



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE. NO. 396 OF 2014

EDWARD OUMA ODHIAMBO.....CLAIMANT

-VERSUS-

UNITED ARYAN (EPZ) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent as a machine operator from 28.6.2010 to 11.7.2013 when he was summarily dismissed for alleged misconduct. He however brought this suit on 17.3.2014 contending that the dismissal was unjustified and fair procedure was not followed before the dismissal. He therefore prayed for the following reliefs:-

- (a) A declaration that the termination was unlawful, untimely and an order that the Claimant be paid his dues and benefit of Kshs.247,719.20 as aforesaid.
- (b) Costs of the claim plus interest therein

2. The respondent filed defence on 28.4.2014 denying the alleged unfair dismissal and averred that the dismissal was justified under section 44(4) (c), (d) and (e) of the Employment Act because of the claimant's untoward conduct at the factory. She therefore denied the reliefs sought by the claimant and prayed for the suit to be dismissed with costs.

3. Both parties tendered evidence and also filed written submissions.

Claimant's Case

4. The claimant testified that he joined the respondent on 28.6.2010 as a Machinist. On 11.7.2013 he reported to work as usual but the HR Manager asked him to surrender the pass card. No explanation was given for the direction and as such he refused to surrender the card. As a result, the HR manager told him to go to the Director's Office.

5. On arrival at the said office, five security men attacked him and took him to Ruaraka Police Station on allegation that he had caused disturbance at the employer's premises. The company sent no one to record statement and he was released on cash bail of Kshs.5,000 on the same day at 2 pm. He then went to hospital the following day for treatment.

6. He further testified that the employer told him not to report back to work after leaving the police station. He contended that the termination was without prior notice and he was not accorded any hearing. He denied the allegation that he incited the other workers at the factory and prayed for reliefs sought in the suit. He denied writing the resignation letter/settlement agreement dated 11.7.2013 after leaving the Police Station.

7. In cross examination, he admitted that he was the only one arrested from the work place that day. He denied that any commotion occurred at the work place on 10.7.2013. He further denied that he was served with a show cause letter on 11.7.2013. He denied that he brought commotion on 11.7.2013 after the HR demanded pass card from him. He denied knowledge as to why security was called to arrest him. He did not produce any treatment notes to prove that he went to the hospital after the alleged assault by the security guards.

Defence case

8. Mr. Caleb Bumba Wanga, a Security guard at the respondent testified as Rw1. He testified that on 11.7.2013, the claimant was asked by the Personnel Manager to report to his office concerning an incidence on 10.7.2013 where disturbance was created resulting to stoppage of production for some minutes.

9. Rw1 further testified that when the claimant went to the Personnel's Office, he was served with a show cause letter, which he read and thereafter tore it and threw it at the Personnel Manager. Thereafter the claimant went to the HR Manager's Office and demanded to meet the Chief Shop steward Mr. Wafula. The HR Manager Mr. Job Oloo agreed to the request and the claimant went to look for Mr. Wafula at the factory but returned shortly saying that he could not find him and demanded to see the Director.

10. Rw1 further testified that the claimant proceeded to the Director's office in a wild manner shouting and threatening to kill somebody. As a result the HR Manager Mr. Job Oloo called KK Security Personnel who removed the claimant from the Director's office and kept him at the reception. He however continued to be rowdy and as a result the KK Security personnel escorted him to Ruaraka Police Station where he was locked up.

11. He produced a settlement agreement dated 11.7.2013 to prove that the claimant was paid all his terminal dues and he has no further claim against the respondent.

12. In cross examination, Rw1 stated that the claimant worked for 3 years and his salary was about Ksh.10,000 per month. He maintained that the claimant caused commotion at the work place and was served with a show cause letter but tore it. He contended that the claimant was heard on the offence but admitted that he had no evidence to prove the alleged hearing. He further contended that the claimant was released from police custody on 11.7.2013 in the afternoon and went back to the office where he was paid his terminal dues and signed a settlement agreement.

Analysis and determination

13. There is no dispute that the claimant was employed by the respondent as a Machine Operator until 11.7.2013 when he was dismissed. The issues for determination are:-

(a) Whether the dismissal of the claimant was unfair.

(b) Whether he is entitled to the reliefs sought.

Unfair termination

14. The claimant was dismissed for gross misconduct under section 44 (4) c, d, & e of the Employment Act. The said provision allows the employer to summarily dismiss his employee if the employee neglects to perform his duty under the contract of service; uses abusive or insulting language or behaves in a manner that is insulting to the employer or a person placed in authority by the employer; and refuses or fails to obey lawful command from his employer or a person placed in authority by the employer.

15. Rw1 gave consistent testimony of the claimant's misconduct at the work place on 10.7.2013 and 11.7.2013, which led to his arrest and confinement at Ruaraka Police Station. Such acts by the claimant are consistent with a case of violent person at the work place and I therefore return that the respondent has proved that there was a valid and fair reason to warrant summary dismissal of the claimant under section 44(4) of the Act.

16. However, I find that the claimant's evidence that he was not accorded a fair hearing before dismissal has not been rebutted. The court observes that the claimant was just removed from the premises after he became violent and escorted to the police where he was locked up until 2 pm the same day and then released. Rw1 alleged that there was a disciplinary hearing but he did not prove that he attended the hearing. He also did not produce any minutes as exhibits of the alleged hearing. The failure to prove that the claimant was given a fair hearing in the presence of another employee renders the dismissal unfair.

17. Under section 45(2) of the Employment Act, termination of an employee's contract is unfair if the employer fails to prove that it was grounded on a valid and fair reason; and that a fair procedure was followed.

Reliefs

18. The claimant signed a discharge voucher after dismissal acknowledging that he had been paid all his terminal dues and that he had no further claim from the respondent in relation to the contract of service between the two. It is now trite that a settlement agreement signed by an employee discharging his employer from further claim constitutes a binding contract that cannot be set aside unless there is proof that it was not entered into voluntarily but through one or more of the vitiating factors known at common law. Such factors include coercion, undue influence, fraud and mistake. None of the said factors have been pleaded and proved by the claimant herein. I therefore return that he is bound by the said settlement agreement signed by him on 11.7.2013. Although during the hearing he denied executing the same, a casual glance at the signature thereon, in my view, resembles the one on the Verifying Affidavit herein.

19. In conclusion, I find and hold that, although the dismissal was procedurally unfair, the claimant is not entitled to the reliefs sought. I therefore dismiss the suit with no order as to costs.

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

ONESMUS N. MAKAU

JUDGE