



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2068 OF 2017

ZEDEKIAH MWANGI MUNYIRI

CLAIMANT

v

GILL CONSULT LIMITED

RESPONDENT

JUDGMENT

1. On 20 June 2018, the Court directed the parties to file *Agreed Issues* ahead of hearing. The directive was not complied with and the Court will, therefore, adopt the Issues as proposed by Zedekiah Mwangi Munyiri (Claimant) and filed in Court on 8 February 2018.
2. The Cause was heard on 16 September 2019. The Claimant and the Managing Director of Gill Consult Ltd (Respondent) testified.
3. The Claimant filed his submissions on 24 September 2019 while the Respondent filed its submissions on 8 October 2019.

**Whether the summary dismissal was unfair**

**Procedural fairness**

4. In cases of *summary dismissal*, section 41(2) of the Employment Act, 2007 creates an obligation upon an employer to grant an employee an audience, and consider any representations made by the employee before taking a decision to summarily dismiss the employee.
5. The Claimant case was that there was no *written notice of termination of employment* and that he was not afforded an opportunity to be heard prior to the dismissal.
6. The Respondent's witness, on the other hand, testified that he had on previous occasions called the Claimant to respond to various allegations which caused the summary dismissal.
7. The witness stated that the meetings were in July 2017, August 2017 and lastly on 5 September 2017 before the dismissal on 19 September 2017.
8. According to the witness, the agenda of the meetings were to enable the Claimant to explain why he continuously failed to get ETR receipts upon fuelling; taking a colleagues monies without permission and failing to account for Kshs 4,000/- which he had been given to purchase fuel (there was less fuel when the fuel levels were checked).
9. The Court accepts the Respondent's witness testimony that he had several meetings with the Claimant in July, August and 5 September 2017 to discuss with him his conduct.
10. However, there was no evidence or disclosure from the Respondent's witness whether the Claimant was explicitly informed around 19 September 2017 that his *summary dismissal* was in contemplation.
11. In the Court's view, the Respondent ought to have unambiguously informed the Claimant that his *summary dismissal* was on the cards, and sought his representations on 19 September 2017.
12. The Court in effect finds that the meetings between the parties did not meet the threshold required by section 41(2) of the Employment Act, 2007.

### **Substantive fairness**

13. The Court has already adverted to the reasons which precipitated the summary dismissal of the Claimant.

14. The Claimant did not deny that the Respondent's operating procedures/instructions were that he had to account for fuel monies by producing ETR receipts. He also did not deny that he failed to produce ETR receipts.

15. The Claimant attempted to explain the failure by stating that some of the petrol stations he fuelled in did not have ETR receipts, or that the machines failed due to power/electricity problems and that he instead got stamped sales receipts.

16. To the Court, the explanations by the Claimant on failure to get ETR receipts were lame as the highways he used to drive through are littered with tens of petrol stations, not far from each other. It is also not lost to the Court that ETR receipts are a legal requirement.

17. The Claimant did not deny taking a colleague's Kshs 2,000/- which he said he found lying in an office when there was nobody else in the office. He returned the money only after being confronted by the Managing Director.

18. The last reason given for the dismissal of the Claimant was the failure to account for Kshs 4,000/- given to him to fuel around 5 September 2017. The Claimant did not proffer any plausible reason why he did not fuel immediately he was given the money or why he had to wait until confronted by the Managing Director the next day.

19. The Court is satisfied that by failing to get ETR receipts and fuelling promptly, the Claimant was exhibiting signs of dishonesty and, therefore, finds that the Respondent had and has proved valid reason(s) for dismissal.

### **Compensation**

20. In the view of the Court, this is not a proper case to award compensation, a discretionary remedy considering the lack of honesty on the part of the Claimant.

### **Pay in lieu of notice**

21. The Claimant sought Kshs 44,000/- as pay in lieu of notice. Since the Court has concluded that the Respondent did not afford the Claimant an opportunity to be heard, the Court will allow this relief.

### **Service pay**

22. The Claimant was registered with and was contributing towards the *National Social Security Fund* and would be ineligible for service pay as envisaged by section 35(5) & (6) of the Employment Act, 2007.

### **Leave**

23. The Claimant sought Kshs 20,533/- on account of outstanding leave.

24. The Respondent did not produce the Claimant's leave records or rebut the Claimant's assertions on the leave and the Court will allow the head of the claim.

### **Certificate of Service**

25. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 21 days.

### **Conclusion and Orders**

26. The Court finds and holds that although the Respondent had valid and fair reasons to summarily dismiss the Claimant, a fair procedure was not followed.

27. The Court declines to award the Claimant compensation but orders the Respondent to pay him

(a) Pay in lieu of notice Kshs 44,000/-

(b) Leave Kshs 20,533/-

**TOTAL Kshs 64,533/-**

28. Respondent to issue a certificate of service within 21 days.

29. Each party to bear own costs.

**Delivered, dated and signed in Nairobi on this 22<sup>nd</sup> day of October 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Ngigi instructed by Ngigi Njuguna & Co. Advocates

For Respondent Mrs. Ochieng instructed by Olotch & Co. Advocates

Court Assistant Lindsey