



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1883 OF 2011

(Before Hon. Lady Justice Maureen Onyango)

JARED OKUDA ODUORA.....CLAIMANT

VERSUS

NAKUMATT HOLDINGS LIMITED.....RESPONDENT

JUDGMENT

The Claim herein is filed by Jared Okudo Oduora alleging unfair and unlawful termination of his employment Contract by the Respondent and failure to pay terminal dues contrary to the provisions of the Employment Act. He seeks the following reliefs:

- (i) Kshs.70,225.32 being payment of overtime, 20 days worked in June 2011 and one month's salary in lieu of notice;
- (ii) A declaration that the Respondent's action to terminate the Claimant's employment amounts to wrongful dismissal and unfair termination;
- (iii) Kshs.396,540.00 being 12 months' salary for wrongful dismissal and unfair termination taking into account promotions and salary increments for the remainder of the period the Claimant would have worked until lawful retirement;
- (iv) Severance Pay;
- (v) Costs of this Suit;
- (vi) Interest on (i), (iii) and (iv) until payment in full.

The Claimant's case is that he was employed by the Respondent on 20th June, 2006 as a shop attendant and cook attached to the Respondent's Kisumu City Branch. He further contends he was employed on permanent and pensionable terms following his successful completion of the probation period of three months and was earning a gross salary of Kshs.30,765/-.

The Claimant avers that the Respondent's action of terminating his services was in breach of his employment contract and was a gross violation to the provisions of Section 41 of the Employment Act, 2007.

The Respondent filed a statement of defence dated 21st November, 2011 and filed in court on 23rd November, 2011, in which it admits having engaged the Claimant through a contract of service dated 20th June, 2006. It however, contended that it summarily dismissed the Claimant on 20th June 2011 for being rude to a customer and fighting with a colleague during working hours.

The Respondent further averred that the Claimant absented himself from his place of work without permission prompting the Respondent to issue him with various warning letters on the same. The Respondent contended that it did accord the Claimant an opportunity to be heard prior to the termination of his employment.

The Respondent further contended that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim and urges the Court to dismiss the Claim with Costs.

The matter proceeded for hearing on 29th November 2017 and 13th December, 2018, when the Claimant (CW1) testified on his behalf and

the Respondent called two witnesses (RW1 and RW2) to testify on its behalf.

Claimant's Evidence

The Claimant (CW1) in his testimony stated that he was employed by the Respondent as from 20th July 2006 as a shop attendant and was later added duties of a cook. He further testified that his services were unfairly terminated by the Respondent on 20th June 2011.

CW1 stated that his termination was for reason that he allegedly fought with an employee by the name Enock Odeny, an allegation that the Claimant disputed. He further stated that he did not attend to any customers at the Respondent's branch on 15th and 16th at 8:45 pm as alleged.

CW1 further testified that he was asked by his branch manager to visit the Respondent's head office where he was handed a letter of dismissal. He averred that he was not accorded any hearing and was not informed of the reasons for his termination. CW1 further averred that he was not paid for days worked in June 2011 prior to his termination.

CW1 admitted that he was away from duty in the year 2009 as his mother had passed on. He urged the Court to allow his Claim as drawn.

On cross examination CW1 stated that at the time of termination he was working as a cook at the Respondent's establishment in Kisumu.

He confirmed that his services were terminated on 20th June 2011 via a letter which was handed over to him at the Respondent's head office along Mombasa Road. He denied that he was engaged in a fight while on duty as alleged. He further denied that the statement purportedly signed by him admitting to the same was his.

On further cross examination CW1 stated that he had a SACCO loan which was paid by his guarantors following his dismissal. He further contended that he did not quarrel with any customer or fight with his colleague as alleged and that the reason for his dismissal is not known to him.

On re-examination CW1 stated that the signature appended on the statement is not his as it is different from that on his letter of appointment which he signed.

Respondent's Evidence

RW1 (JOSEPH KIMOLI) Staff Co-ordinator with the Respondent testified on 13th December 2018. He adopted his witness statement dated 26th November 2018 as his evidence in chief. In his statement RW1 reiterated the averments made in the Statement of Defence filed on behalf of the Respondent herein.

RW1 further stated that the Claimant was employed by the Respondent on contract basis as a shop attendant and packer as evidenced by the Contract annexed to the Statement of Defence as Appendix 1.

RW1 further testified that the Claimant was rude to one of the Respondent's customers while packing the customers goods on 18th June 2011 and that he slapped the cashier who tried to intervene. RW1 also confirmed that the Claimant as well as other employees who witnessed the incident recorded statements with the Respondent after the incident stating what transpired as annexed and marked Exhibit 4 of the Respondent's Statement of Defence.

RW1 further testified that the Respondent considered this act by the Claimant as gross misconduct and proceeded to summarily dismiss him. RW1 testified that the Claimant was a habitual absentee and had been issued with several warning letters as evidenced by the attached letters marked as Appendix 3.

It was his further evidence that the Claimant never worked any overtime and that all entitlements were paid to him at the time of his dismissal. RW1 urged the Court to dismiss the Claim as the same has no merit.

On cross examination RW1 confirmed that he works for the Respondent at its head office and that the evidence given on this matter is based on records as kept at the Respondent's head office. RW1 further testified that the branch manager at Kisumu reported the Claimant's incident on the same day via phone call.

RW1 stated that the Claimant's Contract of service provided for summary dismissal and that the Claimant was summarily dismissed on accordance with his Contract. RW1 further stated that the Claimant did not work overtime as alleged. RW1 stated that the Claimant was accorded a hearing prior to his dismissal.

On re-examination RW1 stated that after the incident the Claimant was called and recorded a statement on the same.

RW2, ENOCK ONYANGO ODENY, a cashier also testified on behalf of the Respondent.

