



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**SUIT NO. 388 OF 2017**

**SHADRACK MUTHIANI KIN'GOO.....CLAIMANT**

**VERSUS**

**APEX STEEL LIMITED.....RESPONDENT**

**JUDGMENT**

1. This claim was filed by the Claimant seeking the payment of terminal dues for his dismissal in October 2015 unilaterally, without any prior warning, without any justifiable cause and in complete disregard procedure expressly set out in the Employment Act 2007. The Claimant averred that prior to his termination, he was never invited to a disciplinary meeting or accorded an opportunity to defend himself against any allegations that formed the basis of termination of his employment by the Respondent. He sought to have this matter resolved and to that end had a demand letter sent by his advocate on 16<sup>th</sup> September 2017 addressed to the Respondent. The Claimant sought one month salary in lieu of notice, damages for loss or termination of employment, Kshs. 61,440/- in lieu of unutilised leave for four years, certificate of service, gratuity for the period worked at the rate of 15% of his monthly salary as well as costs of the suit.

2. The Respondent filed a response in which it denied the allegations contained in the claim. It stated the Claimant was found on the 25<sup>th</sup> September 2015 in possession of company property which were hand brushes, two aluminium angles, one chisel, one spanner size 14, flat plate, tongs, pliers, battery chip, plate chisel – render plate, metal rod/chisel, spanner, cable (1m), bel bicycle, speaker, padlock, belthead, light and sandpaper. The Claimant was issued with a show cause letter why disciplinary measures should not be taken against him in the Claimant respond to the show cause letters where he denied being absent but later confessed that he was absent. It was the Respondent's position that the Claimant partly admitted and partly denied being in possession of the company property. The Respondent was not satisfied with the explanation given by the Claimant and therefore called him for a disciplinary hearing on the 3<sup>rd</sup> October 2015 at 10 AM. Though the Claimant having been served with the said notice to appear before the disciplinary committee failed to show up for the hearing. The Claimant was served with another show cause letter at his last known address and he refused or neglected to attend the disciplinary hearing and he was thereafter dismissed after failing to attend the second disciplinary hearing. The Respondent denied that the Claimant is entitled to any of the claims and that after he left the Respondent was employed by China Communications Construction Co. Ltd and that he willingly failed to attend the disciplinary hearing because he had secured a job with another company. The Respondent averred that the Claimant was not entitled to any relief sought as he was not unlawfully terminated. The Claimant's suit was therefore sought to be dismissed with costs the Respondent.

3. The hearing took place before me in February 2018 where the Claimant stated that he used to report for duty and worked with diligence until 26<sup>th</sup> September 2015 when he went to work and his fingerprint could not be recognised by the biometric clocking-in machine. It was then, he says, that he learned that he had been dismissed. In cross-examination he says was not given any contract that he had begun working as a 'burry-man' and later was promoted to supervisor. He did not have a letter showing the promotion to supervisor. He was able to confirm that in the statement which he filed, he did not indicate the promotion. He says that as a 'burry-man', he worked on the metal as it melted in the oven and that he used the plate, rod and chisel at the furnace. He admitted that he was given a show cause letter and that he did not attend any disciplinary hearing. He confirmed that he responded the show cause letter and stated that the items were found in his toolbox. He confirmed that box number 29 Kathwonzweni was his. He knew China Communication Construction Co. Ltd but said he had no relationship with the said company. He testified that his leave days were not paid. He confirmed his NSSF dues were paid by the Respondent. In re-examination, he stated that he was a supervisor the end of service and that he was basically a supervisor.

4. The Respondent called Constant Mangoli who testified that the Respondent found the Claimant in possession of items that were not properly in his possession. He stated that issues arose in September regarding lost items and a search was conducted at the changing rooms and where the employees worked. The check was on the boxes and the lockers and that they found some items such as scrap metal which the Claimant has found in his possession, chisels, spanner, flat plate, aluminium angle as well as the items listed in his statement. He testified that the items in the Claimant's possession are for smelting and that the Claimant therefore had them in this position without authority.

