in the Occurrence Book. He further denied ever deserting his employment and maintained that the Principal informed him that the Director had directed him not to report back to work.

6. On cross examination CW1 confirmed having authored the letter dated 4.10.2014 but maintained he was not involved in any theft at the Deputy Principal's house. He further maintained that he was off duty on 30.10.2015 and maintained that he was not served with the letter dated 30.10.2015. Finally, he contended that the letter dated 4.10.2014 was not made in relation to the alleged theft that led to his termination and reiterated that his termination was unlawful and unfair.

Respondents' Case

7. Ms **Immaculate Nyambura Wachira**, the Respondent's Principal testified as Rw1 and also adopted her written statement dated 31.01.2017 as her evidence in chief. In brief, she stated that the Claimant herein made an admission of attempted theft and disappearance of the Deputy Principal's house help on 4.10.2014 vide his letter dated 6.10.2014 and sought for forgiveness. She further stated that the Claimant was again on 29.10.2015 at 2.00 am found attempting to steal student's bags and was issued with a Notice to Show Cause but he instead absconded duties and thereafter brought this suit. However, she changed her story and indirectly admitted that the claimant was indeed dismissed when he stated that, the reason for dismissing the claimant was that he was caught at the stores carrying away student's bags at 2.00 am.

8. On cross examination RW1 stated that the Claimant was not issued with a termination letter for the reason that he absconded duties. She admitted that the school has attendance register for recording employees who are present or absent. However, she did not produce the register as evidence that the claimant absconded work. She further admitted that Juma, Wafula and Moses Washiali are still employees of the respondent. She also admitted that there is an Occurrence Book in the office but she did not produce the same as exhibit to prove that the alleged offence was recorded. Finally, she admitted that she never followed up the claimant after he absconded duties.

Claimant's Submissions

9. The Claimant submitted that his termination was wrongful and unfair as the Respondents failed to comply with the mandatory provisions of Sections 41, 43 and 45 of the Employment Act, 2007. For emphasis the Claimant cited and relied on the cases of **Kenya Union of Commercial Food and Allied Workers Vs Meru North Farmers Sacco Limited (2013) eKLR** and **Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited (2014) eKLR** where it was held that for a termination to be fair the employer must abide by the mandatory procedure set out by Section 41 of the Employment Act, 2007.

10. He further contended that the Respondents have failed to prove the occurrence of the alleged incident of 29.10.2015 by availing the occurrence book or calling witnesses to attest to the incidence was unfair. To buttress this argument, the Claimant relied on the provisions of Section 109 of the Evidence Act and the case of **Charles Ochieng Ogola Vs Bhole Kondele Limited (2017) eKLR**.

11. The Claimant further submitted that no evidence was tendered by the Respondents to prove the allegation that he absconded duties after being served with a show cause letter. He urged this Court to disregard the defence and grant the reliefs sought in his Statement of Claim.

Respondents' Submissions

12. On the other hand, the respondent submitted that the Claimant having absconded lawful duty after being served with the Notice to Show Cause dated 30.10.2014 he is not entitled to any compensation. To buttress this argument, she relied on **Joseph Nzioka Vs Smart Coating Limited (2017) eKLR** and **Joseph Njoroge Kiama Vs Summer Limited (2014) eKLR** where the Court held that a Respondent may dismiss an employee summarily for absconding duties by dint of Section 44 (4) of the Employment Act, 2007. Finally, she contended that the Claimant has not proved his case as against her and therefore urged and prayed this Honourable Court to dismiss it with costs.

Issues for determination and analysis

13. Having considered the facts of this cause, evidence, and submissions presented by the parties it is common ground that the claimant was employed by the respondent until end of October 2015. Rw1 admitted during examination in chief that the claimant was dismissed from employment and the reason for the termination absconding duties after being served with a show cause letter. The issues for determination are: -

- a. Whether the Claimant was unfairly and wrongfully dismissed from his employment;
- b. Whether the Claimant is entitled to the remedies sought.

Whether the dismissal of the claimant was unfair and wrongful

14. Section 45(2) of the Employment Act provides that termination of an employee's contract of service is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason (s) relating to the employees conduct, capacity and compatibility or based on the employer's operational requirements; and that a fair procedure was followed. In **Walter Ogal Anuro -v- Teachers Service Commission (2013) eKLR** the Court held that:

"... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination."

