



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1253 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

BONIFACE NZUKI MBITHI.....CLAIMANT

VERSUS

ATHI RIVER SHALOM COMMUNITY HOSPITAL....RESPONDENT

JUDGMENT

The Claimant, Bonface Nzuki Mbithi filed a Memorandum of Claim dated 27th June 2016 alleging unfair/unlawful dismissal from employment by the Respondent, Athi River Shalom Community Hospital. He avers that he was employed by the Respondent on 8th June 2012 as a Driver and that his last salary was Kshs.11,000/= per month. That the Respondent issued him with a suspension letter dated 22nd May 2015 which alleged he was absent from work on the same day the letter was issued to him. That in the said letter, the Respondent also blames him for damaging the radiator and breaking the windscreen of Motor vehicle KBU 734Z, which allegations he denies.

He avers that on 27th May 2015 he attended a hearing held by the Respondent, with the CEO, Human Resource Manager and two other persons in attendance. That after the disciplinary hearing he was asked to go home and wait to be recalled back to work. That he was never recalled to date of filing this suit. He contends that the Respondent’s action to dismiss him was unfair, unlawful and against the tenets of fair labour practices, the Employment Act, principles of natural justice and the Constitution of Kenya because:

- i. The Claimant has done nothing to warrant the dismissal.
- ii. No show cause letter was issued to the Claimant.
- iii. Due process was ignored in haste to dismiss the Claimant.
- iv. The decision to dismiss the Claimant was harsh, inhumane, unwarranted and unjustified considering that he had served the Respondent diligently and without blemish.

As a result of the unfair and unlawful dismissal from employment, he claims:

- a. One month’s salary in lieu of notice..... Kshs.11,000
- b. Service pay from 08/06/2012 to 27/05/2015
 (15/30 x 11,000 x 12 x 4 years)..... Kshs.264,000
- c. Compensation for pecuniary embarrassment suffered and inability to meet financial obligations as a result of the dismissal (11,000 x 12 months)..... Kshs.132,000

Total Kshs.407,000

He prays for judgment against the Respondent for:-

- a. A declaration that the Respondent’s dismissal of the Claimant from employment was unfair and unlawful.

- b. A declaration that the Claimant is entitled to payment of his dues and compensatory damages totalling to Kshs.407,000/=
- c. Interest on (b) above from the date of filing suit until payment.
- d. Costs of the suit and interest thereof

In his Witness Statement, the Claimant denies that he is to blame for the damage to the radiator which was caused by a stone, which stone could not be seen. On the breakage of the vehicle's windscreen, he states he had been sent to Machakos to pick a theatre machine which he fastened onto the vehicle but while driving, the rope which had fastened the machine broke and caused the machine to break the windscreen.

The Respondent filed a Memorandum of Response to Claim dated 16th January 2017 in which it avers that the Claimant was neither dutiful nor diligent in his work, that he also did not meet the stipulated terms of engagement. That the suspension letter which was wrongly dated 22nd May 2015 was amended to 25th May 2015, which is the same day it was collected after the Claimant reported back to work. That the Claimant has admitted absconding duty and being negligent in carrying out his duties in paragraphs 4, 5 and 6 of the Memorandum of Claim. It avers that the Claimant was arrogant and indifferent during the hearing and dismissively told the panel to do what it wants because he does not care. That after the hearing, it notified the claimant of the decision to summarily dismiss him as shown in the annexed letter dated 27th May 2015 marked **ARSCH 2**.

It avers that **Section 43** of the **Employment Act** places upon it the burden of proof of the reasons for termination of employment. That it incurred hefty and unnecessary costs for repairs on its motor vehicles owing to the Claimant's negligence and that the decision to dismiss him under **Section 44(3)** and **(4)(a)** and **(c)** of the **Employment Act** was therefore fair, lawful and procedural. That the Claimant is not entitled to payments enlisted in the Claim.

The respondent denies being issued with demand or notice of intention to sue and avers that even if any was issued, it was not obliged to make good for reasons it has mentioned above. The Respondent lists the Claimant's several incidences of negligence as follows:

- a. On 28th February 2015, he left an ambulance unattended with the engine running and in gear at a petrol station, occasioning an accident where the ambulance hit someone else's car endangering the life of a colleague and petrol pump attendants, besides risking a fire accident;
- b. In April 2015, he lost the ambulance keys necessitating the replacing of the entire ignition system;
- c. On 11th May, 2015 he broke the back windscreen of an ambulance;
- d. On 16th May, 2015 he damaged the radiator of an ambulance;
- e. On 22nd and 23rd May, 2015 he absconded duty.

The Respondent avers that the Claimant brought this matter to court as an afterthought calculated to benefit unfairly from it after committing acts of gross misconduct. That the Claimant was duly paid all his dues in accordance with the law for all days worked, for all public holidays (whenever worked) and was given rest days as required. That without prejudice to the foregoing, it is not legally required to make any payment in lieu of notice nor was it required to pay severance pay since the Claimant is a member of the NSSF. That Paragraph 6 of the **Industrial Court (Procedure) Rules, 2010** requires the Claimant's claim to be accompanied by a Conciliation Process Report together with minutes as well as a Certificate of Conciliation, absence of which the Claimant or their representative should swear an affidavit attesting the reasons why the conciliator has not issued a Certificate of Conciliation. That the Claimant did not exhaust the conciliation process or even institute any conciliation but instead chose to drag the Respondent to this Court.

It submits that the Claimant did lodge a complaint to the Sub-County labour officer as per the provisions of **Section 47(1)** of the **Employment Act** and the said officer was satisfied with the Respondent's action. That equity dictates that the Claimant comes to Court with clean hands but which the Claimant has failed to do. That he is not entitled to compensation for loss of employment since he constructively terminated his employment and is guilty of fundamentally breaching his obligations under his contract of service.

Evidence

The Claimant testified in court and adopted his filed Witness Statement as his evidence in chief. He denied that he drove carelessly and damaged the radiator, stating that he was removing the car from the parking when he noticed the gauge beeping and when he checked, he noticed it was leaking. That the vehicle had been parked by another driver and there was no formal assignment of drivers to vehicle with drivers using whichever vehicle that was available. He explained that he was not the one who damaged the vehicle. He denied being absent on 22nd May 2015 stating that he was on duty in Nairobi and he drove the vehicle to Kenyatta National Hospital. That he signed in the work ticket of the vehicle, which work ticket was kept by the Respondent. He denied that on 23rd May 2015 he reported to work and left early stating he worked until 6.30 pm and that he signed out when leaving and when reporting to work.

He further testified that after the suspension, he was called back on 27th May 2015 at 8 am and was asked about absenteeism on 22nd May 2015 and 23rd May 2015. That he was not given a letter informing him of the meeting and what was to be discussed. That he was not accompanied by a colleague at the meeting and insisted he was never informed of the termination of his employment with immediate effect. He referred the Court to the letter of dismissal dated 27th May 2015 in the Respondent's bundle which he says he never received. He stated that he went back to ask about his work status but was not told anything. That he went to Labour offices but did not get any assistance and that is why his lawyer wrote a demand letter to the Respondent, which is marked as Appendix 2 of the Claim. He stated he was not

terminated in a fair manner, was not notified of intention to terminate his employment or reasons of termination. He however withdrew the prayer for Service pay since he was a member of NSSF.

The respondent did not call any witness and opted to rely on pleadings, documents and written submissions. When the matter came up for mention on 12th June 2019 to confirm filing of submissions and upon request by the Respondent's advocate, the Court granted a final opportunity to the Respondent to file submissions. On 22nd July 2019, the Claimant's advocate stated they had not been served with the Respondent's submissions. The court thus proceeded to take a judgment date without the respondent's submissions.

Claimant's Submissions

The Claimant submits that his evidence remains uncontroverted since the Respondent failed to appear in court to defend the claim despite having knowledge of the hearing date. That the Respondent's denial in the memorandum of response is not evidence before this court and that no witness was availed in court to substantiate the averments in the defence which thus remain mere allegations. That the Respondent did not furnish before this court any minutes of the purported meeting to buttress its averments of the proceedings of that day. That under **Section 41 of the Employment Act**, the Respondent is obligated to give notice of hearing before termination on grounds of gross misconduct with **subsection (1)** of the provision providing that:

Subject to section 42(1), 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 a shop floor union representative of his choice present during this explanation.

He relies on the case of **Alphonse Machanga Mwachanya -V- Operation 680 Limited [2013] eKLR** on the requirement for notification and hearing before termination and further on the case of **Gilbert Mariera Makori v Equity Bank Limited [2016] eKLR** wherein the same principle was emphasised by this Court. He further submits that he was not accorded an opportunity to be heard during the meeting that took place on 27th May 2015. That in **Cause No. 1998 of 2011, Donald Odeke v Fidelity Security Limited**, the court equally observed that it does not matter what offence the employee is charged of, if the employee is not heard, the termination is *ipso facto* unfair. He submits that from the foregoing, fair procedure was not applied hence his dismissal was unfair and unlawful.

It is further submitted by the Claimant that failure to prove the reasons for termination renders such termination unfair and illegal as pronounced at **Section 45 of the Act**. He relies on the case of **Jane Samba Mukala v Oltukai Lodge Limited, Industrial Cause No. 823 of 2010: LLR 255 (ICK) (September 2013)** where the Court held that the burden of proof is on the employer when terminating an employee from their employment.

He submits that he has proved his case to the required standards. That he is entitled to Notice pay as under **Section 36 of the Employment Act** since the same was illegally not paid by the Respondent. That since the Respondent did not remit his NSSF dues for the period of service from 8th June 2012 to 27th May 2015, service/gratuity is payable because he does not fall within the exceptions set out in **Section 35(6)(d)** of the **Act**. That the Respondent's employment was his only source of livelihood and having served it for three years without blemish, the Respondent never issued him with a letter of service to enable him get alternative employment. That under **Section 49 of the Act**, an employer who unfairly and unlawfully dismisses the employee should be made to pay the full 12 months' gross salary in compensation. That he is also entitled to a Certificate of Service as required by **Section 51 of the Act** which he thus prays for.

Analysis and Determination

The first issue for determination is whether the Claimant was unfairly and unlawfully terminated from his employment by the Respondent. The second issue for determination is whether the Claimant is entitled to the reliefs sought in his claim.

In **Shankar Saklani -v- DHL Global Forwarding (K) Limited [2012] eKLR**, Ongaya J. held that before summary dismissal, a hearing and notification are mandatory and necessary as envisaged under **Section 41 of the Employment Act**.

Under **Section 43 of the Employment Act**, the burden of proving that the reasons for terminating an employee constitute justifiable or lawful grounds for dismissal lies with the employer and that where the employer fails to do so, the termination shall be deemed unfair within the meaning of **Section 45 of the Employment Act**.

Although the respondent did not attend court for hearing or file written submissions, the claimant admitted to damaging the radiator and the windscreen of the Ambulance Registration No. KBU 734Z. These are the very complaints contained in the defence and the letter dated 26th June 2015 which the respondent wrote to the sub-county Labour Officer following the claimant's complaints to the Labour Officer.

The claimant further admitted in the witness statement that he was called for a disciplinary hearing a 27th May 2015. At paragraph 4 of the witness statement the claimant states –

“On 27th May 2014, I attended a meeting held by the respondent. The meeting was also attended by the Chief Executive Officer, the Human Resource Manager and two other persons. At the end of the meeting I was asked to go home but with a promise that I will be called back to work. To date I have never been recalled.”

Based on the foregoing I find that there was valid reason to dismiss the claimant and that he was subjected for a disciplinary hearing. The only lapse on the part of the respondent was in not sending the claimant a notification for disciplinary hearing and not stating the specific grounds for termination of employment in the letter of dismissal.

From the foregoing I reduce the summary dismissal to normal termination so that the claimant is entitled to one month's salary in lieu of notice. Further for the lapses in the procedure for disciplinary hearing and the letter of termination, I award the claimant two months' salary as compensation. The prayer for service pay was withdrawn by the claimant at the hearing.

I thus enter judgment for the claimant against the respondent in the **total sum of Kshs.33,000** being –

i. One month's salary in lieu of notice Kshs.11,000

ii. Two months' salary as compensation Kshs.22,000

The respondent shall also issue the claimant with a certificate of service.

The respondent shall pay claimant's costs. Interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF DECEMBER 2019

MAUREEN ONYANGO

JUDGE