



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 83 OF 2016

BERNARD SHEM KOWERU.....CLAIMANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed on 29th March, 2016 by the Claimant praying for an Order for payment of:-

- (i) 3 months' salary in lieu of notice.
- (ii) Compensation for unlawful and unfair termination of employment.
- (iii) Provision of Certificate of Service.
- (iv) Costs and interest.

2. The Claimant testified as C.W.1 that he was employed by the respondent as a technician for 9 years. That his work was to maintain the milling machine in the old wheat mill. That he worked diligently and had good work record.

3. That in July, 2015, his colleagues gave false information to management that the Claimant was drunk at work and hence could not do maintenance. That the Claimant was deaf and dumb and so did not get the gist of the information given.

4. The Claimant testified that he was surprised when his employment was terminated without being given appropriate hearing. That his disability did not allow him to understand what was happening and no interpreter was provided for him.

5. That the Human Resource Manager wrongfully terminated his employment and did not pay the Claimant any terminal benefits. The claimant prays to be awarded as prayed.

6. The claimant produced a payslip for July, 2015 which shows that the Claimant earned a basic salary of Kshs. 36,162. That he was paid Kshs. 19,372 in lieu of leave days not taken. That he was paid service gratuity in the sum of Kshs. 72,324. That he was deducted kshs. 24,538.50 for lost hours and he received gross pay of Kshs. 103,319.50. This was the last payslip for the claimant.

7. The claimant also produced a letter dated 17th February, 2015 which stated that the claimant's employment contract had been extended to 30th June, 2015 and that all the terms and conditions enumerated in the earlier contract remained unchanged. The letter was written to the Claimant by the Human Resource Manager Mr. Duncan Abwawo.

8. The Claimant also produced a notice to attend a disciplinary hearing dated 7th July, 2015. The hearing was scheduled for 8/7/2015 at 2 p.m. in the office of Human Resource Manager.

9. The letter contains two charges including:-

- (i) That the Claimant reported to work drunk on 18th June, 2015 hence rendering himself incapable of performing work.
- (ii) That the Claimant declined to acknowledge the "Show Cause letter" issued and the hearing notification dated 19th June, 2015.

10. The Claimant further produced a letter of demand written by Nyanga & Company Advocates to the Managing Director of the respondent

dated 6/8/2015.

Defence

11. The respondent filed Memorandum of reply to the Statement of Claim on 5/8/2016 in which the particulars of the suit are denied and is averred that the Claimant was working on a one year contract from 1st August, 2010 to 1st August, 2011. That the contract was renewed severally for period of one year until the last contract which commenced on 1st July, 2014 and ended on 30th June, 2014.

11. R.W.1 testified that the Claimant was employed as a maintenance fitter on 1/8/2010. That he was a regular employee on permanent and pensionable terms. However he was given one year contract from time to time as stated in the statement of defence.

12. R.W.1 testified that a decision was taken by Management not to renew the last contract of employment of the claimant. That the decision was based on claimant's work attendance record which was not good. That this had impacted the claimant's performance. That the claimant had verbal and written warnings. That the claimant became violent when he was issued with the notices. That the claimant started to come to work drunk. That the claimant had previous warnings for coming to work late and drunk. That a Show Cause notice was issued to the claimant dated 19/6/2015 to explain why severe disciplinary action should not be taken against him for being intoxicated and failing to follow lawful instructions during working hours. He was to respond within 72 hours. The claimant was suspended from duty and was given notice to attend a disciplinary hearing. The notice was dated 19/6/2015 and he was to attend the hearing on 22/6/2015.

13. That the claimant wrote a letter of apology to the respondent dated 16/7/2015 in which he apologized for his misconduct by refusing to sign the Show Cause letter. The claimant begged for forgiveness from the Human Resource Manager.

14. The Claimant did not respond to the show cause letter and did not attend the disciplinary hearing. The respondent made a decision to terminate the employment of the claimant.

15. R.W.1 testified that the claimant was paid terminal benefits upon termination of employment and he was given a Certificate of Service.

16. R.W.1 conceded that the claimant was deaf and dumb but that was not a hinderance to his work. R.W.1 stated that the claimant had worked for the respondent for four years only. That the claimant used to come to work drunk, hence the termination. R.W.1 insisted that the claimant willfully refused to answer the show cause letter and to attend the scheduled disciplinary hearing.

17. R.W.1 stated that he was able to communicate with the claimant over the period he worked for the respondent because the claimant reads and writes good English.

18. R.W.1 stated that the respondent had counseling services but the drunkenness of the claimant had ran out of control.

19. R.W.1 added that the claimant received a net of Kshs.97,515 as terminal benefits including severance pay for years worked, payment in lieu of leave days not taken and salary for days worked.

20. R.W.1 stated that the respondent has about 500 employees and that the claimant was the only dumb and deaf employee.

21. R.W.1 stated that the claimant read the notices issued to him and understood them well. That the claimant chose to ignore the notices.

22. That the claimant's suit lacks merit and it be dismissed with costs.

Determination

The issues for determination are:-

(i) Whether the respondent terminated the employment of the claimant for a valid reason following a fair procedure.

(ii) Whether the Claimant is entitled to the reliefs sought.

23. The Court has carefully considered the testimony by the claimant vis a vis that by R.W.1 and has come to the conclusion that the claimant was not an honest and truthful witness. The claimant was not candid on the issue of his going to work frequently drunk. The claimant was also not truthful as to why he failed to respond to the show cause letter and to attend a disciplinary hearing to answer to charges of misconduct at work.

24. R.W.1 ably demonstrated that the claimant had previous records of coming to work drunk and at times being violent. That on the material date when he was issued with a notice to Show Cause he had come to work drunk and was thus unable to perform his work.

25. R.W.1 demonstrated clearly that the claimant declined to sign the show cause notice and did not respond to it. That the claimant also declined to attend a disciplinary hearing despite the fact that he could read and understand the notices which the claimant did not refute receipt of.

26. The claimant was not truthful that he needed an interpreter in the circumstances explained by R.W.1.

27. Accordingly, the Court is satisfied that the respondent has demonstrated that it had a valid reason to terminate the employment of the claimant in terms of Section 43(1) and (2) of the Employment Act, 2007. The respondent also demonstrated that it followed a fair procedure before terminating the employment of the claimant as is required of the respondent under Section 41, 44, and 45 of the Employment Act.

28. The claimant was also not truthful on the issue of payment of terminal benefits.

29. R.W.1 demonstrated that the claimant received terminal benefits in the sum of Kshs. 103,319.50 gross comprising of severance pay; payment in lieu of leave days not taken and salary for days worked.

30. R.W.1 also proved that the claimant was issued with a Certificate of Service.

31. Therefore, the Claimant has failed to prove his case on a balance of probability and the entire suit is dismissed for lack of merit.

32. Due to the personal status of the claimant being a person with disabilities, and in consideration of service rendered by the claimant to the respondent for a period of 4 years, the Court deems this an appropriate case for each a party to pay their costs of the suit.

Dated and delivered at Nairobi this 17th day of December, 2020.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of 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 Judgment 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

M/s Odinga for Claimant

Mr. Ouma for Respondent

Chrispo – Court clerk