



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 241 OF 2017

SAMUEL MWIKYA KILONZI.....CLAIMANT

VERSUS

H. YOUNG & CO. (E.A) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent for about 1 ½ from 9th September 2016 to 24th October 2016 as a driver. He averred that he was earning Kshs. 22,745/- per month and dismissed in breach of the rules of natural justice. He stated that he was not given an opportunity to defend himself before the sacking and was therefore sacked arbitrarily without reason, notice and/or giving him any audience. He sought payment of 1 month's salary in lieu of notice, leave days for years worked, severance pay, transport allowance and general damages for wrongful dismissal. He also sought a certificate of service.

2. The Respondent filed a statement of response in which it was averred that the Claimant's services were summarily dismissed for justifiable cause as the Claimant had performed his work carelessly and improperly contrary to his duty hence the dismissal. The Respondent denied the jurisdiction of the court.

3. The Claimant was heard on 6th February 2018 and testified that he worked as a driver from 9th September 2016 for the Respondent and that he drove a pick up until the dismissal vide a letter on 24th October 2016. He stated that he was called to the site and was given a letter dismissing him. The letter of dismissal stated that he had driven beyond the speed limit and he said that was not true as there was no proof that he drove fast. He stated that he had driven carefully and was never given any warning. He testified that he was not heard before the dismissal. He stated that he was aggrieved by the dismissal and sought legal redress where his lawyer wrote a demand letter which was received by the Respondent and filed suit to seek the reliefs in his claim. He stated that he was never arrested by the traffic police for speeding or driving badly nor was he charged in any court of law. He termed the allegations against him as all lies. He testified that he was not paid terminal dues nor issued with a certificate of service. In cross-examination he testified that he was given a reason for the dismissal which was careless driving. He stated that he worked for the Respondent in Garsen as a pick driver and that he was not given any warning letter nor summoned to the transport manager's office. He termed the allegations against him as false as he was not involved in any accident and was simply dismissed. He stated that he was paid for days worked. In re-exam, he testified that he did not have an accident and that there was no proof that he did. That marked the close of the Claimant's case.

4. The Respondent called Beth Makena Mutea, its assistant HR manager who testified that the Claimant was dismissed for reckless after working from September to October 2016. She stated that he worked in Garsen-Lamu and was severally warned verbally by his site administrator, which warnings were not heeded by the Claimant. She testified that there was an accident after which the Respondent had no option but to dismiss the Claimant and paid him all his dues upon termination. In cross-examination, she testified that she had worked for the Respondent from June 2017. She stated that she knew what had happened when the Claimant was employed by the Respondent as the records showed what happened. She testified that the Claimant was given several verbal warning warnings. She admitted that the records were not before court and that there was no record of the verbal warnings given. She said the Claimant was very new and that he was only given verbal warnings. She stated that she was not the author of the letter of dismissal which was by Hassan. She testified that there was an accident on 24th October 2016 and that she would have to check the records to see if it was reported. She confirmed that it was not reported to the police and the site administrator is the one who gave that information. She stated that the action taken was in compliance with Section 44(c) of the Employment Act and that the Claimant was not called to account before the summary dismissal. In re-examination she testified that she was briefed by the project manager before coming to court and that what she had testified before the court is what happened. She stated that the accident was not reported and was resolved at the site. She reiterated that the Claimant did not heed the warnings and was not called for a hearing and based on the verbal warnings the company had no option but to summarily dismiss the Claimant. That marked the end of the Respondent's testimony.

5. Parties filed written submissions and the Claimant in his submissions stated that he neither caused an accident as alleged by the Respondent nor was he ever charged by the Respondent for the alleged offence. He submitted that he was never actually given a chance to be heard before the Respondent came to the decision to terminate his services. He submitted that the Respondent's witness did not substantiate

the allegations and did not have proof that the Claimant was orally warned or that they had previously issued him with warning letters against his offences. It was submitted that the Claimant had worked for a continuous period which amounted in aggregate to the equivalent of not less than one month and in terms of Section 37(1)(a) of the Employment Act is entitled in terms of Section 37(3) to terms and conditions under the Employment Act. The Claimant was accordingly entitled to his certificate of service and one month's salary in lieu of notice. He argued that he was entitled to have his employment terminated for a valid reason and upon following fair procedure in terms of Sections 41 and 43 of the Employment Act, 2007. It was submitted that this was not the case and the terms of the termination violated Section 45 of the Act and further that no hearing was undertaken before the dismissal. The Claimant relied on the case of **Moses Kaunda Moro v CMC Motors Group Ltd [2013] eKLR** Ndolo J. citing her own determination in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** held that substantive justification and procedural fairness ought to be met before dismissing an employee. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination. The Claimant submitted that as held in **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** that whatever reason or reasons that arise to cause an employer to terminate an employee, that employee must be taken through the mandatory process outlined under Section 41 of the Employment Act. The Claimant opined that he was therefore entitled to compensation in terms of Section 49(4) of the Act and in this regard the maximum compensation payable is the equivalent of twelve (12) month's salary. The Claimant relied on the case of **Linus Barasa Odhiambo v Wells Fargo Limited [2012] eKLR** and submitted that he was stellar in the performance of his duties there being no evidence to link him to non-performance. The Claimant thus sought an award in terms of his claim.

6. The Respondent submitted that the issues for determination were three:-

1. Whether the termination was valid and fair?
2. Whether the employment was terminated in accordance with fair procedure?
3. Whether the Claimant is entitled to the prayers sought?

It was submitted that for the termination to be deemed by a court to be valid and fair, the Respondent must be able to justify the termination. This is as provided for in Section 47(5) of the Employment Act.

The Respondent submitted that the Claimant was severally verbally warned against driving at excessive speeds and that there was a valid reason for the termination of the Claimant. The case of **Walter Ogal Anuro v TSC** (supra) was cited in support of the contention that the dismissal satisfied the fairness test as there was substantive justification and procedural fairness. The Respondent was of the view that there was compliance with Section 41(2) and 45(4) of the Employment Act as the Claimant was called by the site supervisor after the accident was reported to him and given a chance to defend himself after which the Claimant was terminated from employment. The Respondent submitted that the Claimant was paid all his dues and had no other valid claim. The Respondent prayed that the suit herein be dismissed.

7. The Claimant was dismissed a month and a half after his employment. Curiously, he seeks payment of 1 month's salary in lieu of notice, leave days for years worked, severance pay, transport allowance and general damages for wrongful dismissal. He also sought a certificate of service. He was dismissed at a point when he was just beginning to work for the Respondent and was in the probationary period of employment. Under the Employment Act, the employer has an obligation to prove the reasons for the termination were fair. In this case, the reasons for termination were fair and therefore sufficient for the dismissal of the Claimant. The Claimant did not prove the allegations that he was not given a reason for his dismissal and the suit therefore fails as it was not proved. Each party will bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 26th day of April 2018

Nzioki wa Makau

JUDGE