

was lawful and procedural because he reported to work while intoxicated. She further averred that the claimant's misconduct was habitual and she had severally served him with warning letters but he did not reform. On the other hand, she averred that she is entitled to surcharge the Claimant Kshs. 1,380/- for failing to hand over the following company property after the separation: -

a. Rain coat Kshs. 1,150/-

b. Cap Kshs. 260/-

Total Kshs. 1,380/-

3. The matter proceeded for hearing on 4/2/2020 when both parties tendered evidence and thereafter filed written submissions.

Claimant's Case

4. The Claimant testified as Cw1 and basically adopted his written statement dated 29.3.2018 his evidence in chief. In brief, his case is that his employment was unlawfully and unfairly terminated by the respondent on false allegation that he reported to work while intoxicated. He denied the alleged misconduct and contended that no test was carried out to prove that he had reported to work while intoxicated. Further, he contended that he was not served with any prior notice or taken through any disciplinary hearing before the dismissal. He, therefore prayed for the reliefs sought in his Claim.

5. On cross examination he admitted that he received various warning letters from the respondent during his employment. He further admitted that he took alcohol on 13.7.2014 but denied that he was intoxicated while he was on duty. He also admitted that he made a written apology for the said misconduct but thereafter he was served with a letter of summary dismissal on ground that he reported to work while intoxicated.

6. He confirmed that the Respondent made deductions for NSSF payments as indicated in his payslips. He maintained that he was entitled to payment of house allowance backdated to 2001 and salary for 14 days worked in July 2014 contending that his payslip for that month was not accurate as the same provides for payment for more days than the 14 days worked. Further, he contended that he was not refunded kshs.2400 for uniforms despite having surrendered the same to the Respondent and dismissed the Clearance Form serial number 8005 as inaccurate.

Respondent's Case

7. Mr. RAYMOND NZIOKA, the respondent's Human Resource Manager testified as Rw1. He also adopted his written statement dated 27th May, 2019 as his evidence in chief. In brief, he contended that the Claimant abtually absconded work and often reported to work while intoxicated; that despite being issued with several warning letters, he failed to improve; that on 13.7.2014, the claimant reported work while intoxicated and his Supervisor recorded the offence in the Occurrence Book and directed him to report to the office on 14.7.2014 to explain himself; that on 14.7.2014, the claimant went to the office where as usual, he admitted the offence of reporting to work while drunk and wrote an apology; however, after considering the previous warning letters on record, he dismissed the claimant by the letter dated 14.7.2014.

8. RW1 contended that the Claimant's dismissal was justified and as such he is not entitled to any compensation as pleaded in his Claim. He further contended that the Claimant is further not entitled to service pay because he was a member of NSSF and all his contributions were duly remitted. He also denied the Claimant's prayer for overtime pay contending that he never raised any complaint with the Respondent within 7 days of his payments as required under Clause 6.2 (iii) of his employment contract. Finally, he contended that the Claimant was paid all his dues after the separation and prayed for the suit to be dismissed with costs, and instead allow the Counter Claim as prayed.

9. On cross examination RW1 stated that the reason for the Claimant's dismissal was that he reported to work while under the influence of alcohol. He admitted that the Claimant's supervisor did not use an alcohol blower to confirm whether the Claimant was intoxication but contended that he used his common sense. He maintained that the incident was recorded in the Respondent's Occurrence Book and thereafter the claimant was invited for a disciplinary hearing in company of another employee of his choice, but he attended alone and admitted the offence and apologised.

Submissions by the Parties

10. It is submitted by the Claimant that his termination was wrongful and unfair because the allegation that he reported on duty while intoxicated, was not true and maintained that he was not subjected to any form of examination to confirm that he was intoxicated. Consequently, he urged the court to find that respondent has not proved the alleged intoxication by any credible evidence, and proceed to award him Kshs. 1,174,375/- as plus costs and interest as prayed in his Claim.

Respondent's Submissions

11. On the other hand, the Respondent submitted that she legally procedurally and lawfully dismissed the Claimant for gross misconduct under Section 44 Employment Act, 2007. She contended that the reason for the dismissal was clearly indicated in his letter of summary dismissal and he admitted the offence in writing. She further contended that the claimant had been served with several warning letters before the dismissal. Consequently, she submitted that the Claimant has failed to demonstrate that his termination was unlawful and unfair and urged the Court to dismiss the Claim with costs.

12. As regards the Claim for overtime the Respondent maintained that the same has not been proved by the Claimant and urged the Court to dismiss it. For emphasis, she relied on **Fred Makori Ondari Vs The Management Committee of the Ministry of Works Sports Club**

(2013) eKLR, Charles Nguma Maina Vs Riley Services Limited (2018) eKLR and Samuel Omutoko Mabinda Vs Riley Services Limited (2019) eKLR where the Court dismissed claims for payment of overtime on the grounds that the same had not been specifically pleaded and proved by evidence.

13. In addition, the Respondent submitted that a Claim for underpayment and overtime pay are in the nature of a continuing injury and as such they are time barred by dint of Section 90 of the Employment Act, 2007 and urged the Court to accordingly dismiss the same.

