



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 83 OF 2015

HASSAN GITHENDU MWAURA.....CLAIMANT

VERSUS

MATHAI SUPERMARKET.....RESPONDENT

JUDGMENT

1. The Claimant's suit is for the unlawful and unfair termination of his employment. He averred that he was employed as an attendant then later promoted to cameraman in charge of the control room. He worked until his dismissal on 15th November 2014 by Lucy Muthoni his supervisor. She apparently told him that his services were no longer required and no reasons were given. At the time he earned Kshs. 15,000/- per month. The Claimant averred that he was not issued with a show cause letter and that he had done nothing to warrant his dismissal from employment. He thus sought a declaration that his dismissal was unlawful and unfair and that he is entitled to payment of the terminal dues - one month's salary in lieu of notice – Kshs. 15,000/-, payment for the 14 days worked in November 2014 – Kshs.7,000/-, unpaid and untaken leave for one year – Kshs. 15,000/-, compensation up to the maximum 12 months gross salary – Kshs. 180,000/-, costs of the suit and interest.

2. The Respondent in its defence averred that the Claimant was engaged as a casual earning Kshs. 413/- per day vide the letter dated 17th April 2013. The Respondent denied that the Claimant was told that he was no longer required or that no reason as given for his dismissal. The Respondent averred that the Claimant was summarily dismissed for theft of goods at the supermarket. The Respondent denied that the dismissal offended the provisions of the Constitution or the Employment Act or the principles of natural justice. The Respondent averred that the suit was misconceived, incompetent and bad in law as it discloses no reasonable cause of action, is frivolous and should be dismissed with costs.

3. The Claimant and the Respondent's general manager Michael Sila. The Claimant testified that he was employed initially on casual basis and later was employed as a cameraman on permanent basis. He stated that he was dismissed without cause. He admitted that NSSF dues were paid on his account by the Respondent. The Respondent's witness on his part testified that the Claimant was dismissed as he was assisting thieves steal from the supermarket by tampering with the CCTV footage and that he failed to explain. He stated that the Claimant was not paid for the days worked and that the amount for leave was Kshs. 3,500/-.

4. The parties filed submissions and the Claimant submitted that the dismissal was not in keeping with Section 41 of the Employment Act. It was submitted that the employer had an obligation under Section 45 to not only prove the reason for termination is valid and fair and that the employment was terminated in accordance with fair procedure. The Claimant submitted that the Respondent failed to show that the dismissal was fair and procedural. He cited the case of **Donald Odeke v Fidelity Security Ltd [2012] eKLR** where Ndolo J. held that *an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them. It does not matter what offence the employee is charged of. If the employee is not heard the termination is ipso facto unfair*. It was submitted that fair procedure was not followed in the dismissal.

5. The Respondent in its part submitted that the Claimant was dismissed for gross misconduct because he conspired to shoplift the supermarket (Respondent). The Respondent submitted that the Claimant contributed to his dismissal and that if the court were to find that he was unfairly dismissed then he should only get compensation for one month. The Respondent submitted that the Claimant had not worked for one year and had not earned leave and the dues were paid thus disentitling him to any relief.

6. The Claimant was dismissed for alleged gross misconduct. Section 41 of the Employment 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)

The above is what gives rise to the procedural fairness and substantive fairness espoused in precedent such as the case of **Donald Odeke v Fidelity Security** (*supra*) and **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**. As stated by Ndolo J. in the case of **Donald Odeke v Fidelity Security**, it does not matter what offence the employee is charged of. If the employee is not heard the termination is *ipso facto* unfair. I find the dismissal was unfair for the reasons that the Claimant was not heard, he was not told what charges he faced and his dismissal was unlawful and unfair. He is entitled to recover as against the Respondent. I enter judgment for the Claimant against the Respondent for:-

- a. One month's salary in lieu of notice – Kshs. 15,000/-
- b. 14 days worked in November 2014 – Kshs. 7,000/-
- c. 2 month's salary as compensation for unfair dismissal – Kshs. 30,000/-
- c. Costs of the suit
- d. Interest on the above sums at court rates from date of judgment till payment in full
- e. Certificate of service in terms of Section 51 of the Employment Act.

It is so ordered.

Dated and delivered at Nyeri this 11th day of February 2019

Nzioki wa Makau

JUDGE

I certify that this is a true

copy of the original

DEPUTY REGISTRAR