



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2054 OF 2015

GEORGE KABIRU MATHENGE.....CLAIMANT

v

MURINGA HOLDINGS LIMITED.....RESPONDENT

JUDGMENT

1. George Kabiru Mathenge (Claimant) was offered employment by Muringa Holdings Ltd (Respondent) as an Administrative Assistant through a letter dated 5 May 2006.
2. Around 30 May 2012, the Respondent promoted the Claimant to the position of Manager in charge of Central and Eastern Region. The salary was adjusted to a Kshs 50,000/-, gross monthly.
3. The Claimant continued to perform well and on 11 February 2015, the Respondent appointed him as Factory Manager, based in Kinale at a gross monthly salary of Kshs 80,000/-.
4. However, on 10 September 2015, the Respondent redeployed the Claimant to another assignment, *Bulk Material Sourcing and Purchase*.
5. On 29 September 2015, the Claimant was suspended and sent on leave pending investigations into circumstances leading to the *downing of tools* by drivers on 28 September 2015.
6. The suspension/leave was followed with a letter dated 25 October 2015 informing the Claimant that he had been *summarily dismissed*.
7. The Claimant was not happy and on 18 November 2015, he instituted these proceedings alleging unfair termination of employment and breach of contract.
8. The Respondent filed a *Memorandum of Response* on 19 December 2015, and the Cause was heard on 6 March 2019.
9. The Claimant testified and adopted his witness statement while the Respondent opted not to lead any evidence despite having filed a witness statement by one of its directors.
10. The Claimant filed his submissions on 11 April 2019 while the Respondent filed its submissions on 30 April 2019.
11. The Court has considered the pleadings, evidence and submissions and condensed the Issues for determination from the 10 identified by the Claimant into 3 being
 - (i) Whether the summary dismissal of the Claimant was unfair
 - (ii) Whether the Respondent was in breach of contract and
 - (iii) Appropriate remedies/orders.

Unfair termination of employment

Procedural fairness

12. This was a case of summary dismissal.

13. An employer is not expected to issue a *written notice of termination of employment* as envisaged by section 35(1)(c) of the Employment Act, 2007 in cases of summary dismissal.

14. However, pursuant to section 41(2) of the Employment Act, 2007, a hearing is mandatory in cases of summary dismissal.

15. The Claimant was dismissed on account of gross misconduct and therefore, it was mandatory that the Respondent conducts a hearing in terms of section 41(2) of the Act.

16. Apart from suspending/sending the Claimant on leave to facilitate investigations, there was no evidence from the Respondent that the Claimant was afforded an opportunity to be heard.

17. In the view of the Court, *investigatory explanations* cannot substitute for the disciplinary hearing envisaged under section 41(1) & (2) of the Employment Act, 2007.

18. If at all the Claimant was afforded an opportunity to be heard, the minutes/notes of such a hearing were not filed in Court. Even the names of the persons/directors who formed the hearing team were not disclosed.

19. The Court therefore finds that the *summary dismissal* of the Claimant was procedurally unfair.

Substantive fairness

20. In terms of sections 43 and 45 of the Employment Act, 2007, the employer is under a statutory burden to prove the reasons for terminating the employment of an employee, and that the reasons were valid and fair.

21. The Respondent opted not to lead any evidence despite filing in Court statements recorded from the Claimant's work colleagues. Such statements having not been adopted were of no probative value as evidence with the consequence that the Respondent did not discharge the statutory burden placed upon it as an employer.

22. The conclusion the Court makes is therefore that the reasons for dismissing the Claimant were not valid and fair.

Breach of contract

Salary arrears

23. The Claimant's testimony that he was not paid salaries from July to August and half salary for September 2015 was not rebutted by production of pay records.

24. The Court will allow the head of claim.

Accrued leave

25. The Claimant produced a leave application form dated 30 September 2015 which indicates that he had accrued leave of 69 days as of that date.

26. For the leave, the Claimant sought Kshs 133,333/-. The Respondent did not interrogate the amount or produce its own computations/records.

27. The head of claim is allowed.

Salary in lieu of notice

28. The Court having concluded that the *summary dismissal* of the Claimant was unfair holds that he is entitled to the equivalent of 1 month salary in lieu of notice of Kshs 80,000/-.

Compensation

29. The Claimant served the Respondent for about 9 years and on account of the length of service, the Court is of the view that the equivalent of 9 months gross wages would be appropriate compensation (gross monthly salary was Kshs 80,000/-).

Conclusion and Orders

30. The Court finds and declares that the *summary dismissal* of the Claimant was unfair and further that the Respondent was in breach of contract.

31. The Claimant is awarded

(i) Salary arrears	Kshs 200,000/-
(ii) Accrued leave	Kshs 133,333/-
(iii) Compensation	Kshs 720,000/-
(iv) Pay in lieu of notice	Kshs 80,000/-
TOTAL	Kshs 1,333,333/-

32. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 5th day of July 2019.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Kuria instructed by R.W. Kuria & Co. Advocates

For Respondent Mr. Maondo instructed by Mulanya & Maondo Advocates

Court Assistant Lindsey