



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1626 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 2nd October, 2019)

FESTUS MWANJA.....CLAIMANT

VERSUS

PUNCHLINES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed the Claim herein challenging the termination of his employment while seeking the payment of his terminal dues. In particular, he seeks the following prayers:-

a) A declaration that the Respondent's action in dismissing the Claimant from employment was unlawful and unfair.

b) A declaration that the Claimant was entitled to a contract of service.

c) The sum of KShs. 534,380.90 particularized as below-

i. 1 months' salary in lieu of notice in the sum of KShs. 24,290.00.

ii. Gratuity (809.67 x 18 days x 15 years) amounting to KShs. 218,610.90.

iii. 12 months' salary compensation in the sum of KShs. 291,480.00.

d) Costs of this suit.

e) Interest on the amount awarded at Court rates.

2. The Claimant was initially employed by the Respondent as a general worker earning a monthly salary of KShs. 3,120.00 plus a house allowance of KShs. 468.00. He was never issued with a contract of service. He was later promoted to a machine operator then to a supervisor in the cheques printing section and finally transferred to the binding section.

3. It is the Claimant's case that on 22nd November 2013 he realized that part of the series of the parking tickets were missing. He notified the production manager who ordered the said series to be re-printed. However, the missing tickets were recovered on 28th November 2013 and shredded.

4. Thereafter Claimant was called upon by the Respondent's Manager to explain why he had ordered for the re-printing of the tickets. He denied the allegations and explained that those were the orders of the production manager. The Manager did not listen to his explanation and sent him on compulsory leave. He picked his suspension letter on 29th November 2013 and proceeded on compulsory leave on full salary.

5. On 30th December 2013, he received a call from the Respondent informing him to report to work the following day, which he did and was issued with a termination letter. He pleaded with the Respondent's manager who told him that he would consider his request. He visited the Respondent's offices on 6th, 7th and 8th January 2014 to follow up on his matter but he was informed that the Manager was not around.

6. However, when he came back on 20th January 2014, he found the Manager, explained himself and was told that the investigations would

be re-opened. He was sent on another suspension with full pay. He unsuccessfully followed up on the matter several times until 17th July 2014 when the Manager informed him that his employment had long been terminated. He was requested to leave the premises.

7. He was not accorded the opportunity to defend himself. He avers that he performed his duties diligently and had never given the Respondent a reason to dismiss his services. It is therefore his position that the termination of his employment was malicious.

8. The Claimant testified as CW1 and adopted his witness statement filed on 15th August 2016, as his evidence. It was his testimony that though he was told that he would be called upon to record a statement with the police, the same never happened.

9. On cross-examination, he maintained that he reported the matter to the manager and that he was never issued with a letter of invitation. He admitted to being paid KShs.48,580.00 but stated that the reason he was paid a salary for 2 months was so that he could remain in Nairobi to record a statement.

10. He denied ever writing a letter to the Respondent after December 2013. It was his statement that he was forced to sign the settlement form. It was his testimony that his Sacco recovered their money from his terminal dues. He denied requesting the Respondent to keep paying him gratuity for 7 months.

11. The Respondent filed a Response on 28th September 2016. The Respondent contends that the Claimant was issued with a contract of employment.

12. They further contend that the Claimant never reported the loss of the tickets to the production manager, nevertheless, the production manager could not have ordered for reprinting. It is also their contention that they were never found or even shredded.

13. It is the Respondent's case that the Claimant was sent on compulsory leave because he did not issue an explanation for the ticket loss or his failure to report to management. He was invited for a disciplinary hearing on 18th December 2013 but did not attend so the Committee recommended his summary dismissal. This was communicated to him in the letter of 31st December 2013. It is also the Respondent's case that the Claimant was summarily dismissed for being in breach of his contract of employment.

14. The Respondent avers that upon termination of the Claimant's employment, his terminal dues being notice pay and 7 months' gratuity, were paid to him thus he is not entitled to any other payments.

15. Asheesh Kumar Anand testified as RW1 and sought to adopt his witness statement filed on 10th June 2019, as his evidence.

16. On cross-examination, he testified that there were no investigations conducted neither was the matter reported to the police. He conceded that the document on page 5 of the Respondent's bundle of documents did not have a company logo or signature, but testified that he knew the person who prepared it. He testified that he didn't know the person who wrote or signed the settlement form.

17. When asked about the invitation to a hearing, he maintained that the Claimant was served with the letter but he refused to receive it, though there was no affidavit to that effect.

Submissions by the Parties

18. The Claimant in his submissions filed on 2nd July 2019, submitted that the Respondent did not have a valid reason to summarily dismiss him. Further, the Respondent placed reliance on hearsay evidence therefore such evidence was inadmissible.

19. The Claimant submitted that his dismissal was procedurally unfair as he was never accorded a fair hearing. It is his position that the invitation letter was forged as the Respondent could not explain why it didn't contain his signature yet he had signed all the other letters. He relied on the case of **David Gichana Omuya vs. Mombasa Maize Millers Limited [2014] eKLR.**

20. The Claimant submits that he is entitled to notice pay as he was not issued with a notice. It is his submissions that he is entitled to gratuity payment pursuant to the Regulation of Wages (Protective Security) Order 1998 because the Respondent's business is in the security industry.

21. He submits that he is entitled to 12 months' compensation for unfair dismissal since the termination of his employment was unfair. He submits that the document relied upon by the Respondent as computation of his final payment fell short of the rules of evidence as their maker is not known hence inadmissible.

22. He submits that the Respondent should bear the costs of this suit as its actions necessitated this cause.

23. The Respondent in their submissions filed on 9th July 2019, submits that the termination of the Claimant's employment was lawful. It is their further submissions that the Claimant failed to prove that the termination was unfair and wrongful as required under Section 47 (5) of the Employment Act.

24. On the other hand, they discharged their burden of proving that the termination was justified. They conducted a disciplinary hearing as required by Section 41 of the Employment Act but the Claimant failed to attend.

25. The Respondent sought to clarify that the Claimant was not accused of stealing but for failing to report the lost tickets while printing

others without the authorization to do so. They rely on the case of **Pius Machafu Isindu vs. Lavington Security Guards Limited [2017] eKLR.**

26. The Respondent submits that the Claimant is not entitled to any of the reliefs sought because the Respondent has proved that the Claimant was paid salary in lieu of notice and severance pay for each year worked.

27. They further submitted that they do not fall in the category of the security industry as contemplated in Regulation of Wages (Protective Security) Order 1998 because they are involved in security printing.

28. I have examined all the evidence and submissions of the Parties herein. The issues for this Court's determination are as follows:-

1. Whether the Respondent had valid reasons to terminate services of the Claimant.

2. Whether the Claimant was accorded due process before the termination.

3. Whether Claimant is entitled to the remedies sought.

29. On the 1st issue, the Respondent have averred that they terminated the Claimant for reprinting some receipts without authority from the Respondent. The Claimant insisted that he was given permission to print the receipts in question by the Respondent's Manager.

30. In determining whether the Respondent were able to establish they had valid reason to terminate the Claimant, I note that RW1 testified in Court and in cross examination, he stated that it is the Production Manager who reported to him what the Claimant had done. The Production Manager was not called as a witness. The RW1 also stated that there were no investigations done.

31. Other than lack of investigation, the RW1 told Court that the Claimant was not subjected to any disciplinary hearing but he also admitted that there was no evidence that the Claimant was ever summoned to attend the disciplinary hearing.

32. Section 45(2) of Employment Act envisages that an employment is unfairly terminated where employee fails to prove that they had valid reasons for the termination and that the employee was accorded a fair hearing before the termination.

33. In the case of the Claimant, the two instances are both lacking. In the circumstances, it is my finding that the Claimant was unlawfully and unfairly terminated. That answers issue No. 1 and 2 above.

34. As to remedies, having found the termination unfair and unjustified I find for Claimant and I award him as follows:-

1. 1 month salary in lieu of notice = 24,290/=

2. 10 months' salary as compensation for unlawful and unfair termination = 24,290 x 10 = 242,900/=

TOTAL = 267,190/=

3. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Dated and delivered in open Court this **2nd day of October, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties