



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 115 OF 2014

(Before Hon. Justice Mathews N. Nduma)

JEFF DAVIS ONCHARI.....CLAIMANT

VERSUS

KENYA CREDIT TRADERS LTD....RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent on 9th October 2001 as a messenger. The claimant worked continuously until 16th March 2012 when he was summarily dismissed from employment. The claimant was accused in the letter of termination of violating company rules by enabling customers who did not qualify to take items on higher purchase causing the company losses. This was termed gross misconduct and therefore the claimant was not paid in lieu of notice nor given any other terminal benefits. The claimant was however paid two months salary on humanitarian grounds half of which was transferred to his security account.

2. The claimant testified that he was promoted to shop manager and transferred to shop KCT22 in Kisii. That on 14th March 2012, an inspector of the Respondent came to his work station, relieved him of his duties and told him that he was needed at the head office Nairobi. That on 15th March 2012, he met the Managing Director at the head office in Nairobi and was informed that he had not been following work procedures and his performance at work was unsatisfactory. That on 16th March 2012, he met with the operations manager who handed him his dismissal letter. The claimant prays for the reliefs set out in the statement of claim including:

(a) Declaration that the summary dismissal was unlawful and unfair.

(b) An order directing the respondent to pay the claimant terminal benefits in the sum of Kshs. 171,176.20 set out under paragraph 11 of the statement of claim including notice pay. KCT SACCO shares, SRBI contributions balance, security account, Sales security, benevolent fund and March 2012 arrear salary. The claimant also seeks costs of the case and interest.

Defence

3. The respondent filed statement of defence on 26th June 2014 and a list of documents. The respondent called RW1 Alphonse Oluoch who told the court that he was the General Manager of the respondent and that the claimant worked under him. RW1 relied on a witness statement dated 25th May 2015 filed on 2nd June 2015 in which he told the court that the claimant was on 16th March 2012 summoned to the head office at Nairobi for a meeting with the company managing director Mr. Earnest M. Wangeri and RW1. The claimant was asked to explain why he had approved many Hire Purchase Sales without due care and/or flouting company rules. That the conduct by the claimant had hurt the company accounts and the claimant did not offer reasonable explanation.

4. That the claimant was summarily dismissed with loss of all benefits. He was paid two months salary on humanitarian grounds which money was put to his security account and the other paid to him. The claimant refused to collect the cheque.

5. That matters of KCJ Sacco should be directed to the Sacco since the claimant had a loan balance of Kshs. 58,900 at the time of dismissal as per the pay slip of February 2012. He had contributed Kshs. 66,144.50 to the SACCO. Regarding SRBS, the claimant collected on 11th August 2012, Kshs. 37,879 while Kshs. 12,626.33 being 50% of employers contribution was deferred for his decision to either transfer it to another approved occupational Scheme or an individual Retirement Fund of his choice or access it upon attaining retirement age.

6. That final dues analysis was computed and the amount held in security account.

7. That the dismissal of the claimant was lawful, the claim has no merit and it be dismissed.

Determination

8. The issues in determination are:

- (a) Whether the dismissal of the claimant was for a valid reason and in terms of a fair procedure.
- (b) Whether the claimant is entitled to the reliefs sought.

Issue I

9. The claimant relies on the cases of ***Alphonse Mwachanga Mwachanga vs operation 680 Limited (2013) eKLR*** in which the court stated that an employer must follow requirements of fair hearing set out under *Sections 41 of the Employment Act 2007*. The claimant submitted that he was not given notice to show cause and was not subjected to a proper disciplinary hearing by the respondent before he was summarily dismissed.

10. The claimant said that the allegations of poor work performance were not proved and were without foundation since this was not tested at a fair hearing.

11. The claimant further relied on the case of ***Mwikali Nzuki vs Food for the Hungry Kenya (2015) eKLR*** in which the court held that an employer must satisfy substantive fairness under *Sections 43 and 45 of the Employment Act* prior to dismissal of an employee.

12. The claimant submitted that he was substantively and procedurally unfairly dismissed and is entitled to the reliefs sought.

13. From the evidence before court the claimant was simply summoned to head office and without notice or notice to show cause and without any evidence of previous poor performance record by the managing director and RW1 and was summarily dismissed upon being accused of poor work performance by the managing director. RW1 failed to demonstrate that the claimant was a poor performer and/or that he had caused the company loss of money. RW1 made mere allegations without substance.

14. The court is of the considered finding that the claimant has proved on a balance of probabilities that he was summarily dismissed from work for no valid reason and that the respondent did not follow a fair procedure before summarily dismissing the claimant. The conduct by the respondent violated *Section 41, 43 and 45 of the Employment Act*.

15. The claimant is entitled to compensation in terms of *Section 49 (2) (1) (c) as read with (4) of the Employment Act*.

16. In this regard the claimant had served the respondent for a period of 7 years. The claimant wished to continue working. It was not proved that the claimant contributed to his summary dismissal. The claimant was only offered two months salary upon summary dismissal as *exgratia* payment. The claimant lost all benefits due to him due to the summary dismissal. The claimant suffered loss and damage. The claimant lost a good job and was unlikely to get an equivalent job of Branch Manager. Claimant testified that the Branch was a good performer and did not understand accusation made against him. His shop was ranked 7th out of 62 shops nationally. He was also at another time ranked number 25 out of 62. Records also showed that the claimant exceeded the performance target set. The appraisal made on his performance contradicted the allegations of poor work performance made against him.

17. Upon consideration of all the above and the case of *Nicholus Muasye Kyula vs Four Chen Ltd.* in which the court awarded the claimant equivalent of 12 months salary for unfair dismissal and the case of *Alphonse Mwachanga Supra* in which the court also awarded the equivalent of 12 months salary in compensation for unlawful and unfair dismissal, the court awards the claimant the equivalent of 10 months salary in compensation for the unlawful and unfair dismissal in the sum of Kshs. 93,800.

Notice pay

18. The court also awards the claimant Kshs. 18,760 in lieu of notice.

Arrear salary

19. Court awards the claimant arrear salary for the month of March 2012 in the sum of Kshs. 13,000.

SACCO; SLPS; Security I and Security II; KCT Sacco Benevolent fund.

20. The respondent to compute and file computation of money due and owing to the claimant under above items set out in the memorandum of claim failing which the claims shall be deemed as proved per clause 11 of the statement of claim.

21. In the final analysis judgment is entered in favour of the claimant as against the respondent as follows:

- (a) Kshs. 93,800 compensation
- (b) Kshs. 18,780 notice pay
- (c) Kshs. 13,000 arrear salary for March 2012.

(d) Claims for KCT SACCO; SRBS contributions balance; security account I; Sales Security II and KCT SACCO to be computed by the respondent and filed in court within 30 days failing which the figures under paragraph 11 of the statement of claim to be deemed as proved sum due and owing to the claimant.

(e) Interest at court rates from date of judgment till payment in full.

(f) Costs of the suit.

Judgment Dated, Signed and delivered this 23rd day of May, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Kimanga for Claimant

Mr. Onsongo for Respondent

Chrispo – Court Clerk