



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1408 OF 2015

EVANS GATO ORINA.....CLAIMANT

-VERSUS-

AGGREKO INTERNATIONAL

PROJECT LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed his Memorandum of Claim in Court on 13th August 2015 alleging that he was employed by the respondent as Generator Technician on 25th September, 2008 earning Kshs.87,886.67 per month. He further alleged that he served diligently until 30.6.2015 when his employment unfairly and unlawfully terminated by the Respondent and his benefits withheld. He therefore prayed for the following reliefs:

- a) A declaration that the termination was unfair
- b) One Month salary in lieu of notice.....Kshs. 87,886.67
- c) Unpaid Leave for the year 2014- 2015
(25 Days x Kshs.2900 x 2 years).....Kshs.145,000.00
- d) House allowance for 108 months
(15% x 87,886 x 108).....Kshs.1,423,764.54
- e) Twelve months compensation for loss of employment as provided under Section 15 of the Labour Institution Act (12 months x 87,886.67).....Kshs.1,054,640.04 **Total..... Kshs.2,711,291.25**
- f) Costs of this suit and Interest at Court rates
- g) Certificate of Service

2. The Respondent filed his Memorandum of response on 5th October, 2015 admitting that she employed the Claimant in the position of Generator technician on or about 25th September, 2008 earning a consolidated basic salary of Kshs.59,208 which amount was subsequently increased to Kshs.87,886.67 with effect from 1st July 2014. She however denied the alleged unfair termination of the said employment and averred that the Claimant’s services were terminated for just reason and after following due process as stipulated in her Disciplinary Policy and Procedure Manual. She therefore prayed this Court to dismiss the same with costs.

3. The matter was heard on 13/12/2016, 29/11/2018 and 18/3/2019 when the claimant testified alone while the respondent called two witnesses. Thereafter both parties filed written submissions.

Claimant’s Case

4. The Claimant testified that he was employed by the Respondent herein as a mechanical technician on a casual basis from 2006 to 2008 but from September 2008 he was issued with a written contract. He produced his payslip to prove that his salary was Kshs.87,000 per month.

5. CW1 further testified that in August 2015 he travelled to Turkana on official duty and that on 10th June, 2015 while working for one of the Respondent's clients he was denied from exiting their premises with work tools on ground that he did not have a gate pass. As a result, he informed the Respondent about the issue via email. Thereafter he proceeded on his annual leave and there, was called to the office where he was served with a letter requiring him explain what transpired on 10th June, 2015. That after his response he was invited for a disciplinary hearing on 29th June, 2015 with his witness but he attended alone after which he was served with a dismissal letter. He appealed but the same was dismissed. He contended that he was not issued with any warning prior to his termination and prayed for the reliefs set out in his claim.

6. In Cross examination, CW1 admitted that there was an incident with one of the Respondent's customers where he was not allowed to leave with work tools as he had no gate pass. He further admitted that the Respondent's letter inviting him for the disciplinary hearing, dated 23rd June, 2015, stated the reason for the hearing and further informed him of his right to be accompanied by another person at the hearing. He also admitted that his termination letter cited the reasons for his termination as use of rude language, and that he appealed against the termination and his appeal heard on Appeal on 7th July, 2015.

7. As regards the reliefs sought, he admitted that he was issued with a certificate of service after leaving employment. He however contended that, despite the payslip for July 2015 indicating that he was paid for leave, he did not receive any such payment.

8. In re-examination, CW1 stated that the email communication was not produced at the disciplinary hearing for him to respond accordingly. He further added that the Respondent failed to call the complainant (client) in question as a witness in the disciplinary hearing.

The Respondent's Case

9. Mr. Patrick Songa Eshitemi, testified as RW1. He stated that he works for Tulow Oil in Turkana as the Asset Production Adviser but previously he was an Assistant Field Officer. He further stated that he received a call on 10th June, 2015 from the officer in charge of security informing him to proceed to the gate where he found the Claimant in the company of his driver and the security guards. That upon enquiry, he was informed that the Claimant had no gate pass to exit and that he had been rude to the guards at the gate. That in his opinion the claimant was drunk and after the encounter, he wrote an email to the Respondent requesting for the replacement of the Claimant on account of misconduct.

10. In cross examination RW1 admitted that he did not test the sobriety of the Claimant as he had no tool to do that. He further admitted that he did not witness the altercation between the claimant and the security guards and that he had no evidence to prove that the Claimant was rude to the security guard and the customer. He however contended that the email at page 8 confirmed that the Claimant had no proper documentation to ferry goods out of the Company's compound. He also stated that he had not interacted with the Claimant prior to 10th June 2015.

11. The respondent's Human Resource Manager, Claudia Soittara testified as RW2. She stated that the Claimant was indeed employed by the Respondent herein earning a consolidated salary of Kshs.59,208 per month. She further testified that a confrontation did occur between the Claimant herein and the security guards at one of the Respondent's customer's premises on 10th June, 2015 and as a result, the Respondent did invite the Claimant for disciplinary hearing on 29th June, 2015 via her letter dated 23rd June, 2015. That the invitation letter explained clearly the reason for the hearing and gave him the option of being accompanied by a colleague of his choice but chose to attend alone.

12. RW2 further testified that after the hearing, the Claimant was summarily dismissed on 30th June, 2015 for gross misconduct. That thereafter he appealed against the dismissal but upon hearing on 7th July, 2015, the appeal was dismissed vide the Respondent's letter dated 8th July, 2015.

13. Regarding the reliefs sought, RW2 testified that after the dismissal the claimant was duly paid all his terminal dues and was issued with a certificate of service. She further contended that the Claimant was summarily dismissed and therefore not entitled to payment in lieu of notice as claimed.

14. On cross examination RW2 stated that there was no charge of being drunk levelled against the Claimant herein. She further contended that the Claimant was summarily dismissed for gross misconduct and before which he was given an opportunity to defend himself of the accusations levelled against him.

Claimant's submissions

15. In his written submissions, the Claimant contended that his summary dismissal was unfair and contrary to the Employment Act more specifically Section 44 (4) (d) of the Employment Act. He further submitted that the Respondent had failed to show how its business was affected by the alleged misconduct thus warranting the Claimant's summary dismissal. For emphasis the Claimant relied on **Union of National Research and National Institute Staff of Kenya (Unisk) Vs Kenyan Industrial Research and Development Institute (Kirdi) (2013) eKLR** and **David Gichana Omuya Vs Mombasa Maize Millers Ltd (2014) eKLR**.

16. As regards the reliefs sought, the Claimant submitted that he is entitled to the same by dint Section 49 of the Employment Act, 2007 and Section 15 of the Labour Institution Act. For emphasis the Claimant relied on the Authority of **Bamburi Cement Limited Vs William Kilonzi (2016) eKLR**. On house allowance the Claimant submitted that he is entitled to the same and relied on the provisions of Section 31 of the Employment Act as well **Kenya Union of Employees of Voluntary and Charitable Organisations (Kuevaco) Vs Nairobi Pentacostal Church Christ is the Answer Ministries (NPC- CITAM) (2015) eKLR** where the Court held that:

“The reason of the contract talks of a “consolidated” salary but does not in any way mention whether house allowance is part of

this consolidated amount. By being silence, the issue of house allowance is not addressed. I therefore find that the Claimant ought to have been paid her house allowance.”

17. In conclusion the Claimant urged this Court to allow the Claim as drawn.

Respondent’s submissions

18. The Respondent on the other hand submitted that she had a valid reason for terminating the Services of the Claimant herein and that the procedure followed was in accordance with the provisions of the Claimant’s employment contract as well as with Section 41 of the Employment Act, 2007. For emphasis she relied on **Sarah Wanyaga Muchiri Vs Henry Kathii & Another (2014) eKLR**, **Samuel Kalomit Murkomen Vs Telkom Kenya Limited (2017) eKLR** and **Alfred Mutuku Muindi Vs Rift Valley Railways Limited (2015) eKLR** and **Peter Kithaka Mbawa Vs Coca Cola Juices Kenya Limited, Cause No. 1956 of 2014 (2018) eKLR**.

