



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1838 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 16th September, 2019)

SHADRACK OLINDI ESIKOTE.....CLAIMANT

VERSUS

EAST AFRICAN PACKAGING INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant, Shadrack Olindi Esikote, filed a Statement of Claim dated 16th October 2015 for unlawful and unfair termination seeking payment of his terminal benefits against the Respondent, East African Packaging Industries Limited.
2. He avers that on or about 3rd May 1996, he was employed by the Respondent as a Machine Operator at a gross salary of Kshs.7,500/= per month exclusive of House Allowance. That he carried out his duties with due diligence, zeal and dedication to ensure the Respondent's company excelled and that the Respondent increased his salary on various occasions for his commitment and hard work.
3. That on 9th June 2014, he was promoted to a Conversion Supervisor at a gross monthly salary of Kshs.35,000/= exclusive of House Allowance and that despite the Respondent's illegal actions, he dedicated his all to the company. That on 5th March 2015, the Respondent further increased his salary to Kshs.57,831/= inclusive of House and Transport Allowance
4. That on or about 11th August 2015, he was executing his duties as Conversion Manager and that while making his usual rounds, he found two of the Respondent's employees had absconded duty; with the first employee, Raymond Kitavi taking a shower before time and the second one Vaud Agutu lying on an Isoma 2 machine.
5. That he immediately instructed Mr. Kitavi to report back to his workstation and called the responsible machine operator to talk to Mr. Agutu about risking his life by lying on the said machine. That on 12th August 2015, he convened a crisis meeting involving the Station Supervisor, Machine Operator, the abovementioned two employees and two of their colleagues wherein Mr. Kitavi being remorseful, tendered an apology letter.
6. That Mr. Agutu on the other hand became hysterical and exhibited uncouth behaviour by semi-undressing and throwing his overall to him and that he reported the incident to the Productions Manager who advised him to write an email to that effect copying the Human Resource Manager, to which he obliged.
7. That he later learnt that Mr. Agutu had gone to the Resource Manager and alleged that the Claimant had tried to procure a bribe from several employees and that he learnt about it when he was served with a show cause letter on 21st August 2015.
8. That he responded to these baseless allegations via a letter dated 22nd August 2015 and the Respondent sent him an email requiring him to attend a disciplinary hearing at the Respondent's Board Room on 25th August 2015 at 8.00 am.
9. He continues to aver that when he attended the said hearing, the basic tenements of fair process were done away with and when he requested to be furnished with any evidence tendered against him, the Respondent's management rubbished his request.
10. That the said hearing lasted barely 30 minutes before a decision was hurriedly made on the spot suspending him for two weeks, which he was informed of and told to collect the suspension letter from the Human Resource Manager. That the said letter stated that the Respondent had grounds of evidence and were further investigating the matter and that he should report to the Production Manager on 7th September 2015.

11. That when he reported to the said Manager, he was issued with a letter dated 7th September 2015 terminating his employment and that the particulars of malice/breach of contract/statutory duty of care on the part of the Respondent are as follows:-

a) Failing to issue the Claimant with a warning letter or warning at all.

b) Terminating the Claimant without any evidence of bribery being tendered.

c) Issuing a disciplinary hearing and not allowing the Claimant to answer the questions being asked nor defend himself before dismissing the Claimant.

12. The Claimant avers that he has as a result of the aforesaid suffered loss and damage which he particularises as emotionally and financially since he was the sole bread winner and that he was also not paid his terminal dues which he claims as follows:-

i) Salary up to 07/09/2015 Kshs.13,493.90

ii) 1 month salary in lieu of notice .Kshs.57,831.00

iii) Earned but un-utilised leave days

(21days x Kshs. 1,927.70) Kshs.40,481.70

iv) 12 months' salary for unfair and wrongful dismissal

(12 x Kshs. 57,831).....Kshs. 693.972.00

Kshs. 805,777.70

13. That despite demand and notice of intention to sue, the Respondent refused to settle his Claim and he prays for judgment against the Respondent for a declaration that the Respondent's action in dismissing him from employment was unlawful and unfair; the sum of Kshs.805,777.70 as particularised above; costs of the suit; and interest on the amount awarded at Court rates.

14. He also filed his Witness Statement dated 26th February 2019 stating that none of his accusers attended the disciplinary hearing and neither was he given an opportunity to question them. That he reported to the Respondent's Production Manager on 7th September 2015 with a view of getting a brief of the investigations but was instead issued with a termination of employment letter. He believes that the termination was malicious and was due to his close relationship with the former boss, Mr. Heinz Peter Meyer who was also dismissed by the Respondent.

15. The Respondent filed its Response to Claim dated 17th November 2015 denying the Claimant's averments and averring that no report was made by the Claimant to the Production Manager. That the Claimant was indeed soliciting bribes from the workers and that it conducted the disciplinary hearing in accordance with the Staff Handbook, which the Claimant is well aware of.

16. It avers that all the contractually and legally laid down procedures were followed and that it is the Claimant's own gross misconduct that led to the termination of his contract. It particularises the gross misconduct as follows:-

a. Between the months of February 2014 to June 2015, the Claimant received amounts of money from several temporary workers and failed to remit and account for such payment, amounting to extorting money from workers in return for weekly continuity for the workers contrary to the company's regulation and the Employment Act.

b. Asking and receiving bribes from temporary workers with an intention to instil fear amongst them which is contrary to the Respondent's rules and regulations. That on diverse dates, the Claimant received amounts of money from Vaud Omondi Agutu, Daniel Atito, Michael Abuya, Kennedy Kioko, Daniel Juma, Edward Nato, Kevin Ichai Kikunyu and James Muga who were the Respondent's temporary workers, in exchange for favours of continuity of work.

c. Wilfully neglecting, carelessly and improperly performing intended duties by failing to perform the duties as a team leader contrary to the contract of employment and company policy.

17. The Respondent avers that the Claimant's case fell within the ambit of **Section 44(4)(g) of the Employment Act** such that the Claimant wilfully committed or on reasonable and sufficient grounds, is suspected to have committed a criminal offence against or to the substantial detriment of his employer/employer's property amounting to gross misconduct.

18. That the Claimant also breached his terms of employment because of his deceit and was thus rightly and lawfully summarily dismissed from employment. That the termination letter of 7th September 2015 included all the Claimant's terminal dues and that it is the Claimant who owes it Kshs.12,308/=. That the Claimant admitted all the charges at the disciplinary hearing and was remorseful for his transgressions and that since his dismissal is justified in law, the Respondent prays that the Claimant's claim is dismissed with costs.

Evidence

19. The Claimant, CW1 testified in Court that he wished to adopt his filed Statement and documents as his evidence in Court. In cross-examination, he refers the Court to his suspension letter on *page 136 of the Claimant's bundle* and for the *Minutes of the meeting on page 38 of the Respondent's bundle*, he confirmed that he signed at No. 6 and that his answer to No. 2 was that he received lunch on friendly grounds. That he did not know who to appeal to.

20. RW1, PAUL MATHENGE stated in court that he would like to adopt his filed Statement and the List and bundle of documents as his evidence. In cross-examination, he confirmed that the Claimant's accusers were not present during the disciplinary hearing and that he did not know any further investigations that were conducted.

21. In re-examination, he stated that the CEO has the final decision to terminate. RW2, SILAS NGUGI, testified that he wished to adopt his filed Statement and that he also adopted documents *No. 1 to 10* as evidence in court. He confirmed in cross-examination that no evidence showing that the Claimant took the bribes was submitted at the disciplinary hearing.

Claimant's Submissions

22. The Claimant submits that during cross-examination of the Respondent's 2 witnesses, none of them presented any shred of evidence to implicate him of bribery such as Mpesa statement or something to support their allegations against him. That the Investigation Report at *pages 44 to 77 of the Respondent's bundle of documents* was never availed to him and that the Respondent produced the same in court as an afterthought.

23. That the said termination runs contrary to **Section 43 of the Employment Act** as the Respondent had no valid reasons to terminate his services and was thus substantively unfair and that in the case of **David Gichana Omuya –v- Mombasa Maize Millers Ltd [2014] eKLR**, Radido J stated that:-

“Section 43 of the Employment Act has placed a statutory obligation upon the employer to prove the reasons for terminating the services of an employee. Section 45 of the Act on the other hand requires the employer to prove that the reason(s) for terminating are valid and fair reasons.”

24. He submits that the decision to summarily dismiss him as per the letter of termination was arrived at before any investigations were conducted contrary to the suspension letter and that courts have held that even in cases of summary dismissal, one ought to be given a fair disciplinary hearing. That the disciplinary hearing was marred with irregularities and non-compliance with **Section 41 of the Employment Act** and he relies on the case of **Rebecca Ann Maina & 2 Others –v- Jomo Kenyatta University of Agriculture & Technology [2014] eKLR**. Nduma Nderi J discussed the nature of a disciplinary hearing and observed that:-

“...Nevertheless, once a disciplinary process is called to question, the Court is expected to examine each case on its own merit but non-compliance with any of the provisions of Section 41 of the Employment Act, 2007 renders any disciplinary action out rightly unfair.

..However, in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence...”

25. It is submitted by the Claimant that after he was terminated, the Respondent purported to pay him the sums claimed and then proceeded to deduct the said sum on behalf of Sanduku Co-operative Society as evidenced at *paragraph 5 of the termination letter*. That as per his clearance certificate found at *page 50 of the Respondent's bundle of documents*, he ended up receiving negative twelve thousand three hundred and eight only (Kshs. -12,308.00) and that this was illegal as the Respondent was not an agent or debt collectors on behalf of Sanduku Co-operative Society.

26. That if he owed the said society, the society was entitled to file a case at the Co-operative Tribunal and claim their money from him and that he should therefore be awarded the claims he seeks for in this case. That duly guided by **Section 49 of the Employment Act**, he beseeches this Honourable Court to exercise its full discretion and award him the maximum 12 months' compensation and further, costs of this suit. That he has been able to discharge both the legal and evidential burden of proof required by him and that this Claim should be allowed as prayed.

Respondent's Submissions

27. The Respondent submits that the Claimant bears the burden of proving that the termination was unfair and that the Court of Appeal in **Pius Machafu Isindu –v- Lavington Security Guards Limited [2017] eKLR** stated that only when the appellant has proved that he was unfairly or wrongfully terminated, then the employer will be called upon under Section 43(1) to prove the reason/reasons for the termination and that where the employer fails to do so, the termination shall be deemed unfair within the meaning of Section 45.

28. That in **Principal & BOG Machakos Teachers College –v- Wambua Muange [2016] eKLR**, Nyamweya J analysed that termination of employment is unfair or unlawful where there is no substantive justification provided or procedural fairness observed.

29. That in this instant case, the Claimant has consistently stated and acknowledged throughout the trial the reasons for his dismissal as being abuse of office and bribery and that the Respondent adduced evidence to that effect. That the Claimant has thus failed to prove that his employment was terminated unfairly or that there was no substantive justification of procedural fairness observed.

30. It submits that the ***Staff Handbooks, October 2011 and October 2015*** contained at *pages 50 and 101 of the Claimant's List of*

Documents and which were also issued to the Claimant also provide that an employee who is guilty of gross misconduct can be subjected to summary dismissal.

31. That it received the allegations made against the Claimant and proceeded to conduct investigations and found him guilty of the offences he had been accused of due to the overwhelming testimonies by his co-workers. That it is not mandatory that there be notice since the offences for which an employee is usually summarily dismissed amount to gross misconduct as reiterated under **Section 44(1) of the Employment Act**.

32. That it notified the Claimant through the notice to show cause of its investigation as evidenced by the Investigations Report at *pages 44-47 of the Respondent's List of Documents* with the Minutes of the Disciplinary hearing evidenced at *pages 36-38 of the Respondent's List of Documents*.

33. That it then proceeded to terminate his employment which is the bare minimum required of it under the Employment Act, its Staff Handbook and the rules of natural justice. It cites the case of **Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR**.

34. The Respondent submits that this Honourable Court should reasonably conclude that the Respondent acted lawfully and fairly in dismissing the Claimant and that the Claimant having failed to discharge his burden of proof, he is not entitled to any of the remedies under Section 49 of the Employment Act.

35. That the Claimant's claim for 12 months' salary for unfair dismissal should fail and that as for the earned but un-utilised leave days, it clearly communicated to the Claimant in the termination letter that the said leave days were -21days.

36. That this meant that the Claimant owed it Kshs. 40,481.70 as he had utilised leave days which he had not accumulated and that this was not in any way challenged or proved by the Claimant. The Respondent submits that pursuant to **Section 3(4) of the Evidence Act**, a disputed fact which is neither proved or disproved stands disproved.

37. It submits that it is not opposed to the Claimant's claims for one month's pay in lieu of notice and his September 2015 salary up to the date of termination and that this has already been communicated to the Claimant through the termination notice. It prays that this Court dismisses the Claimant's case with costs to the Respondent.

38. I have examined all the evidence and submissions presented before me from both parties. The issues for this Court's determination are as follows:-

1. Whether there were valid reasons to warrant dismissal of the Claimant.

2. Whether the Claimant was accorded due process before dismissal.

3. What remedies to grant in this circumstances.

39. On the first issue, the Claimant was summarily dismissed under Section 44(4)(g) of the Employment Act. Details of the misconduct were not stated in his dismissal letter.

40. Prior to dismissal, the claimant had been placed on suspension on 25th August 2015 and was asked to report to the Production Manager on 7th September 2015 at 8 am for a brief on the matter under investigation. On 7th September 2015 when he reported, he was instead terminated and no brief on investigation was given to him.

41. The Claimant had previously been issued with a show cause letter on 21st August 2015 indicating that he was receiving bribes from staff. He responded to the show cause letter denying these allegations and was thereafter invited for a disciplinary hearing on 28th August 2015 at 8 am.

42. The minutes of the disciplinary hearing were attached to the Respondent's documents and indicate that the Claimant denied allegations of bribery but admitted to receiving some lunch on friendly basis. The Respondents did not call any witnesses during the disciplinary hearing.

43. During the hearing in Court, the Respondent called two witnesses and RW2 indicated that the Claimant's accusers were not present during the disciplinary hearing. He also admitted that no evidence that the Claimant took the bribe was submitted. He also admitted that the decision at the disciplinary hearing was to suspend Claimant pending investigations and these investigations were never done.

44. From the above chronology of events, the fact that the Claimant took bribes was never established. This is because the Respondent never called the Claimant's accusers at the disciplinary hearing and neither were they called as witnesses in Court. Indeed RW2 indicated in his evidence that the evidence that the Claimant took bribes was never submitted.

45. In the circumstances of this case. It is therefore apparent that the Respondent has not demonstrated that they had a valid reason to terminate the services of the claimant. This is contrary to Section 43 of Employment Act 2007, which indicate that it is the onus of the employer to prove that they had valid reason to terminate the services of an employee.

46. On issue No. 2 the Claimant has submitted that he was not accorded due process, the Respondent on their part insist that they called the Claimant to a disciplinary hearing which he attended on 25th August 2015.

47. From the minutes, the hearing was not concluded. No witnesses were called and the minutes at page 37 show that the hearing was adjourned pending further investigation which investigations were never done and the Claimant was terminated on 7th September 2015. It is therefore apparent that due process was not followed as envisaged under Section 41 of Employment Act.

48. Section 45(2) of Employment Act 2007 states as follows:-

(1) A termination of employment by an employer is unfair if the employer fails to prove:-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

49. From my analysis above however, the Respondents did not have valid reason to terminate the Claimant nor did they subject him to due process. It is therefore my finding that the Claimant was unfairly and unlawfully terminated as I declare that as the position.

50. On issue No. 3 concerning remedies and given that the Claimant's termination was unfair and unjustified, I enter judgment for the Claimant and award him:-

1) 10 months' salary as compensation for unfair and unlawful termination = $10 \times 51,831 = \text{Kshs.}578,310/=$.

2) I also award him one month's salary in lieu of notice = $\text{Kshs.}57,831/=$.

Total = $\text{Kshs.}636,141/=$

3) The Respondent will bear costs of this suit plus interest at court rates with effect the date of this judgment.

Dated and delivered in open Court this 16th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Masese holding brief Gomba for Claimant – Present

No appearance for Respondent