



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

AT NAKURU

CAUSE NO.178 OF 2016

JOHNSON GITHINJI KAMAU.....CLAIMANT

VERSUS

MARIDADI FLOWERS LIMITED.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent in November, 2011 as a general worker earning ksh.7,300.00 per month and a house allowance of ksh.2,000.00 per month.

On 27th January, 2014 while at work, the claimant was accused of poor work performance and dismissed from his employment without being given a hearing or notice. such was unfair and unlawful

The claimant claims for compensation for unfair termination of his employment; gratuity/severance pay; costs and any other dues the court may deem fit to grant.

The claimant testified that he was a general worker paid a gross wage of ksh.8,000.00 per month. He was then moved to the spray section as a promotion. He was trained for a day and given uniforms. His supervisor was Harrison Gitau and the senior supervisor was Vincent.

On 27th January 2014 Gitau came to the claimant and said he should report to Vincent and the human resource, Mary who issued him with letter terminating his employment. The alleged hearing and notice to show cause was not conducted or issued. That he was forced to sign on the termination letter so as to be paid his final wages. The alleged warning letters were issued without reference to the supervisor as required and there was no hearing before such warnings issued. One had to accept the warnings issued as failure to do so attracted a sanction.

Defence

The defence is that the claimant was employed under probation after which he was confirmed as a sprayer on 30th November, 2012 and issued with letter of appointment at a basic wage of Ksh.8,188.30. he underwent training on how to perform his duties and singed Certificate of Participation. The respondent maintained a daily register on work attendance. The claimant went on leave. The last gross wage was Ksh.14,763.51 per month.

The defence is also that the claimant was a habitual offender and was issued with verbal and written warnings. On 27th January, 2014 the claimant carelessly and improperly performed his duties by skipping lines while spraying pesticides which led to spread of targeted pests and diseases. He had previously been warned on his poor work performance and other misconduct.

Following the claimant's misconduct, a disciplinary hearing was conducted on 27th January, 2014 and pursuant to section 41 of the employment act and present were the human source manager, head supervisor, a representative, and the claimant with his witness. All parties present singed the attendance and hearing record.

The claimant was found to be of gross misdoubt, insubordinate and which justified summary dismissal in accordance with the collective agreement. The claimant was cleared and paid his terminal dues which included statutory deductions and a Certificate of Service. nothing is owed or unpaid.

In evidence the respondent called Susan Wanjiru Kihara the human resource manager and who testified that the claimant as a sprayer was found not attending to his duties properly, he was issued with both verbal and written warnings and upon failing to taken heed on 27th January, 2014 he was invited for a disciplinary hearing in the presence of his representative and given a chance for defence. He signed to the

proceeding and a sanction of summary dismissal was found justified. The claimant as allowed an appeal which he failed to do.

At the close of the hearing, both parties filed written submissions.

Determination.

The claimant is seeking the court to find that he was not given a hearing as provided for under section 41 of the Employment Act,

That the respondent did not prove that the reason for termination was valid pursuant to section 45 of the Employment Act;

That he should be paid compensation at 12 months basic wage;

Be paid a gratuity/severance pay; and Costs.

By letter dated 27th January, 2014 the claimant's employment was terminated for the reasons of poor work performance. the letter also noted he would be paid his dues wages and one month notice.

The respondent's witness Ms Kihara testified that the claimant was taken through the due process, there was a show cause notice and a hearing conducted to hear his disciplinary case and he signed the attendance sheet. The record of hearing confirm the claimant was in attendance and that the reason for termination of employment followed several warnings with regard to his poor work performance. The record also notes that the claimant had noted his mistakes and asked for a last chance after being found to have skipped some lines when spraying pests.

The claimant has signed to the record of disciplinary hearing. His evidence was that he would be forced to accept and sign the warnings issued and the record of attendance as failure to do so would attract a sanction.

In attendance at the disciplinary hearing on 27th January, 2014 is the claimant's witness Mr Austin Njau. The claimant did not call him as his witness to confirmed his assertions that he was forced to sign on the attendance and disciplinary hearing for fear of a sanction and that the matters subject and leading to the hearing were not true.

The claimant did not address the reasons leading to his termination of employment and relating to his poor work performance and the skipping of line while spraying pesticides. The warnings issued are admitted save for the defence that the claimant was forced to sign them for fear of a sanction.

Where the claimant was forced to sign for any warning(s) the attendance before the disciplinary hearing, upon his employment termination he did not challenge the same on appeal or by letter of protest. The letter of demand done through his advocates on 23rd April, 2016 does not address such a matter at all and its main concern was only as concerns unfair termination of employment and without giving details.

An employer is under section 41(1) of the Employment Act, 2007 allowed to terminate the employment of an employee on the grounds of poor work performance subject to giving the employee a notice of such poor work performance and where the employee fails to take heed be subjected to a disciplinary hearing was held in the case of **Samson R. Karubara & another versus Wrigley Company E.A. Limited [2018] eKLR**. the employee must be given notice of his poor work performance as held in the case of **Alois Makau Maluvu versus Citi trust Kenya Limited & another [2018] eKLR** and where there is no improvement be subjected to a disciplinary hearing was held in the case of **Jane Samba Mkala versus OI Tukai Lodge Limited Cause No.823 of 2010**.

In this case, the court finds that the claimant was issued with both verbal and written warnings, he accepted these warning and did not appeal or cause to be notified his disapproval as to the lawfulness of the subject of the warnings. The claimant cannot now turn on these warnings and be found to say that they were forced on him. following the issued warnings, there is no challenge to the fact that on 27th January, 2014 the claimant as a sprayer was found to have skipped several lines in praying pesticides. As his duty required him to spray such pesticides, he was trained in the performance of such duties and issued with a certificate of participation, the wilful failure and neglect to undertaken his duties as directed directly frustrated his own employment.

There were valid reasons leading to termination of employment. The claimant was paid his terminal dues inclusive of a one (1) months' pay in notice which is a term agreed upon in the collective agreement.

On the remedies sought, compensation is not due in a case where termination of employment is found lawful and justified.

On the claim for payment of gratuity/severance pay, under the collective agreement at clause 24(a) provides for the payment of gratuity to an employee whose employment is terminated after 5 years of continuous service with the respondent at 23 days pay for each full years in the service. the claimant was terminated in his employment after working 30th December, 2012 to 27th January, 2014 a period of 13 months only. He was paid in lieu of notice and the clause on payment of gratuity is not applicable to him having not attained the threshold of 5 years' service.

With regard to severance pay, such pay is not dues to cases outside section 40 of the Employment Act, 2007 provisions.

Accordingly, the claims made are found without merit and are hereby dismissed with costs to the respondent.

Delivered at Nakuru this 17th day of October, 2019.

M. MBAR?

JUDGE

In the presence of: