



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE. NO. 753 OF 2015

BERNARD KWERULA ONGAYA.....CLAIMANT

VERSUS

CROWN HEALTH CARE LIMITED..... RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 6.5.2015 alleging that he was wrongfully dismissed from employment by the respondent on 7.4.2015. he averred that the dismissal was not justified and that it was done by the HR Manager via a text message (sms). He therefore prayed for:

- (a) An order that the respondent rescinds the dismissal.
- (b) In the alternative, 12 months compensation for loss of employment.
- (c) Costs plus interest.

2. The respondent filed defence on 8.7.2015 denying the alleged wrongful dismissal and averred that the claimants were dismissed fairly and lawfully by the letter dated 26.3.2015. She further averred that the claimant and his colleagues absconded work for one week and when they were served with show cause letter by the HR Manager, his answer was found to be unsatisfactory and he was dismissed. She further averred that after the dismissal, the claimant was paid all his terminal dues. She therefore prayed for the suit to be dismissed with costs adding that claimant's performance had been unsatisfactory.

3. The main issue for determination arising from the pleadings is whether the dismissal of the claimant from his employment was wrongful. To answer the said question both parties gave evidence and thereafter filed written submissions.

Claimant's Case

4. The claimant testified that he was employed by the respondent as a labourer from June 2008 and worked until 27.3.2015 when he received a text message from mobile phone number 0721604731 telling him that he had been dismissed with immediate effect. The message came from the respondent's HR Manager M/s Esther Nderi who cited no reason for the said dismissal and accorded no hearing him before the dismissal.

5. In cross examination, he contended that after the dismissal he was called to collect his terminal dues and when he went, he was given a termination letter and discharge to sign failure to which he was not going to be paid the dues. He therefore contended that he signed the discharge through threat and undue pressure from the HR Manager M/s Esther Nderi before being paid Kshs.53,141 as his final dues.

6. He denied the alleged poor performance and contended that he was an excellent performer. He further contended the apology letter he wrote on 27.9.2014 was not related to the reason for the dismissal.

Defence Case

7. The respondent's Finance Director, Mr. Francis Muthiami testified as Rw1. He stated that the claimant was employed by the respondent as a Driver from 1.6.2008 to 27.3.2015 when he was dismissed for poor performance and absconding his duties for one week despite prior warning. He further stated that the claimant was served with a show cause letter but he failed to give satisfactory account for the one week absence from duty and consequently, he was dismissed.

8. Rw1 further stated that the dismissal was lawful because the reason was valid and the claimant was given an opportunity to be heard. He further contended that the claimant was paid all his terminal dues after the dismissal as required by the law and signed a discharge agreement that the sum paid was full and final and that he had further no claim against the respondent. He therefore prayed for the suit to be dismissed with costs.

9. In cross examination, Rw1 stated that the claimant absconded duty for one week and that was an indication of poor performance. He maintained that the claimant was called by phone after absconding to collect a show cause letter. He stated that the claimant responded to the show cause letter in writing. He maintained that the claimant wrote an apology letter for his poor performance but contended that his conduct had caused serious losses to the company. He however did not produce any evidence to prove that claimant absconded duty or to prove the quantum of the loss, occasioned by the alleged absconding.

10. On the other hand, he contended that he invited the claimant to a disciplinary hearing on 6.4.2015 by phone after he declined to be heard by the HR Manager. He however did not produce any minutes of the alleged disciplinary hearing but maintained that after the hearing the claimant undertook to write an apology letter. He finally contended that in view of the discharge and settlement signed by the claimant after the dismissal, his claim herein lacks merit.

Analysis and determination

11. There is no dispute that the claimant was employed by the respondent until 27.3.2015 when he was dismissed. The issues for determination arising from pleadings, evidence and submissions are:

- (a) Whether the dismissal was wrongful and unfair.
- (b) Whether the reliefs sought should be granted.

Wrongful/unfair termination

12. Under section 45 of the Employment Act, termination of employees contract of service is unfair and wrongful if it is not grounded on valid and fair reason and if a fair procedure was not followed. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirement. On the other hand fair procedure involves but is not limited to according the employee a fair hearing before terminating his services for the reasons(s) cited.

Reason for the termination herein

13. The reason cited in the termination letter dated 27.3.2015 was unsatisfactory performance resulting to serious losses to the company. The respondent produced an apology letter from the claimant regarding two accidents he had been involved in within one week in September 2014 while driving motor vehicle KBH 599N and KBG 915F. The said apology was not accepted. Again in 2015, the claimant absconded duty for one week without any good cause and according to Rw1, that was an indicator of unsatisfactory performance of duty

14. The claimant admitted that he wrote the said apology letter dated 27.9.2014 but contended that it was not related to the termination of his employment on 27.3.2015. He also never denied that he absconded duty as alleged by the respondent. I therefore find that the respondent had a valid reason for dismissing the claimant being unsatisfactory or poor performance of his duty. He admitted to being involved in two road accidents in one week while driving different vehicles in September 2014. He also admitted that on 27.3.2015, he received a text message from the HR Manager notifying him that he was dismissed. The said allegation that SMS was sent to him confirms that indeed the claimant was absent from work when the HR Manager decided to correspond to him through text message.

15. Under section 44(4) (a) and (c) of the Act, employer entitled to dismiss her employee if he absents himself from duty without leave or good cause, and for negligent or careless performance of his work that was his duty under the contract of service to have performed carefully. Consequently, I return that unsatisfactory performance of duty was a valid and fair reason for terminating the claimant's service summarily.

The procedure followed

16. The claimant contended that the termination was without prior hearing as contemplated by section 41 of the Act. The said section provides that

“An employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice present during this explanation.

Notwithstanding any other provisions of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

17. The foregoing mandatory procedure was not followed herein. The respondent did not prove that she invited the claimant to any hearing to enable him defend himself before the termination. Rw1 alleged that he invited the claimant to a disciplinary hearing on 6/4/2015. That was after the dismissal of the claimant by the letter dated 26.3.2015. Consequently, I return that, although the respondents had a valid reason for dismissing the claimant under section 44 of the Act, the termination was rendered unfair by the failure to accord the claimant a fair

hearing.

Reliefs

18. Rw1 testified that in view of a discharge and settlement agreement signed by the Claimant after the dismissal the claim lacks merit. The Claimant responded that he signed the discharge while under pressure from the Respondent's HR Manager before being paid Kshs. 53,141 as his final dues. Though he alleges that he signed the said discharge under pressure he did not prove that he did anything to challenge the involuntarily signed discharge agreement before or after it was filed in court by the respondent as an exhibit. Consequently, I find and hold that the claimant has not proved that he did not sign the discharge voluntarily.

19. In *Thomas De la Rue (K) Ltd v David Opondo Omutelema [2013]eKLR* the Court of Appeal held:

“We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge.”

20. In view of the foregoing finding, I dismiss the claim for compensation for unfair termination under section 49 of the Act. Each party to bear his own costs.

Dated, Signed and Delivered in Open Court at Nairobi this 25th day of October, 2019

ONESMUS N. MAKAU

JUDGE