



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 56 OF 2018

(Before D. K. N. Marete)

GEORGE OKELLO MUNYOLO.....CLAIMANT

VERSUS

UNILEVER KENYA LIMITEDDEFENDANT

JUDGEMENT

This matter was originated by way of a Claimant's Statement of Claim dated 28th May, 2018. The issue in dispute is therein cited as;

Unlawful termination of the plaintiff from work by the respondent

The respondent in a Respondent's Memorandum of Response dated 2nd July, 2018 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was offered employment by the respondent as a casual labourer in 1990 before promotion to stores clerk grade II on 1st October, 2012. He then earned Kshs.17,000.00 a months. Ever since, he was always hardworking and committed to the employment of the respondent.

The claimants further case is that on or about 18th December, 2017 he was unjustifiably subjected to summary dismissal on grounds that he was linked to conspiracy to steal sugar from the company. He expresses this as follows;

4. The claimant denied the allegation by the Management and states that each time any person requested for a consignment, including Shadrack who falsely incriminated the claimant, the procedure was per the instructions by the management. So the allegation that he made requests but never received sugar was lies because each request was well documented.

5. The claimant further dismisses the allegation that two tones of sugar was missing because the supplier never raised a complaint of shortage and our records from the bin cards equally indicated that there was no shortage.

The claimant avers unlawful and unfair termination of his employment as follows;

PARTICULARS OF MALICE AND ILLEGALITY OF THE RESPONDENT

- a) Unlawfully terminating the services of the claimant.*
- b) Failure to conduct a proper investigation and relying on information by word of mouth.*
- c) Failing to avail to the claimant fair hearing process*
- d) Going against the respondents code of conduct and business ethics*
- e) Discriminating against the claimant*
- f) Failure to adhere to the laws & rules governing disciplinary process*

The claimant's further case is that as a consequence of his unlawful termination of employment, he has suffered damages as hereunder;

PARTICULARS OF DAMAGES SUFFERED BY CLAIMANT

a) Damages for unlawful termination

Kshs.17,000 x 12 months.....Kshs.204,000/=

b) Service pay Kshs.17,000 x 27 years.....Kshs.459,000/=

He prays as follows;

a) A declaration that the termination of the claimant's services by the respondent was unlawful

b) The retirement benefits due to the claimant

c) Kshs.527,00/= as particularized at paragraph 8 above

d) Certificate Service

e) Any other or further remedy this court deems just and expedient to grant

The respondent denies the claim and avers that this is bad in law, inept, ambiguous and does not, or does not sufficiently disclose proper particulars of the claim and or cause of action and should be struck out with costs.

The respondent's other case is that the claimant was summarily dismissed for stealing two tones of sugar from the respondent. He was subjected to disciplinary action and the claimant found culpable for defiance of the respondent's Code of Business Principles and therefore the falsity of the claim and incidental benefits and costs. The termination of his employment was therefore lawful and in accordance with the Employment Act, 2007 and his benefits thereof paid.

The matter came to court variously until 4th October, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination in this cause therefore are;

1. Whether the termination of the employment of the claimant was wrongful, unfair and unlawful in the circumstances.
2. Whether the claimant is entitled to the relief sought.
3. Whether the claimant is entitled to the costs of the cause.

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful in the circumstances. The claimant in his written submissions dated 16th January, 2019 submits a case of unlawful termination. It is his case that the respondent acted on mere suspicions as no evidence was produced to show the claimants defiance of section 44 (4) (c) and (g) of the Employment Act as alleged.

Further, the claimant sought to rely on sections 41, 43 and 45 of the Employment Act, 2007 in establishing a case of unlawful termination of employment. It is his case that the procedural aspects relied on by the respondent and also presented in his documents in evidence did not proffer compliance with section 41 aforesaid.

Again, the respondent did not prove the reasons for termination of the employment of the claimant thereby contravening section 45 and 43 of the Act.

The respondent submits compliance with section 41 of the Employment Act, 2007 in that there was notice and hearing before the termination of the claimant. Indeed, the respondent complied with all the substantive and procedural aspects of termination of employment as is required by sections 43 and 41 of the Employment Act, 2007. In this she sought to rely on the authority of **Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd, Industrial Court Cause No. 66 of 2012** where the court observed as follows;

(i) That the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

(ii) Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defense/state his case in person, writing or through a representative or shop floor union representative if possible.

(iii) Thirdly, if it is a case of termination, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

The respondent further sought to rely on the statutory authority of section 44 (1) and 4 (g) of the Employment Act, 2007 as follows;

44.(1) Summary dismissal shall take place when an employer terminated the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

Further, section 44 (4) (g) comes out as follows;

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

In the penultimate, the respondent concludes her submission by relying on the authority of **Thomas Sila Nzivo vs Bamburi Cement Limited [2014]eKLR** where the court in amplification of the import of section 44 (4) (g) above observed as follows;

The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under Section 44 (4) (g) of the Employment Act, 2007. The Employer was not required to have conclusive proof of the Claimant's involvement; it was only expected to have reasonable and sufficient grounds.

The respondent's case in the circumstances overwhelms that of the claimant. A case of lawful termination of employment ensues from the insurmountable evidence of the respondent against the claimant.

Again, it can be argued that the claimant has failed to adduce evidence in support of a case unlawful termination of employment. He has failed to satiate his burden of proof as required of section 47 (5) of the Employment Act, 2007 which comes out as follows;

"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"

On this, he loses out. I therefore find a case of lawful termination of employment of the claimant by the respondent and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment he becomes disentitled to the relief sought.

I, however, note that the claimant had put in enormously substantial amounts of time at the work place. He was employed in 1990 and left on 8th December, 2017. This is a period of more or less twenty-eight (28) years. This is a considerable stint of time at work. I therefore find that the fair and justifiable route in this cause would be to ameliorate the damage occasioned by the summary dismissal of the claimant by reducing this to termination of employment. This will enable and facilitate a situation that he earns and is entitled to his terminal benefits in terms of his contract of employment. And it is ordered.

I am therefore inclined to dismiss the claim with a rider and order that the summary dismissal of the claimant be and is hereby reduced to a mere termination of employment. The claimant therefore becomes entitled to his entire terminal benefits in accordance with his terms of employment contract.

Delivered, dated and signed this 1st day of February, 2019.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Mwita holding brief for Ondeyi instructed by Bruce Ondeyi & Company Advocates for the claimant.
2. Mr. Muchela holding instructed by Murimi, Ndumia, Mbago and Muchela Advocates for the respondent.