19. The Respondent further submitted that Section 41 and 43 of the Employment Act were adhered to while terminating the Claimant and urged this Court to find that the Claimant herein was accorded a fair hearing and that the Claim for unfair termination lacks merit and ought to be dismissed. She maintained that the Claimant herein is not entitled to the reliefs sought in the Memorandum of Claim and prayed for the suit to be dismissed with costs. She relied on **Sophia Wambui Muthoni Vs Muramati Sacco Society Limited (2014) eKLR**, **Banking Insurance Finance Union (K) Vs Co-operative Bank of Kenya Ltd (2019) eKLR**, **Vincent Abuya Obunga Vs Mast Rental Services Limited (2019) eKLR**, **Charity Wambui Muriuki Vs M/S Total Security Surveillance Limited (2017) eKLR** and **Joseph Sani Orina Vs Hiprora Business Solutions (EA) Limited (2017) eKLR** for emphasis.

Analysis and Determination

20. There is no dispute that the Claimant was employed by the Respondent on the 25th September, 2008 as a Generator Technician earning a salary of Kshs.59,208 which was increased to Kshs.87,886.67 with effect from 1st July, 2014. There is further no dispute that the Claimant’s services were prematurely terminated by the Respondent herein by her letter dated 30th June, 2015. The issues for determination are:

- a) Whether the Claimant’s termination was unfair.
- b) Whether the Claimant is entitled to the reliefs sought in his Memorandum of Claim.

Whether the Claimant’s termination was unfair.

21. Under section 45(2) of the Employment Act, termination of employees contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reason(s) and that it was done after following a fair procedure. A valid and fair reason is one that relates to the employees conduct, capacity and compatibility or based on the employer’s operational requirements. Fair procedure on the other refers, but not limited to according of a fair hearing to the employee before termination.

Reason for termination

22. The reason cited by the Respondent for the Summary Dismissal of the claimant was. The letter dated 30.6.2015 stated as follows:

“ RE: SUMMARY DISMISSAL

... you are hereby dismissed from employment with Aggreko with immediate effect for contravening your employment contract under Clause 13, part g:

- Use of threat towards our customer and customer representative***
- Use of abusive language , towards our customer and their representative.***

...

Your behaviour towards our customer could seriously damage the reputation of the company and detrimentally affect Aggreko’s business and customer relationship.

23. Clause 13 of the Employment Contract set out the offences which amount to gross misconduct warranting summary dismissal including:

“g. conduct which seriously damages the reputation of the Company or detrimentally affects the business performance.”

24. Rw1 testified that on 10.6.2015, he was sent to the gate to address an altercation between the claimant and the security guards where he found that the claimant had been denied exit without presenting a gate pass for the items he was ferrying. The claimant denied the offence but admitted in his evidence and his email dated 11.6.2015 that the Supervisor was called to the gate and told him to leave the items. In my view, the reason why the Supervisor was called at the gate can only be because of the claimant’s misconduct. It is not natural for a junior officer

to call their Supervisor to intervene where there is no problem. In addition to the forgoing observation, the claimant stated in his defence during the disciplinary hearing and his appeal that he needed to tone down his temper. Considering the said observation and admission, I find on a balance of probability that the Respondent had a valid reason for termination.

Procedure followed.

25. As regard the procedure, the jurisprudence emerging from this court and the Court of Appeal is that before terminating an employee for misconduct, the employer must comply with Section 41 of the Employment Act, 2007 provides for procedure as follow:

“41(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct ... 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 ...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, make.”

