



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 146 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 18th December, 2019)

NATHAN LUMUMBACLAIMANT

VERSUS

PRESS MASTER LIMITED1ST RESPONDENT

HARJINDER SINGH PANESAR2ND RESPONDENT

JUDGEMENT

1. The Claimant filed a Statement of Claim on 27th January, 2017 alleging his unlawful dismissal by the Respondent and the failure by the Respondent to pay his terminal dues. He avers that his employment was terminated on account of redundancy without following due procedure.

2. He seeks the following reliefs:

i. Kshs. 1,188,000.00/=

ii. Costs of this claim plus interest.

iii. Certificate of service

iv. Any other relief that Honourable Court may deem just.

3. The Respondent filed a Statement of Defence on 29th March, 2017. It avers that the Claimant who was in charge of the Gluing Department was supposed to inspect boxes before delivery. However, in October 2016 he failed to perform his duties thus wrong products were delivered to a customer.

4. It avers that the Claimant was issued with a show cause letter on 13th October, 2016 which he conceded to that fact that the job was not properly done. It avers that the Claimant was suspended and thereafter invited to appear before the disciplinary committee.

5. According to the Respondent, the Claimant, during the hearing, agreed that he was to supervise employees to ensure they followed the correct procedure but he failed to do so. It is the Respondent's case that the disciplinary committee found the Claimant guilty of gross misconduct and consequently dismissed him.

Claimant's case

6. The Claimant, Cw1, testified that he worked for the Respondent for 27 years and that during his employment he had worked as a supervisor in different departments.

7. He testified that in January 2014 their employees wrote a letter enquiring why they had not been paid. He testified that as they continued to work, a customer arrived with urgent instructions at 5pm, which were worked on.

8. It was his testimony that the customer complained that the glue was not well fixed and they fixed it. He contended that he was issued with a warning letter, invited to a hearing and eventually dismissed.

9. In cross-examination, he testified that he was issued with a show cause letter with respect to the work they had done that evening. He testified that he had been a supervisor for 8 years and that he knew the work well.

10. He testified that if work was not properly done, the Respondent was to ensure that the work was redone. He contended that by them redoing the work, the company did not suffer any loss. It was his case that the work was done urgently that night and that is why there were some mistakes.

11. He contended that in his reply to the show cause letter he agreed that the mistake was his case and that on 22nd October, 2016 they had a meeting which aimed at discussing the work that was not done.

Respondent's submissions

12. Peter Mutua Munyoki the Respondent's employee in the Accounts Department testified as Rw1. He testified that the Claimant was the head of the gluing department. It was his testimony that on 13th October, 2016 they received urgent work from a client which was done but the glue did not hold.

13. He testified that the customer returned the work to be redone which resulted to the company incurring costs. He testified that the Claimant was issued with a show cause letter as he was the head of the gluing department.

14. He testified that at the hearing, the Claimant stated that the work had mistakes as it was urgent. It was his case that the Claimant was invited to a hearing and thereafter dismissed.

15. In cross-examination, Rw1 testified that the Claimant had other disciplinary issues though these issues were not presented in Court.

Claimant's submissions

16. The Claimant submits that he testified that he was not allowed to be accompanied by a representative to the hearing. He submits that there was an agreement to pay the Claimant his dues but the Respondent refused to do so. He submits that the Respondent had no evidence of any disciplinary issue concerning him.

17. The Claimant submits that his dismissal was unfair as the Respondent only gave him one (1) day to respond to the Notice to Show Cause, which was not adequate time. He submits that the Respondent did not comply with Section 41 (1) and Section 48 of the Employment Act.

18. He submits that in **David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR** the Court held:-

“During the process the employee is entitled to have a fellow employee present and if a union member, a shop floor union representative.”

Respondent's submissions

19. The Respondent submits that the Claimant was issued with a show cause letter and that he admitted that indeed the job was poorly done. It submits that the Claimant was invited to appear before a disciplinary committee and after deliberations the committee found that the Claimants had committed gross misconduct.

20. It is its submission that the allegations that the Claimant was dismissed without any reason and that the termination was unfair are both untrue. It avers that the Claimant knows the reason for his separation with the Respondent.

21. It submits that Section 47 (5) of the Employment Act provides that the burden of proving that the termination of employment or wrongful dismissal occurred rests on an employee while the burden of justifying the grounds for termination of employment or wrongful dismissal rests on the employer.

22. It submits that the Court in **Lucy Nyambura v Avenue Group [2019] eKLR** cited the Court of Appeal decision in **Reuben Ikatwa & 17 Others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR** and held that the burden place on an employer under Section 43 of the Employment Act is to demonstrate a valid reason would cause a reasonable employer to terminate employment.

23. It submits that the Claimant is not entitled to notice pay as he pleaded that he was summarily dismissed from employment. It submits that the Claimant was a member of NSSF thus under the Employment Act he is not entitled to service pay and gratuity. It submits that due process was followed and urged the Court to dismiss the claim.

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

1. Whether there were valid reasons to warrant dismissal of the Claimant.

2. Whether due process was followed before Claimant was dismissed.

3. Whether the Claimant is entitled to remedies sought.

25. On the 1st issue, the Claimant's dismissal letter was dated 22.10.2016. The letter read as follows:-

"Nathan Lumumba,

Staff No. 138p,

Gluing Department,

Dear Sir,

RE: SUMMARY DISMISSAL

Reference is made to the notice to show cause, your reply, suspension letter dated 13/10/2016 and served several warnings. The same has been canvassed by the management via minutes dated 22/10/2016.

Due to your act or omission as the Gluing Supervisor, the management has unanimously decided to terminate your services because you have failed to follow the terms and contract of your employment, company policy and your personal duties and responsibilities.

Your final dues (if any) will be calculated based on your terms of employment/contract and will be paid after you handover to your supervisor.

Acknowledge the letter by signing hereunder.

Yours sincerely,

FOR: PRESSMASTER LIMITED

Signed

EUNICE MUTAVE

Human Resource "

26. The reasons given herein for dismissal was failure to follow terms of his contract of employment, company policy and personal duties and responsibilities.

27. The Respondent made reference to previous warnings about the way the Claimant had carried out his duties. The Respondent did not annex such warning letters to the current proceedings.

28. From the minutes of the meeting held on 22/10/2016 in which the Claimant was a participant he agreed the mistake of improper gluing was his. In the circumstances, I find that there was a valid reason to dismiss the Claimant from his serves.

29. As for issue No. 2, the Claimant also admitted he attended the meeting of 22/10/2016. Due process was therefore followed.

30. In the circumstances, I find that the dismissal of the Claimant was therefore with valid reasons and due process was followed and was therefore fair and justified.

31. I therefore find this claim without merit and I dismiss it accordingly save for the Claimant's leave allowance for 3 years = 24,510 x 3 = 73,560/=.

32. There will be no order of cost.

Dated and delivered in open Court this **18th day of December, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Rashid for Claimant – Present

Masese for Respondent – Present