



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 529 OF 2017

(Consolidated with Cause No. 530, 531, 532 & 533 of 2017)

1. JAMES GATHUTHI THUKU

2. JAMES NGANG'A MWANGI

3. RICHARD MAUNDU NZOMO

4. GIDEON OBWORI MAKORI

5. PAUL KIPSANG TANUI.....CLAIMANTS

VERSUS

H. YOUNG & CO. (E.A.) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants filed suit against the Respondent seeking various reliefs for their dismissal from employment. They assert that they were dismissed unlawfully and were not given a chance to defend themselves prior to the dismissal. They averred their dismissals were unjustified as there was no prior warning or a reasonable cause given as the basis for the termination. No notification of the intention to dismiss was issued hence their plea for a judgment in their favour.

2. The Respondent averred in respect of the Claimants that they had been accused of siphoning fuel, were given a show cause notice and that the decision to terminate their services was arrived at after they had been granted the opportunity to defend themselves. The Respondent averred that the terminations were justified.

3. The 2nd Claimant testified on his and his co-Claimants' behalf. He stated that the Respondent dismissed them without basis. He said they were all drivers and were told not to drive the Respondent's vehicles on the material day. They were given a show cause letter and in the letters were accused of pilfering diesel and tampering with the odometers of the trucks they drove. They were immediately issued with dismissal letters. They sought interposition by the union as they were union members and upon the union meeting the management the union informed them that the Respondent had declined to pay. They thus sought the relief from court as tabulated in their respective claims. He testified that the seal in the vehicles could not be unsealed and there was an official who would confirm that the seal was not broken. In cross-exam he stated that he worked as a Mercedes Benz tipper driver and that they would fuel depending on the period they were to drive. He admitted that no one else had access to the truck. He and his colleagues were given their show cause letters and given 30 minutes to respond. He was re-examined and he stated that 30 minutes was not enough to respond and that the conciliator ordered that they should be paid.

4. The Respondent's witness testified that the Claimants were given an opportunity to defend themselves against the accusations of pilferage and they could not give a satisfactory answer hence the dismissal. She stated that the Claimants received the letters to show cause and that there was no indication as to the time the letters were given. She testified that the tippers had monitors and tracking devices. She was cross examined and she stated that the Respondent did not expect the fuel to dip as there was an average for fuel consumption. She stated that the conciliator's finding was not binding on the Respondent. She stated the conciliator did not dispute the loss and wondered why he did not order a reinstatement if they were innocent. She was re-examined and stated that there were other ways of siphoning fuel without breaking the seal. She said they could have bored holes in the tanks.

5. The parties were to file submissions and the Claimants submitted that the issues for determination were

- i. Whether they were unfairly terminated
- ii. Whether they are entitled to their terminal dues after termination
- iii. Who bears the costs of the suit

The Claimant relying on the case of **David Gichana Omuya v Mombasa Maize Millers [2014] eKLR** submitted that they were not accorded an opportunity under Section 41 of the Employment Act. It was submitted that the provisions of Section 41 were not mechanical and that an employer has to give an employee a fair and proper chance to be heard in their defence. The Claimant submitted that the period the Respondent gave was an insufficient opportunity to mount a defence and that the dismissal was thus unlawful and unfair. The Claimants sought payment of their dues as well as costs of the suit as costs follow the event.

6. The Respondent on its part submitted that the Claimants were asked to explain the theft of fuel and tampering with the odometer of the trucks they drove. The Respondent submitted that under Section 45 of the Employment Act, the dismissal of the Claimants was not unfair and the reason for the termination was valid. The Respondent relied on the case of **Ronald Wamalwa & Another v Masinde Muliro University of Science and Technology [2018] eKLR** which held that *the procedural requirement set out under Section 41 of the Employment Act, 2007 are fulfilled by asking an employee facing disciplinary proceedings to respond to a show cause letter and to attend an oral disciplinary hearing. The employee is not at liberty to decline to respond to the charges levelled against them and if they have any issues with the process, they must raise them directly with the employer within the timelines provided.* The Respondent submitted that the Claimants were served with the show cause letters dated 13th July 2017 and were to respond by 1230hrs but did not respond. The case of **Kenya Ports Authority v Fadhil Juma Kisuwa [2017] eKLR** was cited in aid of the argument the hearing does not necessarily have to be in writing for it to be deemed fair. The Respondent submitted that the Claimants were not entitled to the reliefs claimed.

7. The Claimants sought to obtain relief for the dismissal which they assert was unfair and unlawful. The Claimants were issued show cause letters and were dismissed shortly thereafter. Whereas the Respondent is right to state that the employees have no right to determine the period within which to respond, the cases cited indicate that there was a hearing which in their case could have been either oral or otherwise. They could have been heard through the response made. They were however not granted an opportunity as the show cause letters are not meant to be perfunctory. The Respondent no doubt had cause to dismiss. However, the manner of dismissal should accord with the rules of natural justice enumerated under Section 41. Section 41 of the Act provides as follows:-

41. (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. (underline mine)

8. The Claimants were not accorded this opportunity and the dismissal was thus unfair and unlawful. They are therefore entitled to each recover the following purely because the Respondent did not accord them a chance to explain as per Section 41:-

a. One month's salary as compensation as follows:-

- i. James Gathuthi Thuku – Kshs. 44,554/-.
- ii. James Nganga Mwangi – Kshs. 44,554/-.
- iii. Richard Maundu Nzomo – Kshs. 43,320/-.
- iv. Gideon Obwori Makori – Kshs. 44,554/-.
- v. Paul Kipsang Tanui – Kshs. 40,946/-

b. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 13th day of February 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar