



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 68 OF 2018

(Before D. K. N. Marete)

MESHACK AUTA ONGERI.....CLAIMANT

VERSUS

NYAMACHE TEA FACTORY COMPANY LIMITED....RESPONDENT

JUDGEMENT

This matter was originated by way of The Claimant's Memorandum of Claim dated 13th July, 2018. The issue in dispute is therein cited as;

(Wrongful dismissal, refusal, failure and neglect by the Respondent to pay the right terminal dues)

The respondent in a Reply to Memorandum of Claim dated 18th September, 2018 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was employed by the respondent from 2005 or thereabouts to 31st May, 2016 with a basic salary of Kshs.47,589.00 and other benefits. He worked for a period of eleven (11) years blemish free.

The claimant's further case is that during his stint of employment, he never sought sick leave, annual leave or absented himself from work without authority. Despite this, he was served with a letter of termination of contract on 31st May, 2016 while on duty. This was on grounds that he had indulged in an irregular replacement in the CTC area to replace bearing of the bank B spreader. This, he asserts, amounted to unjustifiable constructive termination for no reasonable cause. It was unprocedural and unlawful redundancy.

The claimant's other case is that upon dismissal, he has not been paid any severance or outstanding dues and benefits owing to his term of service. He brings out this claim in terms of sections 33 and 44 of Employment Act, 2007. This comes out as follows;

12. The Claimant further avers that the Respondent's actions against him were actuated by bad faith, malice, and spite and only intended to jettison the Claimant from his employment notwithstanding his good work relationship and values.

He claims as follows;

- | | |
|--|----------------|
| i) Unpaid salary during month of service: | Kshs.47,859/- |
| ii) Two months salary in lieu of Notice: | Kshs.95,718/- |
| iii) House allowance dues: | |
| Kshs.5800 x 25 months = | Kshs.145,000/- |
| iv) Damages for unfair termination: | |
| (Kshs.47,859,000 + Kshs.5800) x 12 months | Kshs.643,908/- |
| v) Gratuity for years served Kshs.47859 x 11 years | Kshs.526449 |

TOTAL

Kshs.1,458,934/=

He prays as follows;

1. Kshs.1,458,934 as particularized under paragraph 14.
2. Costs of the suit.
3. Interest
4. Any other relief as the court may deem fit and just to grant.

The respondent's case is a denial of the claim

It is her case that the claimant's stint of service was not blemish free in that the claimant severally flouted work procedures at set out and had been previously warned over absconding duty on 13th March, 2014, insubordination on 15th April, 2015 and negligence 5th October, 2015.

The respondent's further case is a denial of the claimant's allegations at paragraph 6 of the Memorandum of Claim that he was working when he was served with the letter of termination. On the contrary, the claimant was on suspension between 15th October, 2015 and 31st May, 2016 when the notice of termination was effected. This amounted to procedural, reasonable and justifiable dismissal for the following reasons;

- 1) The Claimant was duly served with a notice to show cause on 8th October, 2015, on why disciplinary action could not be taken against him over his dereliction of duty especially concerning his failure to replace the bearing of a "B" spreader in line with the Respondent's safety procedures.
- 2) The Claimant did respond to the said notice to show cause vide his letter dated 13th October, 2015 wherein he made his representations on the allegations of negligence on his part and was placed on suspension with half pay pending determination of his case.
- 3) The Claimant was subsequently invited to attend a disciplinary hearing scheduled for 18th May, 2016 vide the Respondent's letter dated 13th May, 2016 when his representations were heard.
- 4) That the Claimant's representations were subsequently considered and a decision was taken to terminate his employment with effect from 31st May, 2016, owing to the risk posed to the Respondent's factory's operations and employees resulting from his negligence and/or wanton dereliction of duty, aforesaid.
- 5) Furthermore, the Claimant's representation to the effect that there were no "B" spreader bearings in the Respondent's stores hence his failure to replace the worn out one; was found to be insufficient considering that he never made any notification to that effect to its procuring officers. Be that as it may, it is evident from the Stores Bin Card attached hereto and marked as Appendix 10, that the said bearings were in the store as of 5th October, 2015 hence the Respondent's failure to replace them was inexcusable.
- 6) That the Claimant was promptly notified of the decision to terminate his service vide the letter of termination dated 31st May, 2016, a copy of which is attached herewith marked as appendix 11.
- 7) That the Claimant had severally been warned over his repeated acts of negligence, insubordination and absconding duty as is evident from appendix 12 being a bundle comprising warning letters addressed to the Claimant and his responses thereto.
- 8) The Claimant did execute and Employment Release Agreement wherein he inter-alia bound himself that he had no claim against the Respondent arising from disputed wages and/or wrongful dismissal.

The respondent's other case is that the claimant on dismissal/termination was duly paid off his terminal benefits as follows;

Terminal benefits

Salary in lieu of notice.....Kshs.86,600

Payment in lieu of leave days earned

But not taken.....Kshs.42,706.85/=

Gratuity.....Kshs.42,068,.49/=

TOTAL.....Kshs.556,375.34/=

Less deductions

PAYE.....Kshs.108,045.40/=

Advance.....Kshs.10,000.00/=

Chai Sacco Society Limited (loan).....Kshs.155,592.90/=

Others- Nyamache Workers Welfare.....Kshs.18,425.00/=

NET PAY Kshs.264,312.04/=

This was executed through a bankers cheque No.002710 issued in his favour. He accepted receipt upon his execution of the Employment Release Agreement. This is illustrated as follows;

10. The Respondent further avers that the Claimant's was gratuitously paid terminal dues inclusive of gratuity, two months salary in lieu of notice and pay for leave earned but not taken; notwithstanding the fact that he was dismissed for an act that was tantamount to gross misconduct warranting summary dismissal without such benefits pursuant to the Collective Bargaining Agreement (CBA).

The termination of employment was in tandem with sections 41, 43 and 44 of the Employment Act, 2007. She further denies the claims and posits as follows;

14. In further response, the Respondent avers that the Claims for unpaid salary and two months' salary in lieu of notice, are untenable as the Claimant was already paid dues in their respect as is evident from appendix 14. Furthermore, the Claimant has not even specified the month and/or period from which the unpaid salary accrued.

The matter came to court on 1st October, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Whether termination of the employment of claimant wrongful, unfair and unlawful?
2. Whether the claimant entitled to the relief sought?
3. Who bears the costs of the claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant in his written submissions dated 10th November, 2018 and in support of his case seeks to rely on the authority of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014)eKLR** where Mbaru, J. held thus;

Section 41 of Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.

The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.

He further employs the authority of **Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013)** where the court observed as follows;

a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.

The claimant further sought to rely on the statutory authority of sections 43 (1) and 45 (5) of the Employment Act, 2007 as follows;

“ 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”

Further, section 45(5) of the Employment Act, 2007 applies and is as follows;

5. *In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider-*

a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

b) the conduct and capability of the employee up to the date of termination;

c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

e) the existence of any previous warning letters issued to the employee.

In summation, the claimant seeks to rely on the celebrated authority of **Walter Ogal Anuro vs. Teachers Service Commission (2013)eKLR** the court held thus;

“... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

The respondent uses somewhat the same authorities in opposition to a case of unlawful termination of employment for the claimant. It is her case that the claimant's inaction in performance of his duties amounted to neglect of duty, an act of gross misconduct as enunciated in section 44 (4) (c) of the Employment Act, 2007 as follows;

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (32) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

(a) ...

(b) ...

(c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

The respondent further 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;

The ingredients of procedural fairness as I understand it within the Kenyan situation is 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.

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.

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.

It is the respondent's penultimate case and submission that the claimant has failed to prove a case of unlawful termination or dismissal. The burden of proof of such remains not discharged. He *in toto* fails to satiate the requirements of section 47 (5) of the Employment Act which provides 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”

This is a sad case for the claimant. The respondent's case overwhelms his. The claimant has indeed failed to plant a case of unlawful termination of employment. His case is totally controverted by the ample evidence adduced by the respondent in favour of the opposite case: lawful termination of employment. I therefore hold a case of lawful termination of the employment of the claimant by the respondent. And this answers the 1st issue for determination.

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 am therefore inclined to dismiss the claim with costs to the respondent. Why? The claimant has through and through mounted an opportunistic litigation to the detriment of the respondent. Let him pay the price.

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

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kiprono holding for Manyara instructed by Zablon Mokuia & Company Advocates for the claimant.
2. Mr. Mwita instructed by Bett & Company Advooates for the respondent.