Reason for the dismissal

15. The Claimant contended that his services were wrongfully and unfairly terminated by the Respondent on false allegation that he had absconded duties. He further contended that the decision to terminate his employment was done by the respondent's Director and it was communicated to him by the Principal. He submitted that the termination did not comply with the mandatory procedure provided under section 41 of the Employment Act. He further contended that the reason for the termination was not true because no attendance register was produced as exhibit to the alleged absconding.

16. The Respondent is however of a contrary view and she contended that the Claimant absconded duties to evade disciplinary process after being served with a show cause letter. Rw1 admitted in evidence that she never bothered to follow up the claimant after absconding duties until he brought this suit. The Respondents made further references to the Claimant's conduct that would have warranted his termination but she did not.

17. I have carefully considered the evidence and the submissions by both sides and it is clear that the claimant has not proved that he continued to work for the respondent after 29.10.2015 when an allegation of attempted theft was made against him. He did not adduce any documentary evidence or call any witness to rebut the evidence by Rw1 that he absconded duties from 30.10.2015. He also did not prove by evidence that he was on official duty or leave from 30.10.2015. Consequently, I find that the respondent has proved on a balance of probability that the claimant absconded his duties from 30.10.2015 and as such she has discharged her burden of proving the validity of the reason for terming the claimant's contract of service as required by section 43(1) and 45(2) of the Employment Act.

The procedure followed

18. As regards procedural fairness, section 41 of the said Act provides that: -

1. Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2. Notwithstanding any other provision on this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person, if any, chosen by the employee within subsection (1) make."

19. Under section 44(4)(a) of the Employment Act, absence from duty without leave or justifiable cause amounts to gross misconduct that entitles the employer to summarily dismiss the employee. In this case the employer admitted that she dismissed the employee for absconding duties from 30.10.2015 without according him any hearing because according to Rw1, she had no obligation to follow up an employee who has absconded duties. I do not find merits in that defence by Rw1 which at best amounts to evading legal obligation on the part of the employer to follow a fair procedure before dismissing an employee. The jurisprudence emerging from this court and the appellate court is that even if an employee has committed an offence warranting summary dismissal under a statute or contract of service, no punishment should be inflicted on him or her without following the mandatory procedure set out by section 41 of the Act

20. I gather support from **Mary Chemweno Kiptui –v- Kenya Pipeline Company Limited [2014] eKLR** Mbaru J held:

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.

21. Even where the employee is alleged to have absconded duties, the employer has an obligation to call the employee for a hearing unless the employee proves difficult to be reached. I gather more support from **Felistas Acheha Ikatwa Vs Charles Peter Otieno [2018] eKLR** where it was held:

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”

22. In view of the admission by Rw1 that she never made any effort to call the claimant for a hearing, I hold that the respondent has failed to discharge the burden of proving that she followed a fair procedure before dismissing the claimant and that rendered the termination unfair and wrongful within the meaning of section 45 of the Employment Act.

Whether the Claimant is entitled to the reliefs sought

23. Having found that the Claimant's termination was unfair, I further find that he is entitled is entitled to salary in lieu of notice and compensation under Section 49 of the Employment Act. He is awarded one-month salary in lieu of notice as prayed plus six months' salary compensation for the unfair termination. In awarding the said compensation, I have considered the fact that he worked for about 4 years and also his contribution to the termination through misconduct.

24. The Claimant is not entitled to service pay as prayed because according to the payslips he produced as exhibits, he was a member of the NSSF and the employer used to deduct kshs. 200 every month for remittance to the Fund. By dint of Section 35 of the Employment Act, an

employee who is a member of the NSSF or any Pension or Gratuity Scheme is disqualified from claiming service pay.

25. In conclusion I enter judgment in favour of the Claimant as against the Respondents in the following terms:

a. 6 months' salary Compensation	Kshs. 58,200/-
b. One month's salary in lieu of notice	<u>Kshs. 9,700/-</u>
TOTAL	<u>Kshs. 67,900/-</u>

c. the above sum is subject to statutory deductions but in addition to costs and interest at court rate from the date hereof.

Dated and delivered at Nairobi this 17th September, 2020.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE