



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE. NO. 991 OF 2017

BENSON MUBEGI.....CLAIMANT

-VERSUS-

ALLIANCE GARMENT INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This suit is about an alleged wrongful and unlawful termination of the claimant's contract of service by the respondent and failure to pay his terminal dues. The claimant seeks the following reliefs:-

- (i) A declaration that the claimant's termination of employment was wrongful and unfair;
- (ii) The sum of Kshs.240,833.65/= as particularized in paragraph 8 of the claim
- (iii) Interest in (i) above at court rates from date of judgement until payment in full.
- (iv) Certificate of service
- (v) Costs of this suit.
- (vi) Any other relief as the court may deem just.

2. The respondent denied the alleged wrongful and unlawful dismissal of the claimant and averred that the claimant was fairly dismissed for insubordination and after being accorded a hearing in the presence of union officials. She therefore prayed for the suit to be dismissed with costs.

3. The main issues for determination are whether the termination of the claimant's services was wrongful and unlawful, and whether the reliefs sought should be granted. Both parties tendered evidence and thereafter filed written submissions.

Claimant's Case

4. The claimant testified as Cw1 and basically adopted his written statement as his testimony and produced four supporting documents. In brief he stated that he was employed by the respondent as a General Labourer on casual basis earning Kshs.16,128 gross pay per month. That he worked upto 15.3.2007 when he was served with a dismissal letter.

5. He further stated that his summary dismissal arose from a complaint raised by the shop steward that the supervisor had given him instructions to perform duties that he could not perform due to his health. He contended that the reason for the dismissal was not valid in law, and that the dismissal was done without according him any prior hearing. He therefore contended that the termination was irregular, wrongful and unfair and prayed for the reliefs set out in his suit.

6. In cross examination, he admitted that he was being paid salary on weekly basis. He further admitted that the amount paid was fluctuating from week to week. He however contended that he worked continuously for all the years he was engaged by the respondent.

7. He further contended that he could not perform the work given by the supervisor on 15.3.2017 due to medical reason. On further cross examination, he changed to say that he refused to do the assigned work because of fear since another employee had earlier been allocated the same work and ended up being dismissed for alleged theft scandal there.

8. He contended that he first went to the HR office alone and late returned there with the shop steward. He stated that during the meeting he was heard and he stated that he had a health condition and also he feared that scandal in the department.

9. In re-examination, he stated that he was not notified by the HR Manager that he was going to be dismissed. He further contended that he wrote apology letter because he was told that he would go back to the job he was refusing to do, but the following day he was served with dismissal letter.

Defence Case

10. Mr. Philemon Otieno Oloo testified as Rw1. He adopted his written statement dated 4.6.2017 in which he stated that he was employed by the respondent the supervisor in the Cutting Department in 2012. He further stated that on 14.3.2017 he assigned the claimant the duty of clearing the floor but he refused without giving any reason.

11. Rw1 further stated that he reported the matter to the HR Manager who sent him to call the claimant to the HR office but the claimant failed to go. As a result, the HR Manager went to the Cutting Department and ordered the claimant and him to go to the HR office. When the two went to the HR Managers office, the claimant refused to do the work assigned and stated that he would rather leave the employment than do the assigned work.

12. In cross-examination, Rw1 denied any knowledge that the claimant had suffered any injuries at work in 2013. He contended that on 14.3.2017, he assigned the claimant the work of clearing the floor, which involved removing waste paper and fabric cuttings.

13. He admitted that the claimant gave his verbal explanation before him, shop steward, and HR Officer but the explanation was not acceptable.

14. Mr. Martin Obiero, respondent's HR Manager testified as Rw2. He also adopted his written statement which he filed on 18.7.2017. He stated that on 14.3.2017, the cutting supervisor (Rw1) reported to him that the claimant had refused to perform cleaning work he had assigned to him. He then sent Rw1 to call the claimant but when they delayed, he went to the Cutting Department to speak to the Claimant. However, the claimant refused to do the job and went away murmuring some words.

15. Rw2 further stated that after a few minutes the claimant went to his office with the shop steward and explained that he could not do the job because another employee was previously given the same job and ended up being dismissed on alleged theft scandal. He further contended that the claimant never cited any health issue as the reason for refusing to do the assigned work.

16. Rw2 further contended that he held another meeting with the union official where the claimant gave an apology letter but the management was not persuaded because of the misconduct committed by the claimant at the shop floor and he was dismissed.

17. Rw2 denied that the claimant was earning Kshs.16,128 and contended that the claimant was being paid Kshs.538.70 per day and his job depended on availability of work. He admitted that the claimant reported a dispute to the Labour Office and the respondent was served with letter dated 24.3.2017 and he responded by the letter dated 30.3.2017 explaining the reasons for the dismissal of the claimant as refusal to comply with instructions given by his supervisor and the HR Manager.

18. In cross examination, Rw2 contended that the claimant was never injured in 2014. He admitted that he was served with the letter dated 16.10.2015 from Mama Lucy Hospital recommending light duties to the claimant pending surgery and he obliged by assigning him duties at the Cutting Department.

19. Rw2 maintained that when he went to the Cutting Department on 14.3.2017 to talk to the claimant, he went away murmuring words which he did not understand. He maintained that when later the claimant went to see him with the shop steward, he never cited any health issue as the reason for refusing the assigned work but rather the allegation that another employee, who had previously been assigned the same work had been dismissed for a theft scandal.

20. Rw2 denied that the clearing work assigned to the claimant involved heavy metals and contended that it was light work involving taking out small off cuts from fabrics and papers. He further contended that the dismissal of the claimant was proportional to the misconduct committed. He however admitted that he never wrote down the proceedings of the disciplinary hearing.

21. In re-examination, Rw2 maintained that the claimant refusal to perform the assigned work amounted to gross misconduct and it warranted summary dismissal. He further contended that the recommendation for light duties was long before the dismissal on 15.3.2017. He maintained that the claimant was given an opportunity to defend himself before the dismissal. He therefore prayed for the suit to be dismissed with costs.

Claimant's Submissions

22. The claimant submitted that the dismissal did not meet the legal threshold of fairness as set out under section 41, 43 and 45 of the Employment Act. He contended that before the dismissal he was not served with any show cause letter, or served with any termination notice or afforded any hearing save for the impromptu meeting on 14.3.2017.

23. He relied on ***Mary Chemweno Kiptui vs Kenya Pipeline Company Limited [2014]eKLR*** to fortify his submission that his dismissal was unfair and wrongful, and prayed for the reliefs sought in his suit.

Respondent's Submissions

24. The respondent submitted that the dismissal of the claimant was fair and lawful because it was founded on a valid reason and that he was accorded an opportunity to defend himself. She submitted that the claimant refused to perform work assigned to him by his supervisor even after the intervention by the HR Manager contrary to section 44(4)(c), (d) and (e) of the Act. That the work assigned was light and it involved sweeping off cuts from fabric and paper and did not include metals as alleged by the claimant.

25. She further submitted that the issue of ill health was not raised by the claimant in his defence but only an alleged theft scandal, which he repeated in his apology letter. She further submitted that the claimant was accorded a fair hearing in the presence of two shop stewards, Mr. Paul Munyau and John Mwaniki in accordance with section 41 of the Act. She maintained that the claimant had not discharged his burden proving unfair termination under section 47(5) of the Employment Act.

26. She therefore contended that the dismissal of the claimant was fair within the meaning of section 45 of the Employment Act and prayed for the suit to be dismissed

Analysis and determination

27. There is no dispute that the claimant was employed by the respondent as a General Labourer from March 2013 to 15.3.2017 when he was summarily dismissed. The issues for determination as set out above are:-

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

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

Unfair termination

28. The burden of proving unfair termination of employment lies with the employee under section 47(5) of the Employment Act. The said burden is discharged if the employee established a prima facie case that the termination was not grounded on a valid and fair reason and that fair procedure was not followed. Valid and fair reason relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirement. Fair procedure on the other hand refers to, but not limited to, according the employee a fair hearing as required by section 41 of the Act before the termination is decided.

Reason for the termination

29. There is no dispute that the reason cited for the summarily dismissal of the claimant was refusal to perform work assigned to him by his Departmental Supervisor on 14.3.2017 contrary to section 44(4)(d) & (e) of the Employment Act. The claimant admitted that he refused to do the work and cited ill health and theft scandal involved in the said work. The court agrees with the defence that the defence of ill-health was not valid because the work was light because it was just sweeping waste papers and fabric off cuts on the floor. The request for light duties pending surgery was also overtaken by events considering the time lapse between the recommendation letter from the hospital and the date he refused to do the assigned work.

30. In addition, the court finds no merits in the allegations of theft scandal in the cleaning work. The alleged previous employee who was dismissed for theft after being assigned the cleaning work was not named nor was the date when it happened disclosed by the claimant.

31. In view of the foregoing, the court finds that the claimant deliberately refused to perform work after being assigned by his departmental supervisor. He further maintained his hardline stance even after being directed by the HR Manager to comply with the instructions issued to him by his supervisor. The said conduct amounted to insubordination contrary to section 44(4)(e) of the Employment Act which provides that employer is entitled to summarily dismiss his employee if :-

“(e) an employee knowingly fails, or refuses to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.”

32. The claimant admitted that he was a general labourer working in the cutting department. Rw2 contended that he posted the claimant to that department on recommendation by a medical institution. I therefore find that the work assigned to the claimant on 14.3.2017 to sweep the floor was within the scope of his employment and Rw1 being his departmental supervisor had the authority from the employer to instruct him. In the end, the court is of the view that the reason for the dismissal was valid and fair.

The procedure followed

33. The claimant contended that he only held an impromptu meeting with the HR Manager and the shop stewards. He denied that the said meeting amounted to hearing within the meaning of section 41 of the Employment Act. The respondent contended that the claimant was accorded a hearing in the presence of 2 shop stewards and he defended himself of the charge of refusing to perform the work of sweeping the floor as instructed by the departmental supervisor.

34. Section 41 of the Employment Act 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.

35. Applying the facts of this case to the said provisions, I find that the claimant was accorded a fair hearing to defend himself before the dismissal. That the hearing was done in the presence of the shop floor union representatives and his defence of fear of theft scandal in the said assignment was considered but rejected by the management before the dismissal. Consequently, I find and hold that the claimant was given an opportunity to defend himself before the dismissal.

36. The said hearing cannot be rendered unfair just because it was held on the same date when the offence was committed. It all depends on the circumstance of each case. In this case am satisfied that the hearing was conducted in accordance with section 41 of the Act and in the manner set out in the precedents cited by both parties on the matter.

37. Having found that the employer relied on a valid reason for dismissing the claimant and that she followed a fair procedure, I return that the claimant has failed to discharge his burden of proving unfair termination as required by section 47(5) of the Act.

Reliefs

38. In view of the foregoing finding, the court declines to make declaration that the termination of the claimant's employment was wrongful and unfair as prayed. For the same reason the prayer for salary in lieu of notice and compensation for unfair termination is dismissed.

39. The claim for leave for 2017 and salary for 15 days worked in March 2017 are however granted because the same were offered vide the dismissal letter dated 15.3.2017. The prorata leave for 3 months at the rate of 1.75 days per month under section 28 of the Employment Act equals to 6.125 days. Multiplied by daily wage of Kshs.538.70 x 6.125 = 3299.50. I however award him Kshs.3,256 which is the sum pleaded for accrued leave. The salary for the 15 days worked in March 2017 at the rate of Daily Wage of Kshs.538.70 equals to Kshs.8,080.50.

40. The claim for service pay is granted because the employer never proved that she contributed to the claimant's social security. I therefore award the claimant service year for 2 years at the rate of 15 days pay per year of service as prayed.

Hence Kshs. 538.70 x 15 x 2 = Kshs.16,161

Conclusion and disposition

41. I have found that the claimant has not proved that her dismissal from employment was unfair and unlawful. I have however found that he is entitled to the following dues and enter judgment for him accordingly:-

Leave due.....Kshs. 3,256.00
Salary dueKshs. 8,080.50
Salary for September 2013.....Kshs.16,161.00

Kshs.27,497.50

The said award is subject to statutory deduction but in addition to half costs of the suit plus interest at court rates from the date of filing suit.

Dated, Signed and Delivered in Open Court at Nairobi this 18th day of October, 2019

ONESMUS N. MAKAU

JUDGE