



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 218 OF 2017

EDWARD MURIUNGI MPUATHIA.....CLAIMANT

VERSUS

CHEMIGAS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the erstwhile employer asserting that he was employed in 2006 as a driver's assistant earning a salary of Kshs. 27,172.02. He averred that the Respondent did not issue him with a written contract of employment and that the employment could be inferred from correspondence between them. He averred that he worked diligently and impeccably and that the Respondent's directors often acknowledged his good work. He averred that on 11th March 2017 he was unceremoniously summarily dismissed from work by the Respondent without notice or cause. The Claimant averred that on that day he reported to work as usual and he was given a vehicle by the Respondent's depot manager to pick deliveries at a station in Industrial Area. He stated that on return he was rudely reprimanded by the Respondent's general manager who told him he had no authority to drive the said vehicle. He was then ordered to pick a letter of summary dismissal and required to leave the Respondent's premises. He averred that the Respondent did not pay him for the days worked in March 2017. He thus sought payment for the days worked in March 2017 – Kshs. 9,963.10, one month's salary in lieu of notice – Kshs. 27,172.02, leave for 10 years – Kshs. 190,204.10, service pay – Kshs. 135,860.10, compensation for the unfair termination – Kshs. 326,064.20 making a total of Kshs. 689,263.60. He also sought general damages for breach of the employment contract, punitive damages for the victimization of the Claimant by the Respondent, costs of the suit and any other relief the court may deem fit to grant.

2. The Respondent in its defence averred that the Claimant was not unceremoniously fired but that he was dismissed after various warnings and commission of acts tantamount to gross misconduct and failure to obey lawful demands and or directions by the employer. The Respondent enumerated an incident in 2015 when the Claimant is alleged to have damaged the Respondent's vehicle, injury to a pedestrian in December 2016 when he drove a vehicle without the Respondent's authority and was reprimanded with a final warning and in 2017 when he drove the vehicle after lying that he had been permitted by the Respondent to drive the vehicle. The Respondent averred that the dismissal was on justifiable grounds and after several warnings were issued. The Respondent averred that he was given several verbal and formal warnings after he was engaged in acts that were in defiance of lawful authority, insubordination and acts that endangered not only the Respondent's assets but third parties. The Respondent averred that he was paid all his lawful dues after termination. The Respondent denied the court has jurisdiction to hear the claim as the suit ought to have been filed in Nairobi. The Respondent urged the dismissal of the claim with costs.

3. In his reply to defence, the Claimant averred that the Respondent had not adduced any evidence of the alleged warnings issued or proof he was not employed in 2006. He averred that his dismissal was on the same day he is alleged to have committed the offence. He averred that no proof was availed to show payment of the final dues as alleged by the Respondent and that the defence ought to be dismissed and prayers in his statement of claim granted.

4. The Claimant testified but the Respondent's witness did not despite there being two different occasions the Respondent was granted to avail the witness. The Claimant testified that upon being employed he was not issued with a contract of employment and as that he worked till March 2017 when he was dismissed. He stated he had no disciplinary cases and no warnings. He stated that he was dismissed after being sent to collect gas by the transport manager and that he was not given an opportunity to defend himself. He testified that he was a driver's assistant and drove when the driver was on leave. He denied that he was given a hearing. He stated that he was not paid the salary for March 2017 and that he used to be given cars to drive.

5. The Respondent's witness statement which was on record was signed by Yusuf Khan a manager of the Respondent. He stated that the Claimant was an employee of the Respondent but was not a driver or assigned the role of a driver's assistant as asserted in the claim. He stated that contrary to assertions made the Claimant had been warned severally and had caused damage to the company and even on one occasion injury to a person since the Claimant refused to heed the commands of the employer. He stated that the Respondent had no option but to terminate his services. He stated that there were grounds for the dismissal and that the Claimant was the only one to blame for the breakdown in the employment relationship. He stated that the Claimant was paid all his terminal benefits when the services were terminated.

