



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NO 710 OF 2015

DANIEL SHIKUKU SHILABILE.....CLAIMANT

VERSUS

METAL CROWNS LIMITED.....RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent from 10/8/2010 until 3/10/2014 when he was served with termination letter citing poor performance as the reason for the separation. He was aggrieved and brought this suit on 28/4/2015 alleging that the termination was unfair because the reason cited was not valid and that he was not accorded any opportunity to defend himself as required under the Employment Act. He therefore prayed for compensation for the unfair termination, salary in lieu of notice, accrued leave, severance pay plus costs and interest.

2. The respondent admitted the employment relationship but denied the alleged unfair termination. She averred that the claimant was terminated for poor performance which he had failed to improve despite being warned severally. She therefore contended that the termination was fairly done and claimant paid all his dues and as such prayed for the suit to be dismissed with costs.

3. The issues arising from the pleadings are whether the termination of the claimant's services was unfair and whether he is entitled to the reliefs sought. The suit was disposed off by written submissions on the basis of the pleadings, written witness statements and the supporting documents.

Claimant's case

4. The claimant contended that throughout his employment, he rendered exemplary services to the respondent and that was rewarded by salary increments. That he was however shocked to receive the letter dated 3/10/2014 by which the respondent terminated his services effective 3/11/2014 citing poor performance as the reasons thereof. He contended that the termination was unfair because the reason in his view was invalid and he was not afforded any prior hearing.

5. In his submissions, he contended that the termination was unfair due to lack of substantive justification and procedural fairness within the meaning of section 45 of the Employment Act. He contended that the termination was done on speculations and without verification of the culprit because there was change of shift on the material day. He further contended that the alleged poor performance was not proved by performance appraisal documents. He relied on several precedents to justify his submissions.

6. As regards the relief sought, he urged the court to find that the termination was unfair and award him maximum compensation of 12 months gross pay. He also prayed for accrued leave from 10/8/2010 to 3/11/2014 at the rate of 21 days per year.

Finally he prayed for general damages, costs and interest from the date of filing the suit.

Defence case

7. The respondent's HR manager, Mr Joseph Kithikwa filed affidavit on 17/4/2019 as his evidence for the

defence. He deponed that the claimant was employed by the respondent from 18/6/2012 to 3/11/2014 when his services were terminated for poor performance. That the termination was communicated by the letter dated 3/10/2014 and it explained to the claimant that he had mixed Tusker Crowns with Coca Cola Crowns during the production. That the said conduct caused huge loss to the respondent in form of compensation to the clients and stood the risk of being blacklisted.

8. He further deponed that the claimant was paid all his terminal dues based on his monthly salary of Kshs.19,102. He therefore prayed for the suit to be dismissed with costs.

9. In her written submissions, the respondent contended the claimant was terminated for a valid reason. That he was involved in gross negligence in his performance of his duties as a machine operator by mixing Tusker Crowns with Coca Cola Crowns. That as a result, Coca Cola products bore Tusker Crowns in the market while Tusker products bore Coca Cola Crowns. That the said conduct put her at the risk of losing business by being blacklisted.

10. As regards the reliefs sought, the respondent submitted that the claimant was not entitled to the same. She contended that after the termination, she paid the claimant salary up to 3/11/2014 outstanding leave days (2.16 days), 40 days' pay in lieu of notice and service for 2 years at the rate of 21 days' pay per year.

Analysis and determination

11. There is no dispute that the claimant was employed by the respondent as a machine operator until 3/11/2014 when his services were terminated. The issues for termination as set out herein above are:

- a) whether the termination was unfair;
- b) whether the reliefs sought should be granted.

Unfair termination

12. Termination of employment is unfair if the employer fails to prove that it was grounded on a valid and fair reason related to the employee's conduct, capacity and compatibility or based on the employer's operational requirements; and that a fair procedure was followed.

Reasons for the termination

13. The reason cited was poor performance of duty by the claimant by carelessly or negligently mixing Coca Cola Crowns with Tusker Crowns. That the said blunder affected the products and sales by the clients and it led to huge losses to the respondent who was also exposed to the risk of losing business from the said clients. The claimant however denied the alleged misconduct and contended that the incidence was not investigated to verify the culprit between the two shifts involved in the production.

14. After careful consideration of the evidence and submissions, I find that the respondent has failed to prove on a balance of probability that the termination was justified by a valid and fair reason. To begin with, the respondent's witness never produced any documentary or other form of evidence to prove the alleged mixing of the crowns for the two clients. He also never produced documentary evidence or called an eye witness to prove that the alleged mixing up the crowns was done by the claimant.

I therefore return that the reason for the termination has not been substantiated by evidence as required by Section 43 of the Employment Act.

Procedure followed

15. The claimant's allegation that he was not accorded any hearing before the termination has not been rebutted by evidence. Under Section 41 of the Employment Act, before terminating the services of an employee on ground of misconduct or poor performance, the employer is required in mandatory terms to first explain the reason for the termination to the employee in a language he understands and in the presence of another employee or shop floor union official of his choice after which the employee and his

chosen companion must be invited to air their representations which must be considered before the termination is decided.

16. The respondent having failed to prove that the termination was justified by a valid and fair reason and that a fair procedure was followed, I must, which I do, hold that the termination was unfair within the meaning of Section 45 of the Act.

Reliefs

17. In view of the foregoing, I award the claimant 4 months compensation for unfair termination pursuant to Section 49 of the Act. In awarding the said compensation, I have considered the fact that the claimant served the respondent for about 3 years without any record of misconduct. The award is based on the gross pay made up of basic salary, house allowance plus shift allowance which were constant pay items. As per the pay slip for October 2014 his basic pay was Kshs.13,202, house allowance was Kshs.5,900 and night shift allowance was Kshs.780 totalling to Kshs.19,882. ... $Kshs.19882 \times 4 = 79,528$.

18. The claim for salary in lieu of notice is dismissed because the same was paid after the termination.

19. The claim for leave was not particularized and is dismissed for lack of evidence.

20. The claim for severance pay is also dismissed because the termination was not through redundancy under Section 40 of the Employment Act.

21. The claim for revocation of work permit and penalty against the respondent is not well founded and it is dismissed.

Conclusion

22. I have found that the termination of the claimant was unfair and proceed to enter judgment in favour in the sum of Kshs.79,528 plus costs and interest at court rates from the date hereof.

The award is subject to statutory deductions.

Dated and delivered this 20th day of September, 2019

ONESMAU N. MAKAU

JUDGE