



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 5 OF 2018

DANIEL MBAI MUTUA.....CLAIMANT

VERSUS

H. YOUNG & COMPANY EAST AFRICA.....RESPONDENT

JUDGMENT

1. The Claimant's suit against the Respondent is for the unfair termination of employment. He seeks through the suit for recovery of one month's pay in lieu of notice, damages for unlawful termination, certificate of service, gratuity at the rate of 15% of the annual salary as well as costs of the suit and interest. He averred that he was employed as a fuel attendant on 21<sup>st</sup> March 2017 at the Respondent's Gatundu (Kenyatta Road) Project. He averred that he worked long hours, gruelling work and difficult environment and diligently discharged his duties. He averred that on 13<sup>th</sup> December 2017 he was dismissed unilaterally without any prior notice or warning and without any justifiable cause in complete disregard for the procedure expressly set out in the Employment Act 2007. He averred that prior to the dismissal he was not invited to a disciplinary meeting or accorded an opportunity to defend himself against any allegations that formed the basis of termination. He was earning Kshs. 20,342/- at the time of dismissal.

2. The Respondent filed a defence in which it averred that the dismissal was in alignment with Section 44(g) of the Employment Act. The Respondent denied that the dismissal was unfair and averred that the Claimant was given an opportunity to defend himself before termination. The Respondent denied being served with notice of intention to file a suit.

3. The Claimant testified as did the Respondent's witness Eunice Waithira Ngang'a. The Claimant stated that on the material day he reported to work as usual at 6.00am and fuelled 3 trucks and sought permission to go and have breakfast. When he went to take breakfast, he returned and found that his boss had picked someone else to work in his place. He was called by the administrator who told him that he was no longer needed. He testified that he asked for reasons and was not given any. He was told to return the next day and get another assignment. He stated that when he went back the next day he found an email terminating his services. He thus sought relief as sought in his claim form. In cross-examination he testified that he was supposed to record the daily issues of lubricants, oils and fuel. He was dispensing diesel and he stated that he was keeping records and submit them to the material controller. He stated that no reasons were given for the dismissal and that there was no reason for the dismissal. He testified that he was the only one keeping records at the site.

4. The Respondent's witness testified that she was the HR manager at the Respondent and that the Claimant was the fuel attendant at the site. He was called on 12<sup>th</sup> December 2017 by the site administrator due to discrepancy. She stated that the materials controller had noted the difference and the Claimant had nothing to say. He was dismissed summarily and was paid in full. In cross-examination the witness stated that the meeting was in the site administrator's office and that she was not aware of the record of that meeting. She testified that she had not seen any investigative report but was aware that an investigation was conducted. In re-exam she stated that the Claimant was suspected of theft and that there was discrepancy in the fuel consumption. She testified that the surge was unexpected and that the record was not up to date.

5. The Claimant submitted that he was never issued with any warning or given notice of the intention to dismiss. He submitted that the Respondent breached Section 45 of the Employment Act and that the Respondent did not prove the reasons for termination were valid. He submitted that the dismissal being contrary to Section 41 of the Employment Act was not procedurally fair in terms of the law and he relied on the case of **John Rioba Maugo v Riley Falcon Security Services Limited [2016] eKLR**. The Claimant submitted that he was not dismissed fairly and despite the Respondent's attempt to cloak the dismissal in Section 44 of the Act there was no justification. He relied on the case of **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR** where Radido J. held

*“The statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is found in section 47(5) of the Employment Act. The section provides that*

*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.”*

The Claimant thus urged the court to find in his favour as he had proved the dismissal was unfair.

6. The Respondent submitted and isolated the issues for determination to be

- i. Whether the Claimant was unfairly terminated?
- ii. Whether the Claimant is entitled to the reliefs sought?

The Respondent submitted that the termination is deemed to be unfair in accordance with Section 45 of the Employment Act if the employer fails to prove that the reason for the termination is valid or that the employee was terminated in accordance with fair procedure. It submitted that the burden of proving an unfair termination has occurred shall rest on the employee while the burden of justifying the grounds for termination shall rest on the employer. The Respondent submitted that the Claimant was suspected of wrongly recording diesel, was negligent and poor in record keeping at the work place. The Respondent submitted that during the hearing the Claimant confirmed that he was the sole person responsible for keeping the records of fuel, oils and lubricants issued at the site. The Respondent submitted that under Section 44 (c) as read with Section 44(g) of the Employment Act, the Respondent had a valid reason for the termination for the Claimant. It submitted that it did not require conclusive proof of the Claimant's involvement and it was only required to have a reasonable and sufficient grounds based on the suspicion. The Respondent relied on the case of **Kenya Plantation and Agricultural Workers Unions v Del Monte (K) Ltd [2018] eKLR** where the court quoted the Court of Appeal in **Michael Dowling v Workplace Safety and Insurance Board [2004] CAN LII 43692** where the learned Judges of Appeal held as follows:

*“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.”*

The Respondent submitted that borrowing from the above decision, the Claimant's immediate supervisor was not willing to work with him because of the suspicion of dishonesty thus irreparably breaking the relationship between the employer and the employee. The Respondent submitted that it had established that it had a valid reason for the dismissal of the Claimant. The Respondent submitted that the Claimant was called by the site administrator one Duncan Nyabuto and asked to answer to the allegations of wrongful recording and negligence. The Respondent asserts that the Claimant was given a day off and the site administrator caused an investigation and upon establishing the discrepancy he recommended the summary dismissal of the Claimant. The Respondent submitted that the hearing need not be oral and that the hearing the Claimant was accorded sufficed. It thus urged the court to disallow the claim and dismiss it with costs.

7. The Claimant was suspected of negligence in the performance of his duty as the fuel attendant. He was dismissed summarily upon the direction of the site administrator. He was called and notified that discrepancies had been noted on the recording of fuels, oils and lubricants dispensed and the site administrator stated he was not willing to work with the Claimant. The Respondent asserts that the Claimant was dismissed procedurally in line with the provisions of Section 44(c) and 44(g) of the Employment Act. The Claimant by all accounts was not afforded a hearing in terms of Section 41 of the Employment Act. Prior to dismissal, an employer has to give an employee the safeguards of Section 41 of the Employment Act. Section 41 provides as follows:-

*41. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make. (underline mine)*

The employer is always required to abide by the procedural requirements of the law set out under section 41 of the Act by ensuring the employee is given notice and allowed a fair and reasonable chance for a hearing as contemplated above. In this case, the supervisor told the Claimant he did not want to work with him and gave the reason as discrepancies in the stock recording. No document was availed to suggest that there was indeed such a discrepancy and all the court can surmise from the evidence adduced by the Respondent is that the dismissal was on a whim and caprice on the part of the supervisor. He gave the Claimant permission to go and have breakfast and during the break procured another person to dispense fuel. It was a calculated move to replace the Claimant for no apparent reason. Having regard to the context of this dismissal, there is no evidence of misconduct. Only a mere allegation was made and as there was no valid reason for termination it is clear the Claimant is entitled to recover for the unlawful dismissal. He did not prove that he was entitled to gratuity. In the final analysis the Claimant is entitled to:-

- a. One month's salary in lieu of notice – Kshs. 20,342/-
- b. 6 month's salary as compensation for unlawful dismissal – Kshs. 122,052/- subject to deductions per Section 49.
- c. Certificate of service

d. Costs of the suit

e. Interest on a) and b) above at court rates from the date of judgment till payment in full.

It is so ordered.

**Dated and delivered at Nyeri this 29<sup>th</sup> day of May 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**