5. In cross-examination he said he received complaints from employees and that though he received those complaints the documents relating to the complaint were not before the court. He said that the search was in the working area where the boxes were kept by employees and the lockers. He said the Claimant opened his box and when the search was conducted in the presence of the security officer, they found items which the Claimant was accused of possessing. He stated the Claimant admitted possession of the items and that the dismissal of the Claimant was after the show cause and the notices issued for him to appear for disciplinary hearing. In re-examination he testified that the Claimant had items in his position which one not for his work as a 'Burry-man'.

6. The next witness for the Respondent was Abraham Ondara the HR manager of the Respondent. He testified that the Claimant was a 'Burry-man' and that investigations had been conducted in September 2015 after receiving reports of theft, that the inspection was carried out by his deputy Mr. Mangoli the 1<sup>st</sup> Respondent's witness. He stated that some items were found in possession of the Claimant in his locker. Show cause was issued to the Claimant and that he responded and stated that the items were his which he was using. He stated that the Claimant later wrote another letter indicating why he was absent. He testified that the Claimant admitted some of the items were found in

his possession and said others were found on the locker of Benson a former employee. The Claimant was therefore issued with a letter to appear for disciplinary hearing and he did not appear for the disciplinary hearing despite service of the notice. He stated that the Claimant was invited for disciplinary hearing on the 26<sup>th</sup> November 2015 which was copied to the Labour office but the Claimant did not attend. He testified that the Claimant was therefore properly dismissed for having failed to attend the disciplinary hearing. He stated that the Claimant had been paid leave dues as evidenced by the submissions and documents attached to the response for the year 2011, 2012, 2013 and 2014. In 2015 the Claimant was not paid as he deserted work. His last contract had been from 1<sup>st</sup> May to 30<sup>th</sup> November 2015. He said that the Claimant went to work for the company constructing the Standard Gauge Railway as from October the said company China Communications Construction Co. Ltd paid his NSSF dues.

7. He testified in cross-examination that the Claimant was found in possession of items he was not entitled to have during the search that was conducted by the Respondent. He stated that the Claimant was properly dismissed and that he failed to attend the disciplinary hearing he was invited to. He testified the Claimant was employed by another employer in October 2015 and that his dues had been paid. He testified in re-exam that the items found in the Claimant's possession were scrap metal and not part of the tools that the Claimant held for the job of 'burry-man'.

8. The parties filed submissions and the Claimant in his submissions submitted that both the witnesses for the Respondent failed to produce any photographic evidence as to the items allegedly found in the position of the Claimant. It was submitted that the second Respondent's witness could not recall the name of the guard that assisted him in conducting the search. He submitted that some of the items found could not fit in the Claimant's locker and wondered how they could logically fit in such constricted space. As to the issue the whether the Claimant was accorded a fair hearing, it was submitted that under Article 47, the Claimant is granted the right to fair administrative action as stated in the case of **Kenneth Njiru Njorani v Dodhia Packaging Ltd Cause No. 431 of 2010** quoted in the case of **Shankar Saklani v DHL Global Forwarding (K) Ltd [2012] eKLR** where Ongaya J. held that under Article 47 of the Constitution every person has a right administrative action that is *expeditious, efficient, lawful, reasonable and procedurally fair. Managerial decisions by employers are properly administrative actions within the province of Article 47 of the Constitution on the right to fair administrative action.* It was submitted by the Claimant that no proper disciplinary hearing was conducted thereby abridging the Claimant's right to fair administrative action. The Claimant submitted that none of the letters inviting him to a disciplinary hearing were served. The Claimant submitted that the statutory provisions of Section 41 of the Employment Act were not met as no procedure was laid out by the Respondent. It was submitted that under section 41 due notification and hearing before termination on grounds of misconduct are provided for. The Claimant citing Cause No. 746 of 2009 between **Kenya Union of Journalists v The Standard Group Limited** (unreported) where the court stated that *human resources policies and procedures manuals represent what quotidian aspects of human resource management; they do not ordinarily change the contract of employment but expand workplace policies; and not automatically become incorporated in the contract of employment.* The Claimant submitted that the Respondent did not show he was availed the human resources policies and procedure manual on employment; and that he received and signed this manual, for it to be considered much more than a mere quotidian aspect of the employment relationship. It was submitted that the Respondent failed to accord the Claimant a fair and proper hearing which despite the assertions in the case were not done. The Claimant thus sought the grant of the prayers in his claim. The Claimant submitted he was not properly dismissed and per the provisions of the law and cited Section 43 of the Employment Act 2007 in support. It was submitted that there was no proof that there was basis for the termination and that having failed to do so, the termination shall be deemed as being unfair within the meaning of section 45. The Claimant submitted there was no photographic evidence as to the items alleged to have been found and that all there was is a list of items. The Claimant submitted no invoice was produced as proof that indeed the items, if any, belonged to the Respondent. It was submitted that it was trite law that he who alleges must prove. The Claimant cited the provisions of section 44 of the Employment Act and it was the Claimant's position that the Respondent had failed to prove that it had served the Claimant with the letters calling him for disciplinary hearing. The Respondent therefore issued a dismissal to the Claimant for failing to be a lawful and proper command, which command or instruction was never communicated to the Claimant as he was not adequately informed! The Claimant submitted both witnesses for the Respondent contradicted each other as to how the Claimant was served with the summary dismissal letter. The Claimant relied on the case of **Lillian Nyaboe Nyaribi v Wireless Innovations Nairobi Ltd [2013] eKLR** where the decision of **Shankar Saklani v DHL Global Forwarding (K) Ltd** (above) was cited with approval. The Claimant submitted the provisions of Section 41 of the Employment Act were never followed by the Respondent.

9. The Respondent submitted that the Claimant was dismissed in accordance with the procedure as the Claimant was adequately informed of the disciplinary hearing and it proceeded to summarily dismiss him in compliance with statutory requirements. The Respondent submitted that the Claimant was found with company property and properly dismissed. The Respondent submitted that was fair and valid reason to dismiss the Claimant in terms of section 45 and 44 of the Employment Act. The case of **William Kairithia Gacheru v East African Packaging Industries Ltd [2016] eKLR** was cited in support and the Respondent submitted the Claimant was found in possession of company property and though he denied it at first, he admitted during re-examination that he had the Respondent's items in his hands. It was submitted that he was to place scrap metal in the furnace for smelting and that the Claimant failed to explain why he had in this position items belonging to the Respondent. The Respondent submitted the Claimant admitted that he was absent on duty on 28<sup>th</sup> October 2015 without was lawful authority in the disciplinary hearing and the consequent action that was taken was lawful as those warranted sufficient cause and reason to dismiss the Claimant herein. The Respondent submitted the Claimant had joined the China Communication Construction Company Ltd as the Claimant's October, November and December contributions for NSSF were paid by the said company. The Respondent submitted that the Claimant was not entitled to any of the reliefs sought as the Claimant had been paid in full for the days he did not take leave and that his dismissal was lawful. The Respondent cited the cases of **Banking Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] eKLR** and the case of **David Njeka v Lavage Dry Cleaners Ltd [2013] eKLR** where the court held that failure to attend a disciplinary hearing without justifiable cause cannot be basis to fault the Respondent. The Respondent thus urged the dismissal of the Claimant's case with costs.

10. In a claim for unfair dismissal it is the obligation for the Claimant to prove that the dismissal was unfair. In this case the Claimant was allegedly found in possession of items belonging to the Respondent. As a consequence, the Claimant was issued with a show cause letter. Thereafter, the story bifurcates. The Claimant asserts that he was not accorded any hearing and only came to learn of his dismissal upon being unable to access his work place as his fingerprint did not permit his clocking-in as expected. The Claimant was not telling the truth regarding the incident leading to dismissal. He was accorded a fair hearing as provided for under Section 41. He declined to partake of it after giving the show cause. He actually went and obtained employment with a company that paid his NSSF dues for October, November and December. In the premises, he failed to prove that he was unfairly dismissed. In the case of **BIFU v Barclays** (supra) my sister Mbaru J. held that an employee cannot fail to attend the disciplinary process and then turn around to fault the Respondent. In this case, the Claimant did not

take the opportunity to defend himself before the Respondent. He admitted the postal address that the Respondent used to mail his letters was his postal address and therefore cannot claim not to have received notification. I agree with my learned colleagues Mbaru J. and Ndolo J. as held in the two cases cited above. From the foregoing the inescapable conclusion is that the suit must fail and I dismiss it but make no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 23<sup>rd</sup> day of April 2018**

**Nzioki wa Makau**

**JUDGE**