26. Applying the evidence on record tendered by both parties to the said provision of the law, I find that the respondent has proved on a balance of probability that a fair procedure was followed before the summary dismissal of the claimant from his employment. The claimant admitted that he was invited to a disciplinary hearing on 29.6.2015 by the letter dated 23.6.2015 which set out the charges and also gave him the option of being accompanied to the hearing by a witness. He admitted that he attended the hearing on his own and produced copy of the proceedings which confirmed that he was accorded a hearing by the disciplinary committee and also on his appeal.

27. In view of the fact that the respondent has proved the reason for the summary dismissal of the claimant, and that a fair procedure was followed, I return that the termination of Claimant’s employment contract was fair and lawful within the meaning of Section 45 of the Employment Act, 2007. The foregoing holding is fortified by **Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR** where the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

Whether the Claimant is entitled to the reliefs sought in his Memorandum of Claim.

28. In view of the fact that the Claimant’s termination was substantively and procedurally fair, I decline to make declaration that it was unfair as prayed. Flowing from the foregoing I find and hold that the Claimant is not entitled to the prayer for salary in lieu of notice and compensation for unfair termination under section 49 of the Employment Act.

29. I further decline to award the Claim for house allowance because he was receiving a consolidated salary. Clause 7 of the contract of service provided as follows:

“You will be paid a basic consolidated salary of 710 496 KES per annum (59,208 KES per month). This salary will be paid in equal in equal monthly instalments in arrears.”

30. In my view, the description of the salary as consolidated meant that it was the claimant’s constant gross salary and the balance of proving otherwise rests on the employee who has any other interpretation of the said written term of the contract. For that reason, I departed from **Kenya Union of Employees of Voluntary and Charitable Organisations (Kuevaco) Vs Nairobi Pentacostal Church Christ is the Answer Ministries (NPC- CITAM) (2015) eKLR** cited by the Claimant where Lady Justice H. Wasilwa held that:

“The reason of the contract talks of a “consolidated” salary does not in any way mention whether house allowance is part of this consolidated amount. By being silence, the issue of house allowance is not addressed. I therefore find that the Claimant ought to have been paid house allowance.”

31. The foregoing departure is fortified by **Charity Wambui Muriuki v Total Security Surveillance limited [2017] eKLR** where the court held that:

“A consolidated salary includes basic pay and allowances payable to an employee and housing allowance is usually one of them. It is therefore incumbent upon the claimant to demonstrate by production of her payslip that housing allowance was not one of the allowances paid in the consolidated salary”

32. The claimant prayed for 25 leave days for 2014-2015. The respondent’s contended that the only leave outstanding was 8 days which she computed as Kshs.23,115 and paid vide the payslip for July 2015. No leave records were produced as exhibits to support the defence case. However, it is common knowledge that clause 10 of the claimant’s contract of service entitled him to an annual leave of 25 working days and that he proceeded for his annual leave 2 days immediately after he the altercation incidence on 10.6.2015. Assuming Saturday was a working for the claimant and that he started his annual leave on 13.6.2015, the 25 working days would have lapsed on 11.7.2015. However, he was dismissed on 30.6.2015 while 10 days’ leave was still outstanding equalling to Kshs.87886.67 x 10/26 =

36,619.45. No evidence was adduced to prove that the claimant was paid the said cash in respect of the said outstanding leave. Consequently, I find and hold that the Claimant is entitled to **Kshs.36,619.45** for leave in respect of the claim for accrued leave.

33. The award will attract interest at court rate from the date of filing suit but it is subject to statutory deductions. In addition, the respondent is ordered to issue the claimant with a hard copy Certificate of Service duly signed by the authorized officer of the respondent as required by section 51 of the Employment Act. Finally, the Claimant is awarded half the costs of the suit because he partially succeeded in his claims.

Dated, Signed and Delivered in Open Court at Nairobi this 26th day of July 2019

ONESMUS MAKAU

JUDGE