



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2217 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 28th May, 2019)

JOHN KIGALI JALEHA.....CLAIMANT

VERSUS

SAI OFFICE SUPPLIES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 15th December, 2014, where the Claimant states that he was wrongfully, unlawfully and unfairly terminated from the Respondent's employment.
2. Further, he claims that the Respondent herein has failed, neglected and/or refused to pay his terminal dues and compensatory damages. He states that he was employed by the Respondent on or about February 2012 as a driver earning a monthly salary of 16,260/-per month.
3. The Claimant avers that he worked continuously with due diligence and to the satisfaction of the Respondent herein until 25th September, 2014 when his services were unfairly and unlawfully terminated. He further avers that prior to his termination he was not issued any show cause letter requiring him to answer to any charges.
4. The Claimant contends that in dismissing his services, the Respondent breached various mandatory provisions of the Employment Act, the Constitution and the basic principles of natural justice.
5. In his Memorandum of Claim the Claimant prays for the following:-
 - a) A declaration that the Claimant's summary dismissal from employment was unlawful, unfair and inhumane.*
 - b) A declaration that the Claimant is entitled to payment of all terminal dues and compensatory damages as prayed.*
 - c) An Order for the Respondent to pay the Claimant his terminal benefits and compensatory damages totalling to Kshs. 243,900/=*
 - d) Interest on (c) above from the date of filing the suit till payment in full.*
 - e) Costs of the suit plus interest thereon.*
6. The Claimant urged the Court to allow his claim as drawn.
7. The Respondent in its Memorandum of Reply dated 20th January, 2015 and filed in Court on 21st January, 2015, the Respondent admits having employed the Claimant. It however, denied that the Claimant worked continuously, diligently and to its satisfaction.
8. The Respondent further avers that the Claimant's termination was justified, lawful and was as a result of gross misconduct. The Respondent further avers that the Claimant's services were terminated on 28th June, 2014 and that he (the Claimant) had been served with warning letters dated 2nd October, 2013 and 27th December, 2012 with regard to his conduct while under the Respondent's employment.
9. The Respondent contends that the Claimant was paid all the dues owing to him at the time of separation. The Respondent urged the Court to dismiss the instant Claim with costs to the Respondent and to further direct the Claimant to pay the Respondent the sum of **Kshs.**

84,371.00/= with interest being amounts fraudulently obtained by the Claimant through unscrupulous fuel consumption

Evidence

10. The Claimant gave his evidence on 21st January, 2019 which evidence he reiterated the averments made in his Memorandum of Claim.
11. CW1 testified that on the day he was dismissed, he reported to work and was later summoned to the office where he was informed that he was misusing his fuel card. CW1 further testified that a security officer escorted him to industrial area police station where he was detained for 2 days and was released on cash bail. He further stated that he was never charged with any criminal case after his release.
12. CW1 further testified he used his fuel card to fuel the company car at the petrol station on landhies road and once he arrived at the site, the fuel card was handed over to the store keeper.
13. CW1 averred that no investigations were done by the Respondent prior to his dismissal. Further, that he was not called for any disciplinary hearing. He insisted that he was not involved in any theft of fuel at the Respondent Company.
14. CW1 urged the Court to allow the Claim as prayed.
15. On cross-examination, CW1 testified that he had been assigned to Motor Vehicle Registration Number KBL and that he could not recall the full registration number of the Motor Vehicle.
16. CW1 further testified that he was summoned by the Human Resource Officer and was informed that it was about fuel use and that he were accused of misusing the fuel cards.
17. On further cross-examination CW1 insisted that he had never been served with any warning letters and that the letters attached to the Respondent's Memorandum of Response were never served on him. CW1 contended that the signature on the same letters is not his.
18. CW1 insisted that the allegations against him on misuse of fuel were untrue and urged the Court to allow his Claim as pleaded.
19. The Respondent called one witness, RW1 (**Grace Waijuru Nyagathi**) who testified and confirmed that the Claimant was employed by the Respondent herein as a driver. She further testified that during the subsistence of his employment the Claimant failed to carry out his duties diligently and to the Respondent's satisfaction.
20. RW 1 averred that the Claimant received several warning letters as annexed in the Response to the Memorandum of Claim. RW1 further averred that the Claimant was also guilty of excessive use of fuel and that the Claimant was part of a racket that misuse fuel. She further testified that the matter was reported to Industrial Area Police Station and the same is pending determination.
21. RW1 further averred that the Claimant was not taken through disciplinary hearing as he was invited to attend the disciplinary hearing but failed to honour the invite.
22. RW1 contended that the Claimant's services were not terminated as alleged and that the instant Claim lacks merit and ought to be dismissed with costs.
23. On cross-examination, RW1 stated that on employment, the Claimant was issued with the fuel card which was kept by the store people. She further stated that the Claimant had the pin number to be used while fuelling.
24. On further cross-examination RW1 stated that there were no specific time set for fuelling the motor vehicles and that the drivers used to fuel when need arose. She also confirmed that the fuel cards could be used in the absence of the Motor Vehicles.
25. RW1 further stated that the matter of the fuel was reported to Industrial Area Police Station and is pending determination. RW1 further indicated that there is no evidence that the Respondent invited the Claimant for the disciplinary hearing.
26. The Respondent urged the Court to dismiss the instant Claim with costs to the Respondent.

Submissions

27. The Claimant submitted that his termination of employment by the Respondent was unlawful, wrongful and unfair as the Respondent failed to comply with the mandatory provisions of Section 45 of the Employment Act, 2007.
28. The Claimant further contended that he was not taken through a disciplinary process, which is contrary to the provisions of the Employment Act. He further submitted that the Respondent's defence of desertion of work is an afterthought that is far-fetched and unsubstantiated and urged the Court to find that his termination was unlawful and unfair. To fortify this argument the Claimant cited and relied on the Authority of **Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers Vs Mombasa Sports Club, Cause No. 440 of 2013** where the Court held that:-

“No employer shall terminate the employment of an employee unfairly.... Termination of employment is unfair by an employer if the employer fails to prove (a) that the reason for the termination is valid: (b) that the reason for the termination is a fair

reason...”

29. It was the Claimant’s submission that fair procedure was not applied hence the dismissal was unfair and unlawful and urged the Court to find as such.

30. The Claimant further submitted that he is entitled to the reliefs as sought in his memorandum of Claim and relied on the provisions of Sections 17, 28, 36 and 49 of the Employment Act, 2007.

31. The Claimant contended that he is entitled to be issued with a Certificate of Service as provided under Section 51 of the Employment Act.

Respondent’s submissions

32. It is submitted by the Respondent that the Claimant services were rightfully terminated in accordance with the provisions of Section 44 and 45 (5) of the Employment Act, 2007. To fortify this position the Respondent cited the Authority of **Francis Nyongesa Kweyu Vs Eldoret Water and Sanitation Company Limited (2017) eKLR** for emphasis.

33. The Respondent further submitted that the Claimant is not entitled to the reliefs sought in his Claim as he was terminated on account of gross misconduct and which led to the loss of money for the Respondent.

34. On the claim for accumulated leave and allowances the Respondent submitted that the Claimant during the subsistence of his employment with the Respondent was granted leave days but chose not to proceed on leave. The Respondent urged the Court to dismiss this Claim on that basis.

35. In conclusion, the Respondent submitted that the Claimant’s Claim herein is void of merit and ought to be dismissed with costs to the Respondent.

36. I have considered all the evidence and submissions of the parties. The Claimant’s contention is that, he was dismissed unfairly. He indicates that he was condemned unheard.

37. The Respondent’s position is that they had valid reasons to terminate the Claimant who they accused of misusing his fuel card.

38. The Respondent have however not presented any evidence to show the alleged misuse of fuel but only state that they reported the matter to the police. Indeed, the Claimant has never been charged with any offence since 2014 when the alleged theft was committed.

39. RW1 who testified for the Respondent told the Court that the fuel card in question was kept by Stores people but the pin number was with the driver and the card could be swiped in absence of motor vehicles.

40. RW1 did not produce evidence of the times the fuel card was used when it was not and by the Claimant. Proof of these allegations remained wanting.

41. There is also no indication that the Claimant was taken through any disciplinary process before the dismissal as envisaged under Section 41 of Employment Act which states as follows:-

1) “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.

2) 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”.

42. In the absence of any proof that the Claimant indeed misused his fuel case, the Respondent did not have valid reasons to dismiss the Claimant. They also failed to give him a fair hearing.

43. I therefore find the dismissal unjustified as provided for under Section 45(2) of Employment 2007 states as follows:-

(2) A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

44. In terms of remedies, I find for the Claimant and I award him as follows:-

1. Month salary as notice = 16,260/=

2. Salary for September 2014 = Kshs.16,260/=

3. 8 months salary as compensation for the unfair termination = $8 \times 16,260 \times 8 = 130,000/=$

4. Leave not taken for the year = 16,260/=

Total = 178,860/= less statutory deductions

5. The Respondent will also pay costs of tis suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 28th day of May, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Makokha holding brief Namada for Claimant – Present

Respondent – Absent