



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

SUIT NO. 80 OF 2015

STEPHEN GITHIGA MUIYA.....CLAIMANT

VERSUS

MATHAI SUPERMARKET.....RESPONDENT

JUDGMENT

1. The Claimant's sued his former employer asserting that he was unlawfully dismissed by the Respondent. He averred that at all times material to this suit he was employed as a cashier/attendant at the Respondent from 18th November 2013. He was dismissed on 12th January 2015 at 9.00pm after working the entire day when he was handed a termination letter without any explanation by the manager, Raymond Mokuu. He averred the dismissal was without any basis, unfair and unlawful. He thus sought a declaration that the dismissal was unlawful, wrongful and unfair, a declaration that he was entitled to payment of terminal dues and compensatory damages, payment of terminal benefits which were one month's salary in lieu of notice – Kshs. 14,100/-, 3 days salary for days worked in January 2015, overtime for 1.5 years – Kshs. 158,625/-, unpaid leave for one year – Kshs. 14,100/-, 12 months salary as compensation for the unlawful dismissal – Kshs. 169,200/-. He also sought costs of the suit plus interest thereon.

2. The Respondent filed a defence in which it was averred that the Claimant was terminated for unsatisfactory performance. The Respondent denied that the dismissal of the Claimant 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 witness Michael Sila testified. The Claimant testified that he was dismissed after he had worked a whole day with no inkling that his dismissal was imminent. He did not have a hearing where his performance was discussed. He stated that he was just dismissed. The Respondent's witness testified that the Claimant was employed as a casual and that the casual employees did not get any leave. He stated that the Claimant was called for a hearing before the director and Raymond and that the summons were verbal from Raymond. He stated that the Claimant was paid a sum inclusive of the overtime worked.

4. The parties were to file submissions. The Claimant submitted that there was no show cause or a hearing conducted and that the attempt by the Respondent to raise these issues was an afterthought and a scheme to distort the truth. The Claimant submitted that the provisions of Section 41 of the Employment Act were not adhered to in his dismissal and that no evidence of poor performance was shown. He cited the case of **Peter Karenju Mwangi v Home Afrika Limited 2015] eKLR** and submitted that the Respondent did not prove the reasons for the termination. The Claimant submitted that the case of **Donald Odeke v Fidelity Security Ltd [2012] eKLR** was applicable to his case as the Respondent did not grant him an opportunity to answer to the charges that were allegedly laid against the Claimant. He urged the court to find in his favour and grant the prayers sought in the claim.

5. The Respondent submitted that the Claimant's claim should fail as the Claimant was a casual and thus was not entitled to leave, and that Section 41 did not apply because as a casual his services could be dismissed at the close of day without notice by either party.

6. The Claimant was dismissed on 12th January 2015. The terse letter read as follows:-

Following your unsatisfactory performance in your line of duty, the company has decided to terminate your employment with immediate effect.

You are therefore required to hand over any company asset that may be in your possession to the manager Raymond Mokuu immediately.

Your terminal dues (if any) will be computed and the same communicated to you by the accounts officer.

It was signed by Viktah Maina Ngunjiri, a director. It was copied to Michael Sila General Manager and David Kihara, accounts officer.

The Claimant was dismissed ostensibly due to his poor performance. The Respondent in its bundle produced a letter dated 29th September 2014 which sought an explanation from the Claimant on the alleged theft of milk. The Claimant is not indicated as having received it as the place for his signature is blank. No minutes of the alleged meeting held with the director and Raymond were produced. The Claimant thus from all accounts was dismissed for poor performance. Under Section 41 of the Employment Act, an employer is required to grant the employee an opportunity to defend himself against any accusation made. He was not given this from the facts adduced in evidence. The Claimant was thus dismissed contrary to the law. In the case of **Donald Odeke v Fidelity Security Ltd** (supra), Ndolo J. stated 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*. The dismissal was abrupt with no notice and though the Respondent alleged the Claimant was a casual, no evidence of this was adduced. The Claimant proved his case on a balance of probabilities and is entitled to the following relief:-

- i) One month notice Kshs. 14,100/-
- ii) Leave earned but not taken Kshs. 14,100/-
- iii) 6 months salary as compensation for the dismissal Kshs. 84,600/-
- iv) Certificate of service
- v) Costs of the suit
- vi) Interest on the above from the date of judgment till payment in full,

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