He urged the court to dismiss the suit with costs to the Respondent.

6. The parties filed submissions and the Claimant submitted that the termination was unfair, unlawful and wrongful and that he was entitled to the remedies sought. The Claimant submitted that unfair termination occurs where an employer terminates the employment without a valid and fair reason without following fair procedure. The Claimant cited Section 43 and 45 of the Employment Act as well as the case of **David Kipkosgei Muttai v Green Palms Academy [2014] eKLR** on the point. He submitted that the dismissal was unlawful as it did not follow the laid down procedure. He cited the case of **Kenya Union of Commercial, Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR** where Mbaru J. held that in the eventuality the employer is contemplating dismissal for misconduct the employer must accord the employee a hearing as failure to do so renders the outcome invalid and unfair as the employee was not given an opportunity to defend themselves in terms of Section 41 couched in mandatory terms. The Claimant submitted that his dismissal breached the provisions of Section 36 of the Employment Act. He thus urged the grant of the reliefs sought in his claim as he had proved the case on a balance of probabilities.

7. The Respondent submitted that he who alleges must prove and that the defence of the Respondent had denied that the Claimant was a driver's assistant. The Respondent submitted that the Claimant had not proved that he was a driver's assistant. The Respondent submitted that the Claimant's payslip showed that he was employed as an administrator and that it was the reason why he was reprimanded for driving the Respondent's vehicle. It was submitted that the Claimant had driven the vehicle without authority. The Respondent submitted that the Claimant took his leave and none was due. In addition, the Respondent asserts that the Claimant was a member of NSSF and therefore not entitled to service pay. The Respondent relied on the case of **Hassanath Wanjiku v Vanela House of Coffees [2018] eKLR** on the point. The Respondent submitted that there was no breach of contract and as such the claim for general damages for breach of contract should fail. The Respondent cited the case of **Mary Mutanu Mwendwa v Ayuda Ninos De Africa-Kenya ANIDAN K) [2013] eKLR** to buttress the point. The Respondent submitted that the suit ought to be dismissed with costs.

8. Under Section 74 of the Employment Act the employer is required to keep records. Whereas there was the argument that the Claimant did not avail the contract, as the employer there was a burden placed on the Respondent to avail documents in relation to the employment. As Section 43 of the Employment Act clearly provides, there is a burden cast on the Respondent to show that the dismissal was for a valid and fair reason and failure to do so renders the dismissal invalid. In this case, the Claimant asserts that he was dismissed unceremoniously. Whereas he asserts that he was a driver's assistant, his payslip shows that he was an administrator. There may be indeed reason to believe the Respondent when it asserts that the Claimant was not a driver. The Claimant was accused of driving a company vehicle without permission and dismissed summarily. The Respondent asserts there was a valid and fair reason to dismiss. In the case of **Kenya Union of Commercial, Food and Allied Workers v Meru North Farmers Sacco Limited (supra)** my sister Mbaru J. stated as follows:-

Section 41 of the 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. The situation is dire where such an employee is terminated after such a flawed process of hearing as such termination is ultimately unfair. The union must be involved at the hearing before an employee is terminated as the union is there to regulate employer and employee relations and to ensure that their member employees get a fair chance to advance their defence with representation by the union.

9. The Claimant undoubtedly could have been dismissed for driving the Respondent's vehicle without authority if indeed that was the case. However, prior to dismissing him for the misconduct, the Respondent was required to adhere to the provisions of section 41 of the Employment Act whose terms guarantee an employee the right to a hearing before the dismissal. The manner of dismissal was rather abrupt and not in keeping with the dictates of natural justice. In this case it is clear this right was blatantly abridged and the Claimant therefore entitled to:-

- i. One month's salary in lieu of notice – Kshs. 27,172.02
- ii. 6 months salary as compensation – 163,033.20
- iii. Costs of the suit.

It is so ordered.

Dated and delivered at Nyeri this 18th day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar