



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 2214 OF 2014

ALPHONSE MUTHINI WAMBUA.....CLAIMANT

VERSUS

PLANTINUM PAKKAGING LIMITED.....RESPONDENT

J U D G E M E N T

1. The Claimant pleaded that he was employed by the respondent on 6th June, 2012 as an assistant Machine Operator at a monthly salary of Kshs. 13,415/= per month.
2. On 29th September, 2014 he reported to duty as usual and continued with his duties where after the Production Manager one Mr. Sajar ordered him together with his colleague to re-measure the reel slips which he measured the previous day again.
3. Upon re-measuring of the reel slips it was discovered that new measurements were slightly different from the already recorded measurements. Upon this discovery the production manager summoned him to his office and issued him with a summary dismissal letter dated 29th September, 2014.
4. The Claimant contended that the dismissal was unfair unlawful and inhuman considering that he had served the respondent diligently through the Course of his employment save for the slight wrong in the measurements.
5. He complained that no show cause letter was given and that no disciplinary hearing was conducted to confirm his culpability.
6. The respondent on the other hand admitted employing the Claimant but on 27th June, 2013 and not 6th June, 2012 as pleaded.
7. The respondent further stated that contrary to the Claimant's allegations, his dismissal was lawful and procedural due to acts of gross misconduct and fundamental breach of contract.
8. According to the respondent, on 27th September, 2014 as the Production Manager was counterchecking the actual physical weights of items measured by the Claimant vis-avis the figures recorded on the online system he noted a variation of 233kg with respect to recorded weight of Man U Bubblegum. Upon enquiring from the Claimant why there was a difference between figures recorded and the actual weight he did not give a satisfactory explanation. Investigations conducted revealed that the Claimant had been recording the wrong weight of items on account of the fact that he was not measuring the items to ascertain the actual weight before recording the same.
9. The respondent averred that failure by the Claimant to measure the reels before recording the same was careless, negligent, improper and deliberate refusal to obey lawful command envisaged under clause 7.5.3 of the respondent's HR Policy and Manual.
10. Further despite giving the Claimant an opportunity to explain the reasons for his conduct, he refused or neglected to give any and instead left the respondent's premises without permission. The respondent consequently by a letter dated 29th September, 2014 summarily dismissed the Claimant from employment.
11. The respondent further averred that upon dismissal the Claimant was paid all his terminal dues as outlined in the termination letter.
12. In his oral evidences the Claimant repeated the averments in the statement of the claim and further stated that they used to measure and cut material after every 10,000/= metres then weigh and pack. According to him they were never trained on the job. He further stated that he

was never issued with a show cause letter nor did he attend any disciplinary hearing.

13. He further stated that they were registered for NHIF and NSSF but the respondent never remitted their dues.

14. In cross-examination he stated that he signed his letter of appointment on 1st July, 2013 that he was entitled to one-month notice or salary in lieu. He further stated that in paragraph 5 of his statement of claim he accepted that there was discrepancy in measurement because he had not weighed the material. The incident took place on Saturday morning and was issued with a dismissal letter on Monday. He further stated that he did not produce any evidence that he never went on leave.

15. The respondent's witness Mr. Sajar Chellikunel stated that he was the respondent's production manager. It was his evidence that he used to measure input and output to see if they tallied. On 27th morning he counter checked the input and output and while calculating, he noticed two reels were underweight. He reviewed the CCTV to confirm if the reels were actually weighed. The Claimant and his colleagues were on duty on the material day when he asked him if he weighed the reels he said yes but when I showed him the CCTV he walked away from the office and never came back. It was his evidence that he never summarily dismissed the Claimant and that dismissal was a function of the HR.

16. In cross-examination he stated that new employees were well inducted and they signed that they were trained.

17. It was his testimony that he called the Claimant after receiving evidence and that he never told the Claimant to wait at the reception. Further, he was not immediately aware that the Claimant had been issued with a termination letter.

18. According to him, if there was under weighing the respondent ended up over producing the goods he however could not tell if the respondent lost money. He was not aware if the Claimant was issued with a show cause letter. The HR would know that.

19. The reasons for which an employer terminates the services of an employee are those reasons which an employer genuinely believed to exist at the time of termination and which caused the employer to terminate the services of an employee.

20. The reason for which the respondent terminated the Claimant's service was that he failed or ignored to measure the reel slips before recording the weights online. The Claimant did not deny the discrepancy in the recorded weight and the actual weight. According to the respondent's production manager, this was negligence and gross misconduct on the part of the Claimant. According to him underweighting would lead to over production. He reported the incident to HR who decided to dismiss the Claimant summarily.

21. Although the Employment Act enumerates situations where summary dismissal can occur, the Act goes further to state that the listing of those situations does not make them the only situations in which a summary dismissal can take place. The seriousness of the offence for which a summary dismissal can occur depends on the concern with which an employer views an employee's act or omission vis-à-vis its potential impact on the employer's operations or property. In this particular case the respondent considered the Claimant's act as negligence warranting summary dismissal.

22. The Court will not question this however, there is no evidence and in fact the respondent has admitted through its witness Mr. Sajan that he did not remember if the Claimant was ever issued with a show cause letter.

23. Termination employment as has been stated by this Court before is at two levels first there must be a valid and or justifiable reason and second the termination must be carried out through a fair procedure. That is to say an employee where possible must be issued with a show cause letter and given a chance to explain his or her side of the events further the employee must be given a chance to defend self before disciplinary panel.

24. In this particular case the respondent may have regarded the omission to measure the material before recording the weight online as serious warranting summary dismissal however the Claimant had the right to have been issued with a notice to show cause and taken through a disciplinary hearing before dismissal unless it was shown that the Claimant by his own conduct made the process impossible. This was neither alleged nor shown by the respondent. For that reason, the Court would declare the termination unfair for want of procedure as provided under the Employment Act.

25. The Court therefore awards the Claimant the sum of Kshs. 67,075 being five months' salary as compensation for unfair termination of service. The award shall attract interest at Court rates until payment in full but subject to taxes.

26. The Claimant shall further have costs of the suit.

27. It is so ordered.

Dated at Nairobi this 18th day of October, 2019

Abuodha Jorum Nelson

Judge

Delivered this 18th day of October, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge