



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 355 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

PETER NYAMOSI.....CLAIMANT

-Versus-

EMROK TEA FACTORY.....RESPONDENT

JUDGMENT

By Memorandum of Claim dated 23rd October 2015, the Claimant PETER NYAMOSI alleges that his employment contract was unfairly terminated by the Respondent. He prays for the following remedies –

- 1. A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the respondent, he was not remunerated as required by law.
- 2. Payment of the sums of money claimed below

a) Two months’ pay in lieu notice

Basic salary x 2 months

$$23,500 \times 2 = \text{Kshs. } 47,000$$

b) Leave dues

Basic salary x 3 years

$$23,500 \times 3 = \text{Kshs. } 70,500$$

c) Service gratuity

22 day x years worked x 30 days

30

$$\underline{22 \times 3 \times 23,500} = \text{Kshs. } 47,000$$

30

d) Compensation for unfair termination

Gross pay x 12 months

$$23,500 \times 12 = \text{Kshs. } 282,000$$

TOTAL CLAIM = Kshs. 451,200

3. Costs and interests

4. Any other reliefs the Honourable Court may deem fit to grant.

The Respondent filed a Response to the Memorandum of Claim denying the averments of the Claimant. According to the Respondent the Claimant's dismissal was in conformity with the Employment Act (the Act) and the Collective Bargaining Agreement (CBA). The Respondent states that the Claimant was guilty of misconduct and gives the following particulars of misconduct by the Claimant-

- a) The claimant committed acts of insubordination.
- b) The claimant has been paid all leave allowances due to him.
- c) Failing to perform his electrical work diligently.
- d) Sending abusive texts to the Factory Manager and Directors.
- e) Failing to follow instructions from the production Assistant Manager.
- f) Castigating the Factory Manager.
- g) Failing to perform his duties in accordance with the contract of employment dated 16th April 2017.

The case was heard on 28th November 2016 when the Claimant presented his case and on 14th February 2017 when the Respondent's case was heard. The parties thereafter filed and exchanged written submissions.

The Claimant testified on his behalf while the Respondent called KENNETH CHERUIYOT.

Claimant's Case

The Claimant's case is that he was employed by the Respondent by letter of Appointment as an electrician Grade 1 and reported for work on 5th April 2012. He testified that the Respondent poached him from Kaimosi Tea Factory and paid off his notice period and loan to enable him report immediately. He worked with a team of junior electricians to successfully carry out electrical installation works in the Respondent's factory which was under construction and then stayed on as supervisor. His starting salary was Kshs. 20,395 and at the time of summary dismissal he was earning Kshs. 23,500. He was housed by the Respondent.

The Claimant testified that on 9th June 2015 he reported for work at 9 pm but was informed by the security guard at the gate that he had instructions not to allow the Claimant to enter the factory and to inform the Claimant to report the following day. On 10th June 2015 the Claimant reported for work at 7 am. He met the security supervisor at the gate who told him to wait as the supervisor consulted the Factory Manager. The security Supervisor came back and informed him that the Factory Manager had instructed that the Claimant reports back on Friday 12th June 2015.

The Claimant testified that when he reported on 12th June 2015 he appeared before a disciplinary Committee of the Respondent at the Respondent's Boardroom. He was accused of sending an offensive text message to the Factory Manager. He testified that he had sent a text message to the Factory Manager on 9th June 2015 after the wife of the Landlord where he was housed by the Respondent went to the factory and reported that he was stealing electricity. He testified that he informed the Committee that the reason he sent the text message to the Factory Manager was because the Factory Manager told the wife of the landlord that the Claimant will personally pay rent from that day. The Claimant testified that on Saturday 13th June 2015 the Factory Manager told him to collect his letter of dismissal on Monday.

Under cross-examination, the Claimant denied that he was a difficult person to work with. He admitted receiving two warning letters on 5th October 2013 and 13th July 2014. He testified that at the meeting of 11th June 2015 the allegations made against him were that he had sent a text message to the Factory Manager and the previous warnings. He stated that he was also accused of misappropriation of company money and using factory money as a loan without approval. He was further accused of sending a text message to the director without following the chain of command and for insubordination. He was also accused of refusing to unconditionally move out of the premises he occupied after being advised to move out.

The Claimant testified that he was paid terminal dues and signed a declaration that he had received full terminal benefits and was not owed anything by the company. He testified that his reason for signing was to enable him complain about his dismissal to a third party as what he was paid was not what he was entitled to.

Under re-examination the Claimant stated that the meeting at which he was disciplined was a progress meeting and not a disciplinary meeting. He stated that the money he was accused of misappropriating was paid to members of the SACCO in his capacity as chairman and the members had not complained. He denied that the message he sent to the factory manager warranted disciplinary action being taken against him.

In the written submissions filed on behalf of the Claimant it is submitted that the termination of the Claimant was unlawful for the reasons that-

(i) No notice of dismissal was issued nor was payment in lieu of notice made to the claimant.

(ii) The claimant was not given opportunity to defend himself with trade union or his choice colleagues' representation as all those who attended the disciplinary meeting were employees of the respondent who were biased in favour of the respondent and unfair to claimant because they were under instruction to make decisions in favour of the respondent.

(iii) The decision to summarily dismiss the claimant for reason of short message sent to the Manager was not meeting the threshold of misconduct to necessitate the same to be regarded as reason to summarily dismiss the claimant. The witness did not bring the phone to court to show the authentication of the SMS or get the server certificate of approval as it is not indicated in the Respondent regulation as reason.

It is further submitted that the fact that the Claimant was paid in lieu of notice is proof that the termination was unfair.

Respondent's Case

The Respondent's witness KENNETH CHERUIYOT testified that he was the Factory Manager at the time of dismissal of the Claimant. He testified that the Claimant had several cases of indiscipline and was issued with show cause letters. He testified that the reason for dismissal of the Claimant was sending the factory manager (himself) an offensive text message. He testified that the Claimant was given a fair hearing at which he was given an opportunity to defend himself. He further testified that the Claimant wrote a letter of apology at page 22 of the Respondent's bundle of documents.

Mr. Cheruiyot testified that the disciplinary committee was composed of himself as factory Manager and 6 other officers. He testified that he is the one who signed the warning letters. He testified that the Claimant was dismissed for gross misconduct under section 44(4) of the Act and the dismissal was fair. He testified that the Claimant was paid terminal dues and signed acknowledgment on 6th July 2015 that he was not owed any other dues by the company. He testified that the Claimant was not paid service gratuity as he had not worked for the minimum qualifying period of 5 years and also because the termination was due to gross misconduct.

Under cross examination Mr. Cheruiyot testified that the Claimant was a supervisor and a good worker, that he was provided with housing and that the Claimant was represented by a workers' representative during the disciplinary hearing.

In the written submissions filed on behalf of the Respondent it is submitted that the termination of the Claimant's employment was lawful and the letter of termination clearly states that it was on grounds of gross misconduct. It is submitted that the Claimant's offensive text message has been extracted and produced as evidence. It is submitted that the Claimant had two previous warnings. It is submitted that the Claimant wrote an apology and acknowledged full payment of his terminal dues and therefore has no further claims against the Respondent.

Determination

I have carefully considered the pleadings and evidence on record. I have further considered the testimonies of the witnesses who testified and the written submissions filed on behalf of both the Claimant and the Respondent.

The issues arising for determination are whether the dismissal of the Claimant was fair and if the Claimant is entitled to the prayers in his Memorandum of Claim.

Fair dismissal

Fair termination is provided for in section 41 and 43 of the Employment Act. For termination to be fair there must be both valid reason for the termination and the procedure for termination must be fair. Section 41 provides that before an employee is terminated on grounds of *misconduct, poor performance or physical incapacity* the employer shall *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.*

The section further requires the employer to *hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.*

In the present case the Claimant was never informed of the grounds for which the Respondent intended to terminate his employment. Prior to the date of the disciplinary hearing the Claimant was not informed of the charges against him. He was only confronted with those charges during the hearing. Secondly the Claimant was never given an opportunity to **choose** a person to accompany him to the disciplinary hearing. Although the Respondent's witness testified that the Claimant was represented by the workers' representative, there is no indication in the minutes that there was a workers' representative. There is no indication that the Claimant was aware that he was represented. The Claimant himself testified that he was not a member of the union. There is no evidence that he paid union dues.

More fundamentally Mr. Cheruiyot testified that he was the complainant having been the one who received the text messages that led to the termination of the Claimant's employment yet he was the chairman of the disciplinary committee and the author of the letters of dismissal. The Claimant also testified that the members of the panel which sat in his disciplinary committee were junior to him, an averment that was not denied by the Respondent. One of the accusations made against the Claimant in the minutes of the disciplinary hearing is that he did not respect the Factory Manager. Mr. Cheruiyot could not have been the accuser, witness and judge in his own cause.

Besides the foregoing, the letter of dismissal does not contain the grounds for dismissal. The letter reads as follows-

Peter Nyamosi

P.O. Box 47 – 30301

NANDI HILLS

Dear Sir

RE: SUMMARY DISMISSAL

Reference is made to the proceedings of disciplinary hearing from 12th to 13th June 2015 where you were given an opportunity to explain yourself in the presence of employee representatives.

The management has reviewed the disciplinary hearing report and records of previous warnings and you have been dismissed from employment for gross misconduct with effect from 15th June 2015 as per Section 44 of the Employment Act, 2007.

Yours Faithfully

signed

For Emrok Tea Factory (EPZ) Ltd

The letter does not state the grounds of summary dismissal. "Gross misconduct" is a generic word that does not describe what act or omission the Claimant was accused of that constituted the gross misconduct. Section 44(4) of the Employment Act which provides for dismissal on grounds of gross misconduct sets out several actions or omissions that may constitute gross misconduct. Such actions or omissions must be specified. Merely accusing an employee of gross misconduct does not specify the acts or omissions constituting the gross misconduct for which the employee has been dismissed. Without such specification the employer is guilty of not citing the grounds of dismissal as required under section 41.

For the foregoing reasons I find that the summary dismissal of the Claimant was unfair for want of both valid reason and fair procedure.

Remedies

The Claimant prayed for the following-

(i) Notice

Having found the summary dismissal of the Claimant unfair he is entitled to notice. According to the Claimant's letter of confirmation he is entitled to one months' notice or equivalent salary in lieu of notice. I have confirmed from the Claimant's Clearance Form at Appendix 4 of Response that he was not paid in lieu of notice and award him the same at Kshs. 23,500.

(ii) Leave due

The Claimant stated during cross examination that he took all his leave and that any prayer he has made on account of annual leave is in error. I therefore find that he is not entitled to any annual leave. The prayer for leave is accordingly dismissed.

(iii) Service Gratuity

According to the Claimant's letter of confirmation he was entitled to gratuity after completion of 10 years' service. Having left employment after serving only three complete years of service he is not entitled to gratuity.

(iv) Compensation for Unfair Dismissal

The Claimant having been unfairly terminated is entitled to compensation. Taking into account the factors set out in section 49(4) of the Act and especially his length of service, his reasonable and legitimate expectations, I award him 5 months' salary as compensation in the sum of Kshs. 117,500.

(v) Costs

The Respondent shall pay the Claimants costs of this claim.

(vi) Interest

Interest shall accrue from date of judgment should decretal sum not be settled within 30 days.

DATED AND SIGNED ON THIS 15TH DAY OF JANUARY 2018

MAUREEN ONYANGO

JUDGE

DATED SIGNED AND DELIVERED THIS 1ST DAY OF FEBRUARY 2018

MATHEWS NDERI NDUMA

JUDGE