



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 520 OF 2017

FRANCIS OKOYO NDEGE.....CLAIMANT

VERSUS

NAIROBI X-RAY SUPPLIES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking to recover for his dismissal from employment. He was employed on 30<sup>th</sup> September 2015 as a driver and motorcycle rider earning Kshs. 29,000/- a month. He averred that he was dismissed on 29<sup>th</sup> July 2017 after reporting to work without notice. He sought to know the reasons for the dismissal but was told to go home and wait for a call from the office which was not forthcoming. He averred that due to the nature of his work he was not allowed to go on leave. He stated that he worked from 6.00am to 5.00pm. The Respondent did not remit the statutory deductions despite entreaty to do so by the Claimant. The Claimant sought payment for work done on public holidays. He claimed 3 month's salary in lieu of notice – Kshs. 87,000/-, 1 year's salary as compensation for the unlawful dismissal – Kshs. 384,000/-, unpaid leave for 29 days – Kshs. 32,625/-, salary for days worked for and not paid being the month of July 2017 – Kshs. 29,000/- plus costs of the suit.

2. The Respondent averred in its defence that the suit was an abuse of court process and that it should be dismissed with costs. The Respondent asserts that the Claimant was involved in misconduct leading to his dismissal. He sought an apology for negligently causing an accident along Parliament road involving a Mercedes Benz car on 3<sup>rd</sup> April 2017. He was issued with a warning letter on 5<sup>th</sup> April 2017. On 29<sup>th</sup> July 2017, he was involved in an accident along Spring Valley Road while driving the Respondent's vehicle KCJ 199B whilst on the way to collect the Respondent's guests who had arrived from the United Kingdom. The Respondent averred that the accident resulted in material damage to the vehicle which rendered the use of the vehicle unsafe but the Claimant went to great lengths to conceal the accident, picked the guests in the unsafe vehicle thus endangering their lives and even failed to report the accident to the Police. The Respondent averred that Claimant took them to the wrong accident scenes in a brazen attempt to hide the occurrence of the accident. The Respondent investigated the matter and established the Claimant had caused an accident on 29<sup>th</sup> July 2017 a fact that the Claimant admitted and sought an apology for. The Respondent issued the Claimant with a show cause letter to which he responded to admitting causing the accident and he was then given a letter dated 1<sup>st</sup> August 2017 inviting him for a disciplinary hearing on 2<sup>nd</sup> August 2017. He was notified of his right to have a witness/representative of his choice accompany him to the disciplinary hearing. The Respondent averred that after granting the Claimant a fair hearing, the panel concluded that the Claimant had fundamentally breached his contract and by letter dated 18<sup>th</sup> August 2017 he was given the verdict. The letter was copied to the Labour Officer. The Respondent terminated the Claimant's employment in accordance with Sections 44(3)(c) and (g) of the Employment Act and the employment contract. The letter informed the Claimant that the dues would be paid up to and including 2<sup>nd</sup> August 2017 and the Respondent was to recover the cost of repairs to the vehicle and cost of lost company property if any. The Respondent averred that the Claimant was paid for the overtime he worked and that all the statutory deductions were made. The Respondent denied declining to issue the Claimant with the certificate of service but that the Claimant was required to clear with the Respondent which was still pending. The Respondent thus sought the dismissal of the suit with costs.

3. The Claimant and Jennifer Aswani the Respondent's administration officer testified. The Claimant testified that he had an accident on the way to picking the guests. He said that his phone was faulty and that he went to make the report the next day but the traffic police were not there when he went to do so. He stated that he was issued with a show cause letter and that he replied. He denied admitting the accident or asking for forgiveness. He said he was called for the disciplinary hearing and he attended with his witness Ferdinand Lichina who signed the minutes of the proceedings. He stated that he did not get the summary dismissal letter.

4. The Respondent's witness testified that the Claimant was given a show cause letter and he was heard before the dismissal. She stated that the dismissal was on account of the accident that occurred and that the Claimant took the Respondent's staff to the wrong scene on the two days he was asked to show where the accident occurred. She testified that the Claimant was called to collect his dismissal letter and he declined to sign for it.

5. The Claimant filed submissions in which he asserts that the dismissal by the Respondent was contrary to the provisions of Section 41 of the Employment Act and thus unfair and unlawful. He submitted that he went for the meeting but he did not do so with a witness of his choice and was not informed of the consequences of the meeting. He cited the case of **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR** where the Court of Appeal held that the reason for the termination must be communicated. The Claimant relied on the provisions of Section 43 of the Employment Act read together with Section 45. He placed reliance on the case of **Kenya Plantation & Agricultural Workers Union v Zena Roses Kenya (Sosiani, Asia & Thika Farm)[2017] eKLR**. He cited the case of **Standard Group Limited v Jenny Luesby [2018] eKLR** and submitted that he should be compensated for the dismissal. He thus stated that he was entitled to the relief sought in his claim.

6. The Respondent submitted that the Claimant had failed to prove that the termination was unfair. It was submitted that the Claimant was heard in terms of Section 41 of the Employment Act and was summarily dismissed in terms of Section 44. The case of **CMC Aviation**

**Limited v Mohammed Noor [2015] eKLR** was cited in support of the argument that the compliance with Section 41 and 44 is critical in dismissal for gross misconduct. The Respondent also cited the case of **Naftali Ayot Okanja v Rai Plywoods Kenya Limited [2017] eKLR** and urged the dismissal of the claim.

7. The Claimant was dismissed after he had an accident and failed to report the same. After the incident, he was given a show cause letter that he replied to. He was heard and the outcome of the hearing was the summary dismissal. In his claim he concealed the fact that he was issued with a show cause letter, was heard and then dismissed. He averred that he was dismissed without any cause being assigned on 29<sup>th</sup> July 2017 while the disciplinary meeting was on 2<sup>nd</sup> August 2017. In my view, the Claimant failed to prove the dismissal was contrary to the requirements of Section 41 of the Employment Act. The Respondent was justified to terminate the Claimant for his misconduct. Having followed the law in the dismissal no relief can flow the Claimant's way. His suit is dismissed with costs to the Respondent as it lacked any factual foundation.

It is so ordered.

**Dated and delivered at Nyeri this 14<sup>th</sup> day of February 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true copy of the Original

Deputy Registrar