



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI

CAUSE 2150 OF 2014

SIMON KARUGA WAWERU.....CLAIMANT

VERSUS

TWIGA STATIONERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant filed this claim on 4.12.2014 alleging that his employment was unfairly and unlawfully terminated by the respondent and prayed for the following reliefs:-

- (i) The respondents to pay to the claimant all terminal dues accrued.
- (ii) Respondent to pay the claimant reasonable compensation for the illegal and unlawful termination of employment as this Honorable Court may determine.
- (iii) Respondent to pay the costs of this suit with interest.
- (iv) Any other order and/or relief that this Honourable court may deem just and expedient to grant.

2. The respondent denied that she unfairly terminated the claimant's services and averred that the termination was lawfully done for absconding work, and after following a fair procedure. She further averred that she paid the claimant all his terminal dues after the separation and prayed for the suit to be dismissed with costs.

3. The suit was heard on 14.11.2018 and 3.12.2018 when the claimant testified as Cw1 and the respondent's HR Manager testified as Rw1.

Thereafter both parties filed written submission. The issues for determination are:-

- (a) Whether the termination was unfair.
- (b) Whether the reliefs sought should be granted

Claimant's evidence

4. The claimant testified that he was employed by the respondent on 2.2.2011 as a Machine Operator earning Kshs.41,531.65. That on 9.6.2014, he verbally sought permission from his supervisor Mr. Simiyu to attend to a personal matter but he was told to do so during his lunch break. That the matter took longer than expected and at about 3 pm he was called by the Production Manager Mr. Bhat enquiring his whereabouts and he told him that he was in town but he would be back shortly. He however never reported back until the following morning when he was stopped at the gate by the guards following instructions from the respondent's Director Mr. Nilesh.

5. Cw1 further testified that at around 8 a.m. the same morning, the Production Manager and Mr. Simiyu met him at the gate and served him with a show cause memo dated 9.6.2014 referring to his absence from work on 9.6.2014 afternoon. That he responded the same day admitting the offence but he was not allowed back to work and instead he was served with another memo citing gross misconduct and demanding audience with the Workers Union.

6. Cw1 admitted that he never called his supervisor or manager to report that he would not report back on 9.6.2014 afternoon. He further admitted that he attended the meeting with the union officials on 14.7.2014 but he was not given any hearing save that he was only asked whether he wished to continue working. That the rest of the discussion was between the employer and the union official who negotiated for reduction of the disciplinary action from summary dismissal to a normal termination. That thereafter he was served with computation of terminal dues totalling to Kshs.92,103.75 which he accepted and discharged the employer from any further claims. He however contended that his salary for June and July 2014 was not paid.

Defence evidence

7. Rw1 joined the respondent in 2015 after the termination of the claimant's contract. That he only learned about the claimant from the office records. That the claimant was dismissed for absenting himself from work without permission. He further contended that the claimant was given a hearing in the presence of his union representatives before the separation. He further contended that under clause 11(b) of the CBA and the Employment Act, absence from work without permission is gross misconduct that warrant summary dismissal of the claimant.

8. Rw1 further testified that after the termination the claimant was paid his terminal dues as per the tabulation dated 19.7.2014. He further contended that under clause 13(b) of the CBA, a dismissed employee was disqualified from getting gratuity. He however admitted that as per the computation of the claimant's dues, he was paid gratuity. He therefore prayed for the suit to be dismissed with costs.

Analysis and determination

(a) Unfair and unlawful termination

9. Under section 45 of the Employment Act, termination of Employment is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that, a fair procedure was followed. Valid and fair reason is one that relates to the employees conduct, capacity and compatibility or based on the employers operational capacity. Fair procedure on the other hand includes, but it is not limited to according the employee a fair hearing before the termination.

Reasons for termination

10. In this case the reason for the termination was cited as absence from work without permission on 9.6.2014 after lunch and again on 10th to 12th June 2014. The claimant admitted that he absented himself from his place of work on 9.6.2014 after lunch and despite promising his Production Manager that he was reporting back shortly, he never did so until the following day. The said offence was admitted by claimant in his response to the show cause letter and also in his evidence herein. I therefore find that the respondent has proved on a balance of probability that there was a valid and fair reason for dismissing the claimant both under section 44(4) (a) of the Employment Act and clause 11(b) of the CBA.

Procedure followed

11. Under section 41 of the Employment Act, before the employer terminates the contract of service of an employee on grounds of misconduct, poor performance or physical incapacity, he shall first explain, in a language of the employee's understanding and in the presence of another employee or union officials of his choice, the reason for which termination is being considered and thereafter invite the employee and his chosen companion to air their representations for considerations before the termination is decided.

12. In this cause, the claimant was served with an internal memo charging him with absenting from work without permission, which he responded admitting that he absented himself from work on 9.6.2014 after lunch and reported back on 10.6.2014.

13. In a number of previous decisions, I have held that whenever an employee admits misconduct in a response to a show cause letter, the employer is not bound to conduct any further disciplinary hearing. In this case, I dare repeat that any demand for an oral hearing under section 41 of the Employment Act was superfluous in the face of the said unequivocal admission by the claimant that he absconded duty on 9.6.2014.

14. In view of the finding herein above that the respondent has proved a valid and fair reason for dismissing the claimant's employment and that there was no need of conducting an oral hearing under section 41 of the Act after the admission of the misconduct by the claimant vide his letter dated 10.6.2014, I return that the termination of the claimant's services was fair and lawful.

(b) Reliefs

15. In view of the foregoing finding, I dismiss the prayer for compensation for unlawful termination. I further dismiss the claim for accrued terminal dues for want of particulars and evidence.

16. Without prejudice to the foregoing, the claimant would still not be entitled to any award of benefit because after receipt of the dues computed by the employer, he signed voucher discharging the employer from any further claims. He did not plead or adduce any evidence to prove that the said discharge was signed under any of the factors that vitiates a contract between parties. That was the thinking of the Court of Appeal in *Thomas De La Rue (K) Ltd Vs David Opondo Omutelama[2013]eKLR*.

Conclusion

17. I have found that the termination of the claimant's employment was substantively and procedurally fair and dismiss the suit with no order as to costs.

Dated, Signed and Delivered in Open Court at Nairobi this 26th day of April, 2019

ONESMUS N. MAKAU

JUDG