



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1306 OF 2015

ALLOYS ANYEGA MANYANGE.....CLAIMANT

VS

MFI TECHNOLOGY SOLUTIONS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Alloys Anyega Manyange against his former employer, MFI Technology Solutions Limited. The claim is contained in a Memorandum of Claim dated 29th July 2015 and filed in court on even date. The Respondent filed a Memorandum of Response on 5th November 2015.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Assistant Operations and Security Manager, Mahul R. Trivedi. Both parties further filed written submissions.

The Claimant’s Case

3. The Claimant was employed by the Respondent on 1st November 2013, in the position of Key Account Manager-Public Sector. He was confirmed in his appointment by letter dated 22nd May 2014.

4. On 8th July 2014, the Claimant was called to the Human Resource Manager’s office and handed a letter of summary dismissal on allegations of gross misconduct. He was instructed to hand over all company property in his possession. The Claimant handed over and signed a clearance form.

5. The Claimant states that he was not afforded an opportunity to defend himself against the allegations of gross misconduct levelled against him. He now seeks the following:

- a. One month’s salary in lieu of notice.....Kshs. 88,000.00
- b. 8 days worked in July 2015.....23,466.67
- c. 13 days leave for 2014.....38,133.33
- d. Annual leave for 2015.....154,000.00
- e. Gratuity @ 15 days’ pay per year.....192,500.00
- f. 12 months’ salary in compensation.....1,056,000.00
- g. Certificate of service
- h. Costs plus interest

The Respondent’s Case

6. In its Memorandum of Response dated 4th November 2015 and filed in court on 5th November 2015, the Respondent states that on 8th July

2015, the Claimant insulted another employee by the name Nelly Njeri by telling her that he could afford 100 ladies like her. Njeri wrote a letter the management seeking assistance regarding the incident. She also reported the matter to the police vide OB No 10/9/7/2015.

7. The Respondent convened a disciplinary meeting on the same day but the Claimant walked out prompting the management to summarily dismiss him. The Respondent avers that it fully complied with the law and states that the Claimant is not entitled to any claims on account of unlawful dismissal.

Findings and Determination

8. There are two (2) issues for determination in this case:

- a. Whether the Claimant's dismissal was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

9. The Claimant was dismissed by letter dated 8th July 2015 stating as follows:

"Dear Mr. Manyange,

RE: SUMMARY DISMISSAL:

Reference to *the above subject*;

*This is to inform you formally that the company management has decided to **relieve you of your duties with immediate effect**. It is unfortunate to note that the management is not happy with your overall behavior both at the office and even to our clients. The conclusions of our observation are as follows:*

1. That on 8th July 2015, you not only abuse (sic) but harassed your colleague in the office by use of abusive language that amounts to harassment by telling her that "**I can afford a hundred (100) ladies like you**" and shouting at her at the office.
2. That you have been arrogant in addressing most of our clients by threatening them, most of which cases your head of department have (sic) always had to talk to the clients on your behalf to convince and re-assure them of company support.

*In view of this, your act of **harassment** is not only contrary to the company policy but it is also against the **Kenyan law and Constitution** which amounts to **gross misconduct** on your part and therefore after careful thought the management has decided to **summarily dismiss**.*

*You are therefore required to immediately hand over all company property at your disposal to your **immediate supervisor** or the **Departmental Head** as you clear with the **HR department**.*

Your final dues will be tabulated and it shall be communicated to you once it's ready.

Yours faithfully,

MFI TECHNOLOGY SOLUTIONS LTD

(Signed)

JASWINDER SINGH

HEAD IT INFRASTRUCTURE

(Signed)

ANIMESH SOLANKI

GENERAL MANAGER

(Signed)

BIJU BHARATHAN

OPERATIONS MANAGER

(Signed)

EUNICE KOMBO

HR MANAGER

10. The accusations against the Claimant which led to his dismissal are in the nature of gross misconduct. First, he was accused of abusing his colleague, Nelly Njeri and second, he was accused of arrogance towards the Respondent's clients.

11. The Claimant admitted in cross examination having uttered the words “*I can afford a hundred ladies like you*” to his colleague, Nelly Njeri. He however added that the said words were provoked by Njeri’s negative attitude towards him. There was no evidence to support the allegation of arrogance towards the Respondent’s clients.

12. The question then is whether, by uttering the words “*I can afford a hundred ladies like you*” the Claimant committed an offence which would constitute a valid reason for dismissal.

13. Section 47(5) of the Employment Act, 2007 states as follows:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

14. As far as the employer’s burden is concerned, Section 43 of the Act provides that:

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

15. The burden placed on an employer under Section 43 of the Employment Act, 2007 is to establish a valid reason that would cause a reasonable employer to terminate employment. The Court of Appeal affirmed this position in *Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR*, by citing with approval the following excerpt from the Halsbury’s Laws of England, 4th Edition, Vol. 16(1B) para 642:

“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”

16. In adjudicating on the question whether the employer had a valid reason to bring the employment relationship to an end, the Court is not moved by its preferred option; it is moved by the option a reasonable employer would have taken.

17. From the evidence on record, Nelly Njeri was offended by the words uttered to her by the Claimant. In fact she was so offended that she made a written complaint to the Respondent’s management. This Court has arrived at the conclusion that the subject words would have offended a reasonable lady and whether they were uttered in anger or in jest, there was no justification for the Claimant to use such language in the work place. As a result, the Court finds and holds that the Respondent had a valid reason to dismiss the Claimant.

18. The next question is whether, the Claimant was afforded an opportunity to be heard prior to the dismissal. The parties gave conflicting accounts of the events following the altercation between the Claimant and Njeri on 8th July 2015. What is common is that the Claimant walked out of a meeting convened by the Respondent because he needed legal representation. He also went to the police to inquire if a report had been made against him.

19. In *Feroz Ali Omar v Ecu Worldwide Limited [2018] eKLR* this Court stated the following:

“Internal disciplinary proceedings are essentially between an employer and its employee and even though an employee may be allowed to be accompanied by their Advocate at the shop floor, the burden to respond rests with the employee. An employee who receives notice of disciplinary proceedings does not insulate themselves by going to an Advocate. Only the Court can in appropriate circumstances, halt a disciplinary process.”

20. If the Claimant had any issue regarding the manner in which the Respondent was handling his case, he should have raised them formally with the Respondent. He was not at liberty to walk out of a meeting convened by his employer. By walking out of the meeting, he squandered the opportunity to be heard and he cannot come to Court to claim the very right he threw away.

21. In *Jackson Butiya v Eastern Produce Limited (Cause No 335 of 2011)* this Court stated thus:

“An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say, ‘I refused to talk with those people and therefore I was not heard, order them to pay me.’ It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law.”

22. By walking out on his employer, the Claimant effectively locked himself out of the internal disciplinary process availed by his employer

and the Court will not intervene.

23. Flowing from the foregoing findings, the Court finds and holds that the Claimant's dismissal was lawful and fair and his claims for compensation and one month's salary in lieu of notice are without basis and are dismissed.

Other Remedies

24. The Claimant claims leave pay balance for 2014 and 2015. In the absence of leave records to counter this claim, I allow 13 days leave balance for 2014 and prorata leave for 2015.

25. The Claimant is also entitled to salary for 8 days worked in July 2015

26. No basis was established for the claim for gratuity which therefore fails and is dismissed.

27. I therefore enter judgment in favour of the Claimant in the following terms:

- a. 13 days' leave pay for 2014 (87,143.60/30x13).....Kshs. 37,762
 - b. Prorata leave pay for 2015 (87,143.60/30x1.75x6).....30,500
 - c. Salary for 8 days in July 2015 (87,143.60/30x8).....23,238
- Total.....91,500**

28. As the Claimant's claim only succeeds in part, I direct that each party will bear their own costs.

DATED AND SIGNED AT MOMBASA THIS 15TH DAY OF JANUARY 2019

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Manyange for the Claimant

Mr. Bosire for the Respondent