14. With regards to the Claim for house allowance the Respondent submitted that the Claimant received a consolidated salary which included all allowances as laid out in his Contract of employment. She therefore urged the court to dismiss that claim. In addition, she submitted that the Claim for house allowance was also a continuing injury and as such it is time barred by dint of Section 90 of the Employment Act, 2007 and urged the court to dismiss that claim.

15. The Respondent further urged the court to dismiss the claim for salary in lieu of notice because the claimant's employment was summarily terminated for gross misconduct under Section 44 of the Employment Act, 2007 which disentitles a dismissed employee to a claim of salary in lieu of notice. Finally, the respondent urged the court to dismiss the claim for uniform refund because the claimant did not return all the company property in his possession. Flowing from the foregoing, she prayed for her counterclaim to be allowed with costs.

Issues for determination and analysis

16. Having considered the pleadings, evidence and submissions presented by both parties, there no dispute that the claimant was employed by the respondent as a security guard from 2001 to 14.7.2014 when he was summarily dismissed for gross misconduct. The main issues for determination are: -

- a. Whether the dismissal of the Claimant was wrongful and unfair.
- b. Whether the Claimant is entitled to the reliefs sought
- c. Whether the Respondent is entitled to the Counter Claim.

Whether the dismissal was wrongful and unfair

17. Section 45 of the Employment Act provides:

“(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.”

18. In this case, the reason cited for the dismissal in the termination letter was reporting to work while under the influence of alcohol. The claimant's Supervisor noted his state and recorded the matter in the Occurrence Book and referred him to the office to explain himself. The claimant went to the office as directed and voluntarily admitted the offence and apologised in writing. The apology was, however declined and a dismissal letter issued to the claimant because he had failed to heed previous warnings. Consequently, I find and hold that the respondent has proved by evidence that she had a valid reason for dismissing the claimant as required by section 43 and 45 of the Employment Act.

19. As regards the procedure followed, the respondent was bound to comply with Section 41 of the Employment Act, 2007 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 of 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.”

20. In this case it is common ground that the claimant was directed by his supervisor to report to the office on 14.7.2014 to explain himself to the management about the offence of reporting to work while under the influence of alcohol. It is also common ground that the claimant went to the Manager's office and admitted the offence in writing and apologised. The claimant also admitted before this court that he took alcohol on the material day and still reported to work. Considering the fact that the claimant was told his offence by the Supervisor and thereafter referred to the office to explain himself means that he was afforded an opportunity to defend himself before the dismissal. In addition, the fact that the claimant voluntarily admitted the offence and even apologised, there was no need of conducting any further disciplinary hearing as required by section 41 of the Act. Accordingly, I find that the respondent has proved on a balance of probability that she followed a fair procedure before dismissing the claimant.

21. In the case of **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.”

22. Applying the foregoing precedent to the facts of the instant case, I am satisfied that the respondent has demonstrated that the summary dismissal of the claimant was not unfair and wrongful within the meaning of section 45 of the Employment Act.

Whether the Claimant is entitled to the reliefs sought in his Claim

23. Having found that the dismissal of the Claimant was not wrongful and unfair, I proceed to hold that he is not entitled to salary in lieu of notice and compensation for unfair termination under Section 49 of the Employment Act, 2007.

24. The Claim for unpaid overtime also fails for lack of particulars and evidence in support. The Claim for service pay equally fails because the Claimant was a member of NSSF and therefore disqualified by dint of section 35(6) of the Employment Act from that claim.

25. The Clearance Certificate Serial No. 8005 produced as document number 8 by the Respondent clearly indicates that the Claimant was paid his salary for July 2014 and further a payslip for the said month is also attached. He contended that he never went to his bank to verify whether the salary was paid. It follows that he did not rebut the respondent's evidence that the salary was paid and consequently, his Claim for unpaid salary for July 2014 must also fail.

26. The contract of service provided for a basic pay but no house allowance. The claimant was therefore entitled to a house allowance by dint of Section 31 of Employment Act, 2007. The claimant prayed for house allowance assessed at 15% of the basic salary per month for 13 years. However, he did not plead the claim specifically considering the fact that his salary was not constant for all the 13 years worked. Consequently, I decline to award the claim because the court cannot act in presumption to aid a party whose pleadings lack elegance and precision in articulating the claim.

27. The claim for refund of uniform levy succeeds because there is no dispute that he was deducted the money from his salary and the same has not been refunded. However, the said sum is only refundable upon successful return of all the items issued to the claimant as part of the uniform.

28. For the reasons set out herein above, the Claimant's suit is dismissed save for the claim for kshs 2400 being refund of his uniform levy.

Whether the counter claim should be allowed.

29. As regard the respondent's Counter Claim, it is clear from the Clearance Form that the Claimant did not fully clear with the Respondent and therefore the Respondent is entitled to the sum of Kshs. 1,380.00.

Conclusion and disposition

30. I have found that the dismissal of the claimant was fair and lawful and as such he is not entitled to the reliefs sought except kshs.2400 being refund of his uniform levy. I have further found that the respondent is entitled to kshs 1380 sought in her counterclaim. In the end, I enter judgment for the claimant in the sum of Kshs. 1020 plus interest at court rates from the date of filing this suit. No order as to costs.

Dated and delivered at Nairobi this 1st Day of October, 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