



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 96 OF 2018

JOSHUA OTIENO ORIMBA.....CLAIMANT

VERSUS

H. YOUNG & COMPANY (E.A.) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for unfair termination of employment. The Claimant averred that he was employed on the 6th June 2017 as a guard. He was dismissed on 5th 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. 24,100/-, 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 there was cause for dismissal and that the Claimant was called by the senior security manager and was questioned before a recommendation was made for dismissal. The Respondent thus sought the dismissal of the suit.

3. The Claimant and the Respondent's witness Charles Oyoo Ogina testified. The Claimant testified that he was dismissed allegedly for poor performance and absenteeism. He stated that he was on patrol at night and met three Asians who told him he was absent. He tried to explain and Sachi told him to go to his office the next day. He stated that when he went there he was sent to the security office and was told to report the next day to work. When he reported the next day he was sent to Millicent the HR officer who gave him a dismissal letter. He stated that the dismissal was unfair and he thus sought the relief in his claim.

4. The parties filed submissions and the Claimant submitted that the Respondent did not follow the law in the dismissal. He cited Section 45 of the Employment Act as well as Section 41 and argued that the Respondent did not prove the reasons for the termination were valid. The Respondent was also said to have failed to accord the Claimant the safeguard under Section 41. 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** was relied on 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 while the Claimant demonstrated the dismissal was unfair in terms of the Section.

5. The Respondent on its part submitted that the Claimant was absent and was not able to explain the absence at his work place and therefore the Respondent was justified in the dismissal. It was submitted that he was given an opportunity to explain and failed to satisfactorily explain his absence. 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 absenteeism from work. Whereas the Respondent asserts this to be the reason for the dismissal, there is some *lacunae* in this assertion. The Claimant was not proved to have been absent. He was not proved to have failed to report to work as no worksheet or log-in register was availed to show he was absent. He stated that he was on patrol within the premises and on making his round came across the two gentlemen who were within the precincts of the yard and he was asked to see the manager the next day. This went on for a day or so before he was handed the letter of dismissal. There is no way to discern if he was absent during the period the Respondent asserts. In my view the Respondent failed to show there was a valid and fair reason for the dismissal. He was not accorded a hearing and the case cited though good law does not aid the Respondent. There was no hearing. Period. As regards the claim for service gratuity, the Claimant did not prove he was entitled to this payment.

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

- a. One month's salary as notice – Kshs. 24,100/-,
- b. Three month's salary as damages for the unfair dismissal – Kshs. 72,300/-
 - a. Costs of the suit
 - b. Certificate of service
 - c. 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