



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1367 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JUSTUS SHIKHUNGA WERE.....CLAIMANT

VERSUS

TUSKER MATTRESSES LIMITED.....RESPONDENT

JUDGMENT

The claimant, Justus Shikunga Were filed a memorandum of claim on 4th August 2015 claiming unfair and unlawful termination. The claimant states that he was engaged as an employee of the respondent as a shop assistant on 1st June 2007 at a salary of kshs.8,073 which was increased to kshs.15,130 with travelling allowance of Kshs.2269, bonus Kshs.2,500, housing allowance (A) kshs.2,269 and house allowance (B) kshs.1,500 being a gross salary of kshs.23,644.

The claimant avers that on 21st June 2014 he sought leave from the branch manager. That permission to proceed for leave on 23rd June 2014 was granted verbally on the promise that the same would be formalized upon his return. That on 1st July 2014 the claimant reported to the branch office but was turned away and his leave was not formalized. He was informed to report to the head office for briefing, where he met with the human resource manager who served him with a letter of dismissal. The dismissal took effect on the 23rd June 2014.

The claimant avers that his termination was unfair and not procedural as the law was not complied with before the termination. The claimant sought the following prayers;

- I. A declaration and/or finding that the declaration of the respondent's termination was unprocedural, wrongful, illegal, and amounted to unfair termination.
- II. A declaration that claimant's fundamental rights to labour practices were violated and an order for compensation for general damages be awarded for breach of Article 41(1) of the constitution of Kenya 2010.
- III. An order of compensation to the claimant to the maximum of the twelve (12) months' salary of kshs.443,820 on the gross monthly salary at the time of dismissal as stipulated under Section 49 of the Employment Act 2007 as compensation for unfair termination and loss of employment.
- IV. An order of payment of kshs.36,985 in lieu of one month notice.
- V. An order for payment of kshs.35,138 being salary for June 2014.
- VI. An order for payment of costs for this claim and issuance of

Certificate of Service

- VII. Interest on III and IV at court's rates from the date of filling claim till payment in full
- VIII. The court do make these and further orders that it deems fit to meet the ends of justice.

The claimant filed his witness statement together with the memorandum of claim and avers that he was employed as a shop assistant and

reported on duty on 1st June 2007 at the respondent's united branch Kisumu at a salary of kshs.8,073 which was increased to kshs.23,644. He was later transferred to the pioneer branch.

The claimant avers that he worked diligently and this was the reason he remained in employment for the seven years. The claimant maintains that his termination on grounds of absenteeism was unfair as he had sought permission from his manager. He states that he was aware that his termination was linked to his being away from 23rd June 2014 to 1st July 2014. The claimant reiterates that his termination was unprocedural because the respondent did not intimate its intention to terminate him and also he was not given an opportunity to be heard.

The respondents filed its statement of response on 15th December 2015. The respondent admits the claimant was its employee from 1st June 2007 until he was terminated on 1st July 2014. The respondent avers that the claimant had made a habit of being absent from work without leave and relies on the daily attendance sheet for the months of April, May and June. The respondent admits that the claimant had sought leave from the pioneer branch manager and was given permission to be absent but for one day. The respondent avers that the claimant stayed away from his duty station without any communication until his termination on 1st July 2014. The respondent further avers that the claimant was liable to summary dismissal but the respondent chose to terminate his employment and pay one month's salary in lieu of notice.

The respondent states that the claimant's terminal dues were calculated and communicated to him on 10th July 2014 and that the memo was collected by his brother Joseph Nyangumi. The respondent further states that on 10th July 2014 the claimant went to the respondent's human resource office to enquire about his dismissal and upon being told the reason he began shouting and hurling insults, his actions prompting the manager to call security guards who escorted the claimant out of the office.

The respondent avers that this claim is an abuse of court process and maintains that it was legal and rightful to terminate the claimant. The respondent further avers that the claimant is not entitled to any of the reliefs sought and prays that the claim be dismissed with costs.

After considering the evidence before court and the documents tendered, the court finds the following as the issues for determination: -

1. Whether the termination of the claimant was unprocedural, wrong, illegal or unfair.
2. Whether the claimant is entitled to the reliefs sought.

The employment of the claimant by the respondent is not denied. However both the claimant and respondent have a different narrative of circumstances leading to the termination. The claimant during hearing reiterated his averments in the witness statement and written submissions that he had sought permission to be away from work and the same was granted by the branch manager. The respondent on its part maintains that the claimant had been allowed only one day but was away for a longer period.

The court does not involve itself in the internal running of organisations. The role of court is to resolve disputes arising from employment relations. It is clear that there was a dispute between the claimant and he respondent and one which was brought to court by both parties seeking justice.

This court is guided by Section 41 of the Employment Act which provides that 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. The law expects the employer to accord the employee facing termination an opportunity to be heard. The respondent's witness who was the human resource manager admitted that he did not call the claimant for a meeting and that the claimant did not defend himself. Although it is possible that the claimant may not have been innocent by absents from work without an explanation or valid ground, the court will strictly concern itself with the process that was followed during the termination.

The respondent alleged absenteeism as the ground for terminating the claimant's employment. The respondent was bound by Section 41 of the Employment Act, which makes it mandatory for an employer to give notice and accord the employee a hearing. This statutory provision protects employees from excesses of employers. The court wishes to point out that it is not wrong to discipline an employee, however the process severing the agreement should be procedurally fair. This court relies on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** where the court observed thus;

“Section 41 of Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.

The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.”

Further, the court in **Gilbert Mariera Makori vs. Equity Bank Limited [2016] eKLR** observed as follows;

“Section 41 is very categorical on the procedure to be followed before an employee can be dismissed or terminated on grounds of misconduct, poor performance or physical incapacity. First the employer must explain to the employee in a language the employee understands, the reason for which the employer is contemplating the termination or the dismissal. This must be done in the presence of a witness of the employee's choice, who must be either a fellow workmate or a union shop floor official if the employee is a member of a union.

After such explanation the employer must hear the employee's representations and the representations of the person accompanying the employee to the hearing. The employer must then consider the representations made by and/or on behalf of the employee, before making the decisions whether or not to dismiss or terminate the services of the employee."

The court appreciates that there are duties and obligations placed on either party in any contract, an employment contract included. There should be systems put in place to ensure that breaches are mitigated in a fair and justified manner. This court acknowledges that there may be good grounds to terminate employment but parties should be cautious and follow due process. Otherwise it would be unfair to terminate. An employee should be taken through appropriate disciplinary process as is required by the law in termination of employment. The respondent admits that the claimant was not taken through any disciplinary process. This lack of a disciplinary process is not only wrongful and unfair, it is also unlawful and it is on these grounds that this court finds this to be a case of wrongful, unfair and unlawful termination of employment.

This brings the court to the other issue for determination, that is whether the claimant is entitled to the reliefs sought. Having found that the termination was wrongful, unfair and unlawful it follows that the claimant will be entitled to some relief. The court finds in favour of the claimant in the following terms;

1. A declaration be and is hereby issued that the respondent's termination of the claimant's employment was unprocedural, wrongful, illegal and amounted to unfair termination.
2. The claimant did not establish violation of his fundamental rights and therefore the prayer for damages will fail.
3. The court will be guided by section 49 in awarding compensation. The court is cognisant of the fact that the claimant by his actions made a substantial contribution to his termination. The court also considers that the claimant worked for the respondent for about seven years. The court awards six (6) months' salary as compensation in the sum of Kshs.210,828.
4. The claimant is entitled to the sum of kshs.35,138 being pay in lieu of notice.
5. The claimant will get kshs.35,138.00 being June 2014 salary.
6. Leave Kshs.7,361.00

The payments are based on the rate of pay in the memo dated 10th July 2014 being the last document in the respondent's bundle of documents.

7. The total award is **Kshs. 288,465.00/=**
8. The respondent will pay claimant's costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF JUNE 2019

MAUREEN ONYANGO

JUDGE