



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1809 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

PIUS KIMEU KIILU.....CLAIMANT

VERSUS

METAL CROWNS LIMITED....RESPONDENT

JUDGMENT

Vide his memorandum of claim dated 8th August 2014 and filed on the 13th November 2014 the claimant avers that he was unfairly dismissed by the respondent. He seeks the following remedies –

- a. That the court does find that the respondent is guilty of constructively terminating the Claimant services and an order compelling the Respondent to settle the aforesaid claims.
- b. That the court compels the Respondent to pay for the damages for wrongful and unlawful termination from employment without observing the due procedures as stipulated clearly in Employment Act of 2007, and ILO Convention 158 of 1982.
- c. The Respondent pays for the costs of this suit.
- d. That the Respondent director’s work permit be revoked, level lawful penalties for racial and abuse offences committed herein.
- e. Such further or other reliefs as may be appropriate in the circumstances.

The claimant itemised his special damages at page 9, paragraph 2 of his claim as follows –

- 1. Twelve months Salary in lieu of notice on gross income
- 2. Kshs.24,253 x 12 months..... Kshs.291,036
- 3. Twelve months compensation for disturbance by terminating the services of the Claimant unlawfully..... Kshs.291,036
- 4. Payment of annual leave for 12 months of notice 30 days Kshs.24,253/208 Hours Per Month = Kshs.116.6 per Hour x 8 Hours Per Day = Kshs.932.8 x 26 days per year x 12 years (As Per Appointment Letter)..... Kshs.291,033.6
- 5. Pay and fully settle bank loan that the Respondent guaranteed the Claimant Kshs.253,792
- 6. Pay and fully settle accumulated interest on the loan that the Respondent guaranteed the Claimant.
- 7. Compensation for damages suffered by the Claimant from the time of this wrongful and unlawful retirement.

The respondent filed a response to the statement of claim denying all the allegations therein. It prays that the same be dismissed with costs.

The parties agreed to dispose of the claim by way of written submissions pursuant to the provisions of Rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016, which provides as follows –

21. Determination by documentary evidence.

The Court may, either by an agreement by all parties, or on its own motion, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties.

Claimant's Submissions

It is submitted that the claimant was employed by the respondent as a gardener on 1st February 2007 and at the time of termination of employment was earning a salary of Kshs.24,253. That for 12 years he worked diligently to satisfy the respondent's needs. That prior to termination of his employment there was no complaint or any written record of wanting performance, gross misconduct, reprimands or warning letters. That the reason for termination of his employment was on account that the claimant brought meat (chicken and chips) to the factory.

The claimant states that the gates to the factory are manned by security guards from Bob Morgan Security Services Limited who were tasked to record in the OB any items going out and coming into the respondent's premises and conduct body search of staff going out and coming into the premises. He submits there was no record or written account in the OB that food was carried into the premises.

It is the claimant's submission that the allegations against him were made on 1st August 2013, he was tasked to show cause on the same day and his employment was terminated on the same day. He submits there was no valid reason for termination of his employment and he was not subjected to fair procedure. He further submits he was a member of a trade union with whom the respondent had a recognition agreement and had negotiated several collective bargaining agreements, but the union was not involved before his employment was terminated.

He relied on the cases of *Simon Muguku Gichugi –V- Taifa SACCO Society Limited (2012) eKLR* in which the court held that an employer cannot circumvent its obligation to an employee by waving a form of discharge signed by the employee, that if the law was not complied with no form of discharge can cure the irregularity.

He further relied on *Mombasa Cause No. 159 of 2013 Reuben Mwamboga –V- Bahnhof Bar and Restaurant* and *Mombasa Cause No. 110 of 2013 Alphonse Sulpice Mzenge –V- Mombasa Air Safari Limited* in which the court held that the employer is under an obligation to hear the employee. He further relied on the case of *Alphonse Machanga Mwachanya –V- Operation 680 Limited 2013 (eKLR)*, *Mombasa Cause No. 674 of 2012 Anthony Mkala Chitavi –V- Malindi Water & Sewerage Company Limited* and *Bernard Lutubula Bashuru –V- Metal Crown Limited (2017) eKLR*.

He prayed for –

1. Maximum compensation of twelve (12) months' salary in for unfair, unlawful unprocedural termination of services.
2. Kshs.24,253/= x 12 Months..... Kshs.291,036
3. Twelve (12) months' salary in lieu of notice at
4. Kshs.24,253 x 12 Months..... =Kshs.291,036/=
5. service pay for 8 years (5) Kshs.24,253/2 x 12 Years Kshs.145,518/ Compensation of interests at the current market from the time of filing suit.
6. General damages and costs of this suit.
7. Any other monies that is legally due to the favour of the claimant.

Respondent's Submissions

The respondent submitted that it is provided in Section 47(5) of the Employment Act that it is the burden of the employee to prove unfair termination or wrongful dismissal while the burden of the employer is to justify the grounds thereof. That it has discharged its burden as the letter of termination dated 1st August 2013 clearly demonstrates the reason for termination being bringing meat into the company premises contrary to company policies, rules and regulations.

The respondent submits that the claimant cannot deny knowledge of the policies because the clause on discipline in his appointment letter provides that he was expected to observe company rules and regulations as established and issued from time to time by management.

The respondent submits that before the claimant's services were terminated he was issued with a notice to show cause which he responded to. That his explanation that he did not know what food he brought into the factory was insufficient.

The respondent submits that an oral hearing was not necessary relying on the Court of Appeal case of *Kenya Revenue Authority –V-*

Menginya Salim Murgani (2010) eKLR. In the case the court stated –

“The thrust of Dr. Kuria’s submission was that the internal disciplinary procedure of the appellant should have involved an oral hearing of the respondent either by the staff committee or the board being the appellate body or both. However, in our view, the fairness of the hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing.”

The respondent submits that the reason for termination was proved in accordance with Section 43 and 45 of the Employment Act. It submits that the claimant is not entitled to the prayers sought as he was paid all his terminal dues as evidenced by the computation form and cheque. That the claimant received his terminal dues made up of salary up to 1st August 2013, 16.68 days outstanding leave, 70 days salary in lieu of notice and service pay at 25 days per completed year of service, totalling Kshs.203,033 less company liabilities.

The respondent relied on the case of *Bramwel Airo Imbudhila –V- Noble Conference Centre Limited (2016) eKLR* where the court dismissed a claim for unlawful termination.

Determination

I have considered the pleadings and the written submissions of the parties together with documents on record which the parties relied on by consent.

The main facts of the case are not disputed. The claimant’s employment was confirmed by the respondent by letter of appointment dated 28th September 2011. It confirmed that employment was with effect from February 2001 when the claimant joined the company. There appears to have been no disciplinary issues against him until 1st August 2013 when he was issued with a letter to show cause why disciplinary action should not be taken against him. The accusation against him was that “on 30th July 2013, you bought and brought inside the factory meat food (chicken and chips) for Violet Adhiambo which she proceeded to eat while knowing very well that the factory is a meat free zone per company policy.”

The letter is dated 1st August 2013. The claimant was by the same letter required to give his explanation which was to reach the Human Resources Manager by 1 pm on the same day and threatened that “...failure to which management will terminate your services without further reference to you.”

The claimant appears to have responded, as the letter of termination issued to him on the same date reads at paragraph 5 that –

“You brought into the factory meat food, (Chicken and Chips) for the Receptionist while knowing well that meat and meat products are prohibited inside the factory per company policy, rules and regulations. Your explanation that you did not know what food you bought and brought into the factory is insufficient. As a result of your action, management has hereby terminated your services with effect from 1st August 2013.”

The Respondent admits that the Claimant was not given a hearing and argues that the same was not necessary, relying on the Court of Appeal decision *Kenya Revenue Authority v. Menginya Salim Murgani [2010] eKLR* where the court stated that “the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing.”

This may be so, but Murgani’s employment was terminated on 9th March 2001, long before the enactment of the Employment Act, 2007 which at paragraph 41 provides that:

41. Notification and hearing before termination on grounds of misconduct

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.

Section 41(2) in my view, requires an oral hearing in the presence of either a union official or another employee of the choice of the employee whose hearing is taking place. The case of *Menginya Salim Murgani* is therefore not applicable to a case of dismissal after the coming into force of the Employment Act 2007 on 2nd June 2008.

On the grounds for termination, the Respondent states there was a policy that the factory was a meat free zone and that the Claimant was aware of this policy. According to the Respondent’s submissions “the Claimant cannot deny the knowledge of the policies because in his appointment on the clause on discipline he was expected to observe company rules and regulations as established and issued from time to time by the management.”

The claimant's letter of appointment provides as follows at the paragraph on discipline –

“Discipline: The company premise is a non-smoking zone and you are expected to observe this. You are expected to observe company rules and regulations as established and issued from time to time by the management. Nothing in this contract shall stop the company from summarily dismissing you from employment for gross misconduct and in accordance to section 17 of the Employment Act 2007. The company may dismiss you for fraudulent, absenteeism, intoxication at work, neglect of duties, abuse or insult to fellow employees or to your superiors and for any cause as stipulated in the Employment Act 2007.”

No policy was produced in relation to the factory premises being a meat free zone. In the letter of termination, the Respondent states:

“Your explanation that you did not know what food you bought and brought into the factory is insufficient.” This meant that the Claimant denied the accusation. Without a hearing, there was no opportunity for proof of the grounds for termination.

From the foregoing I find that the termination of the Claimant's employment was unfair for want of both fair procedure and proof of valid reason for termination of employment.

Remedies

Having been unfairly terminated the Claimant is entitled to compensation. Taking into account the circumstances under which his employment was terminated, his clean record, the fact that he was terminated because he bought and delivered lunch for someone else (the receptionist) and his long service from 2001 to 2013, a period of more than 12 years, I award the Claimant the maximum compensation of 12 months' salary based on his gross pay of Kshs.17,950/=.

Prayers (a) and (c) are a duplication and are covered under the 12 months' salary compensation already awarded. The Respondent is not liable to pay the balance of the Claimant's loan as no proof was adduced that it took on such liability. The Claimant was paid leave due of 16.68 days and did not prove that he was owed any other leave. The Respondent is further not liable to pay the Claimant salary to the date of retirement. In any event no evidence was adduced as to the Claimant's retirement date or age to retirement.

Other than compensation as awarded above in the sum of Kshs.215,400 all other prayers are dismissed.

The Respondent shall pay Claimant's costs. Decretal sum shall attract interest from date of judgment until payment in full. The decretal sum is subject to deduction of Pay As You Earn (PAYE).

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF JUNE 2019

MAUREEN ONYANGO

JUDGE