It was his evidence that on 15th June 2011 while working as a cashier at the Respondent's Kisumu branch and the Claimant as his packer an incident occurred which resulted in the Claimant hitting him at the back. He further testified that they were asked to record statements on the incident the following day. RW2 further stated that the Claimant was later dismissed.

On cross examination RW2 stated that the statements were not recorded at the same time and that he was not aware from where the Claimant prepared his statement. He further stated that as a policy the Respondent requires that each employee who is allegedly involved in an incident records a statement which aids in disciplinary process.

On further cross examination RW2 stated that he did not at any time provoke the Claimant to hit him. He further stated that there was a disciplinary hearing at the Respondent's Head office but he was not called as a witness.

Claimant's Submissions

In the written submissions the Claimant reiterated the contents of the Statement of Claim and his oral evidence in Court.

The Claimant further submitted that pursuant to Section 44 of the Employment Act, an employer may only resort to summary dismissal when the employee has by his conduct fundamentally breached his or her obligations arising under the contract of service. The Claimant for emphasis cited the cases of *Bamburi Cement Limited Vs William Kilonzi (2016) eKLR* and *Nation Media Group Limited Vs Onesmus Kilonzo (2017) eKLR*.

The Claimant further submitted that the Respondent failed to discharge its burden to demonstrate any justification in summarily dismissing the Claimant.

The Claimant submitted that the termination of his employment by the Respondent was unfair and was contrary to the provisions of 41 of the Employment Act, 2007. The Claimant further submitted that he is entitled to compensation for unfair termination.

The Claimant contended that he is entitled to one month's salary in lieu of notice by virtue of the provision of Section 49 of the Employment Act, 2007.

He submitted that he had made out his case for unfair termination and urged the Court to allow his Claim as drawn.

Respondent's Submissions.

The Respondent submitted that it was entitled to summarily dismiss the Claimant under the provisions of Section 44 of the Employment Act for being rude to its customer and for fighting with a colleague at the work place. It is further submitted that the reason for summary dismissal was well explained in its letter terminating the Claimant dated 20th June 2011. For emphasis on this the Respondent cited and relied on the Authority of *Erick Karanja Gakenyo & Another Vs Samson Gathimba (2011) eKLR*.

The Respondent submitted that the Claimant was fairly and lawfully terminated and that he is not entitled to the reliefs as sought in the Claim. The Respondent relied on the provisions of Section 47 (3) of the Employment Act, 2007.

To support its argument the Respondent cited the following cases *John Kebaso Mose -V- Uchumi Supermarket (2017) eKLR* and *Kennedy Maina Mirera Vs Barclays Bank Kenya Limited (2018) eKLR*.

Analysis and Determination

There is no dispute that the Claimant was employed by the Respondent between 20th June 2006 and 20th June 2011. There is further no dispute that the Contract was terminated by the Respondent by its letter dated 20th June, 2011. The issues for determination are:

1. Whether the Claimants' termination was valid both procedurally and substantively.
2. Whether the Claimant is entitled to the reliefs sought.

Unfair Termination

Under Section 45 (2) of the Employment Act termination of an employee's contract of service is unfair in the event his employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employees conduct, capacity and compatibility and that in arriving at the decision to terminate the services of such an employee fair procedure was followed.

Reason for Termination

The reason cited for the termination of the Claimant's employment was that while packing items bought by a customer of the Respondent, the claimant was rude to the said customer and that the Claimant fought with a colleague during working hours. The Respondent further contends that it did accord the Claimant a fair hearing prior to his termination.

It was on these grounds that the Respondent terminated the services of the Claimant as in its view the Claimant's conduct amounted to gross misconduct.

In view of the foregoing I find that the Respondent had a valid reason for terminating the Claimants' services.

Was procedure followed?

Section 41 of the Employment Act requires that prior to the termination of an employee’s services for misconduct, poor performance or physical incapacity, the employer must explain to the employee in a language he understands and in the presence of another employee or shop floor the reasons for his/her termination is being contemplated and that they be allowed a fair hearing.

In the instant case the Claimants’ termination was unfair as due process was not adhered to as provided by Section 41 of the Employment Act, 2007. Despite the fact that the Respondent contends having accorded the Claimants a hearing no evidence was tendered to support this assertion in terms of minutes of a disciplinary hearing or other valid evidence as required by law.

In the case of *Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR* 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.”

In Francis Mbugua Boro -Vs- *Smartchip Dynamics Limited (2017) eKLR* it was held:

“...It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 AND Missing that essential ingredient and a hearing the court teaches the conclusion that the summary dismissal of the claimant was procedurally unfair.”

Similarly in the case of *David Njoroge Muiru -vs- Elsa Limited (2014) eKLR* it was held that:

“It is obvious that the claimant was not given notice of misconduct or a hearing before the termination. The court finds that the dismissal was unfair under Section 41 of the Employment Act 2007. The reason for removal has not been shown to have been established to exist at the time of termination.”

The termination of the claimant was therefore unfair for failure to accord him a hearing as provided under Section 41 or proving the grounds of termination as provided under Section 43 of the Employment Act.

Remedies

Having found that the Claimants’ termination unfair, he is entitled to notice, salary for days worked and compensation. It is my opinion that 10 months’ salary is reasonable taking into account the long service and the manner in which the termination was handled. The prayer for overtime must fail for lack of evidence on the same

I therefore award the claimant the following –

- 1... One month’s salary in lieu of notice..... Kshs.30,795
 - 2... 20 days worked in June, 2011..... Kshs.20,520
 - 3... 10 months compensation for wrongful dismissal
 - (30,795 x 10 months)..... Kshs.307,950
- Total Kshs.359,235**

4... The Claimant is also entitled to costs of this suit as well as interest for date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE