



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.378 OF 2016

FRED ONYWOKI NYAUNTU..... CLAIMANT

VERSUS

MEGA PARK (K) LIMITED..... RESPONDENT

JUDGEMENT

The claimant was employed by the respondent on 9th July, 2013 as a strapping machine attendant until he was served with a show cause notice over allegations that he had been found using his phone while at work. He responded to the show cause notice and without due process his employment was terminated.

The claim is that termination of employment was unfair and without payment of terminal dues and is seeking the following;

1. Notice pay Ksh.13, 287.00;
2. Leave due for 3 years Ksh.24, 263.40;
3. Compensation Ksh.159, 444.00.

The claimant testified in support of his case that upon employment by the respondent as a stripper he worked in the shift running from 7am to 6pm each day or 6am to 7pm and only took his rest on Sunday. He was accused of taking over the phone which was not true as he had left the phone at the gate as required by the workplace rules and regulations. The manager was called and who said he found the claimant talking on the phone. The human resource officer found that this amounted to gross misconduct after being called to show cause over the allegations. The claimant was accused that he was found chatting on the phone and sitting idle. He was invited to a disciplinary hearing and present were Welsius barasa the chief shop steward but who ended up supporting the respondent's case.

The claimant also testified that he was not treated fairly before the disciplinary panel and this resulted in unfair termination of employment and should be paid his terminal dues.

The defence is that the claimant as an employee of the respondent on a contract running from 1st January, 2016 to 30th June, 2016 and was on fixed term contract for the entire duration of his employment with the respondent.

On 7th June, 2016 the claimant was found sitting idle and chatting on the phone against company policy and consequently he was issued with a notice to show cause why disciplinary action should not be taken against him and he replied thereto and was invited to a disciplinary hearing on 14th June, 2016 under the provisions of section 41 of the Employment act. Present was the chief shop steward.

The claimant was found to have grossly misconducted himself and was issued with letter of summary dismissal. Previously and on 9th September, 2015 the claimant had been issued with a warning letter due to poor work performance and disobeying lawful orders. The decision to warn the claimant followed a hearing on 8th September, 2015 and present was the union representative.

The claimant failed to adhere to shop floor regulations which was addressed and by filing suit is in abuse of court process and suit should be dismissed with costs to the respondent.

In evidence the respondent called Welsius Barasa a machine operator with the respondent and also the chief shop steward and who testified that he worked with the claimant who was found talking on the phone and idling away while at work and was issued with a show cause

notice and which was followed by a hearing and as the union representative he was present and the claimant was found to have gross misconducted himself warranting summary dismissal. Another employee Joshua Temba confirmed the claimant had a phone while at work. The manager caught him using and chatting over the phone while at work.

Eric Njenga Wagatwa the human resource manager also testified that upon the manager finding the claimant with a phone at work and chatting while idling instead of working the matter was placed with him and he issued the claimant with a show cause notice and upon his response he was not satisfied and invited the claimant for a disciplinary hearing. In attendance was the union representative.

Mr Njenga also testified that it is the policy of the respondent not to allow the use of cell phone at work and this is posted in notices all over the shop floor. When the claimant was found with the phone he was issued with a show cause notice to explain his conduct but he had no satisfactory responses.

On the claims made Mr Njenga testified that upon the claimant's dismissal from his employment his terminal dues were posted to his bank account including pay for;

1. Days worked;
2. Leave days due; and
3. Overtime pay.

The claims made for compensation is not due as there was a good reason justifying summary dismissal.

Both parties filed written submissions.

As the claimant has correctly submitted in the case of **Kenya Union of Commercial Food & Allied Workers versus Meru North Farmers Sacco Limited Cause No.74 of 2013** that whatever reason or reasons that arise to cause an employer to terminate employment, the employee must be taken through the mandatory process as outlined under section 41 of the Employment Act.

The employee must be given a hearing and is entitled to attend at the shop floor with a representative of his choice. These rights are to be secured by the employer. Even in a serious case which requires summary dismissal under the provisions of section 44 of the Act. The employee is to be accorded a fair hearing and the safeguard in law is that the employee be given a chance to attend disciplinary hearing with a representative of his choice. As the claimant submitted in the case of **Pius Machafu Isindu versus Lavington Security Guards Limited [2017] eKLR**.

In this case the claimant testified that upon being found by the manager talking over the phone at the shop floor he was issued with a notice to show cause and upon his response he was invited to attend at the disciplinary hearing and present were the management and the chief shop steward.

The court finds the decision to dismiss the claimant from employment followed the due process of section 44 read together with section 41(2) of the Employment Act, 2007. There were genuine and justifiable grounds leading to the summary dismissal. The claimant was allowed the opportunity to show cause why his employment should not be terminated for gross misconduct and following his use of a phone while at the shop floor and contrary to the work place policy and then was invited to a disciplinary hearing and present was the shop steward.

Upon termination of employment the claimant was paid the following terminal dues;

1. Pay for days worked up to 7th June, 2016;
2. Leave days not taken;
3. Overtime earned;

Less what the claimant was owing to Romesi Sacco and statutory deductions. Such dues were paid through the claimant's bank account.

In all the proceedings relating to the claimant, the trade union and the chief shop steward were involved.

The summary dismissal being justified, no compensation of notice pay is due.

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

Delivered at Nakuru this 21st day of November, 2019.

M. MBARU

JUDGE

In the presence of:

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