



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 95 OF 2018

FRANCIS WAMBIRIU WAINAINA.....CLAIMANT

VERSUS

H YOUNG & COMPANY (EA) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for unfair termination of employment. The Claimant averred that he was employed on 21st March 2017 as a general labourer on the Gatundu-Kenyatta Road project and that his services were terminated on 10th February 2018 without any prior notice, justification and in complete disregard to the procedure expressly set out in the Employment Act 2017. He thus sought payment of one month's salary in lieu of notice – Kshs. 21,429/-, damages for unlawful termination of employment, certificate of service, gratuity for the period worked at the rate of 15% of the annual salary, interest, costs of the suit and any other relief the court deems just to grant.

2. The Respondent averred in the defence that the Claimant was paid Kshs. 21,096/- as a labourer from 2nd June 2017 and that he was dismissed for absenteeism after repeated warnings. For the 2nd Claimant, the Respondent averred that he was called by the senior security manager and questioned before a recommendation was made for dismissal. The Respondent thus sought the dismissal of the suits.

3. The Claimant and the Respondent's witness Duncan Nyabuto testified. The Claimant and the Respondent's witness Duncan Nyabuto testified. The Claimant stated that he worked as a casual labourer was given a dismissal letter without cause. He testified that he was not called to defend himself and that the letter of demand on account of a work injury he suffered is what caused his dismissal. The Respondent's witness Mr. Nyabuto testified that the Claimant was called and warned verbally. A warning letter was written but the Claimant did not collect it and was absent causing his dismissal for absenteeism.

4. The parties filed submissions. In his submissions, the Claimant submitted that the Respondent did not follow the law in effecting his dismissal. He relied on the provisions of Section 45 of the Employment Act as well as Section 41 for the argument that the Respondent did not prove the reasons for the termination were valid. The Claimant submitted that the Respondent failed to accord him the safeguard under Section 41. He relied on the case of **Daniel Kiplagat Kipkebut v SMEP Deposit Taking Micro Finance Limited [2016] eKLR** which cited with approval the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** for the proposition that failure to accord an employee the hearing under Section 41 is *ipso facto* unfair and unlawful. The Claimant also placed reliance on the case of **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR** for the argument that the statutory burden placed on an employer under Section 47(5) of the Employment Act was not discharged by the Respondent while he asserts that he demonstrated the dismissal was unfair in terms of the Section.

5. The Respondent on its part submitted that the Claimant clocked in and disappeared and only came back and clocked out conveniently at the end of the day. It was submitted that in addition there was poor performance on his part. The Respondent relied on the case of **Kenya Ports Authority v Fadhil Juma Kisuwa [2017] eKLR** where the Court of Appeal stated that a hearing need not be oral. It was submitted that where the employer meets the degree of fairness required it does not have to be an oral hearing as there are procedures and processes at the workplace that can achieve the fairness that meets the legal threshold.

6. The Claimant was dismissed unceremoniously for his alleged poor performance. There was no criteria shown for his alleged poor performance such as a written request for improvement or a performance measuring tool. As far as I can discern, the decision made by the Respondent that the Claimant was not performing is subjective. In addition, his absenteeism was mentioned as a cause for the dismissal but no clock in/out register was presented to show the Claimant was actually absent on the dates (which are not indicated) or times (also not indicated) as asserted by the Respondent. The Claimant proved that there was no adherence to the law in the dismissal as there was no valid reason for the dismissal and the dismissal was thus unlawful and unfair. The Claimant however failed to prove he was entitled to service gratuity.

7. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a) One month's salary as notice – Kshs. 21,096/-
- b) Three month's salary as damages for the unfair dismissal – Kshs. 63,288/-
- c) Costs of the suit
- d) Certificate of service
- e) Interest on a) and b) above at court rates from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 6th day of March 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar