



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.1438 OF 2010**

**AGGREY OTIANYA OPUKA.....CLAIMANT**

**VERSUS**

**BUNNY INDUSTRIES LIMITED.....RESPONDENT**

**JUDGMENT**

Issue in dispute – wrongful and unlawful termination of employment and non-payment of terminal dues.

1. The claimant was employed by the respondent company in the business of construction on 16th November, 1987 and he became a permanent employee on 1st October, 1989 as a Trimmer Thread Cutter. The claimant was earning Kshs.4, 625.65 per month as net pay. The claimant worked diligently but on 26th June, 2006 the respondent wrongfully and unlawfully terminated the claimant employment and failed to pay severance pay and or terminal dues.

2. The respondent was summoned to the Labour office in Nairobi but refused to respond. The respondent was engaging in unfair labour practice.

3. The claimant is seeking his terminal dues from the respondent being severance pay, untaken leave days and allowances for the period of employment set out as follows;

- a) Gratuity/ service pay for 19 years Kshs.153,665.35;
- b) 3 months' notice Kshs.24,262.95;
- c) Salary balance for June 2006 Kshs.4,625.65;
- d) 4 days leave balance for 2002 Kshs.1,108.00;
- e) 2 days leave balance for 2003 Kshs.554.00;
- f) Severance Kshs.4,130.00;
- g) Travelling allowance balance Kshs.500.00;
- h) House allowance July 2001 to June 2006 Kshs.9,700.00;
- i) Union Kshs.27,368.00

4. The respondent has failed to pay the claimant his dues despite demand. The court should award general and special damages and costs.

5. The claimant testified in support of his claim. His evidence is that upon employment by the respondent he worked diligently until 27th June, 2006 when he was dismissed when he reported late for

work after going on leave for one day. Due to problems with travel, the claimant could not report to work on time. He had taken his luggage home and when he returned, a colleague told him there was no electricity at the respondent premises and therefore delayed in reporting to work. On 27<sup>th</sup> the claimant delayed in reporting and when he was able to, the respondent had already terminated his employment. He reported his case to the Labour Officer. The claimant reported that when he was unable to travel to work, he was forced to spend the night at the police station, then he got sick and on 26<sup>th</sup> he could not report to work. His case was a summary dismissal.

## Defence

6. In response, the respondent's case is that the claimant was paid a gross salary of Kshs.8, 315.00 per month. By a letter dated 28<sup>th</sup> June, 2006 the claimant was summarily dismissed from his employment on grounds of gross misconduct. Such gross misconduct related to the facts that the claimant failed to report on duty on 26<sup>th</sup> June, 2006 after a leave period without due cause. The claimant used abusive and insulting language towards the respondent's management when he was asked to explain his absenteeism. The claimant reported the matter to the Labour officer and the respondent responded to summons and correspondences.

7. The claimant is not entitled to any terminal benefits or severance pay. The claimant had no outstanding leave days, house allowances, travelling allowances or any other claim. The claim should be dismissed with costs.

8. In evidence, the respondent called John Ng'ang'a as the witness. He testified that he was an employee of the respondent for many years until April, 2014 when he retired as a Supervisor. The claimant was under his supervision and he would oversee all employees. The claimant was employed in the year 2000 and issued with a letter of appointment, he had good work but whenever he had a mistake and was corrected he became quarrelsome.

9. Mr Ng'ang'a also testified that in 2005 and 2006 the claimant was issued with warning letters. On 4<sup>th</sup> January, 2005 a warning was issued following the long holiday when the claimant failed to report to work. A second warning was issued on 4<sup>th</sup> May, 2005 and despite verbal warnings the claimant had poor work. A third warning was issued on 17<sup>th</sup> January, 2006 when the claimant quarrelled with a customer.

10. The claimant was dismissed following various incidents. The respondent had power problems due to rationing but those working without use of electricity came in shifts but the claimant's department did not require the use of electricity and he was required to attend at work. The claimant delayed to report. He alleged that he met colleagues who told him to go home. This was not correct as the claimant was required to be at work by his supervisor. The case that the claimant was at Mumias Police Station and his bus got delayed it not a good reason as he had sufficient time to travel and report to work on time. The resulting dismissal from employment was justified and allowed in law.

11. As noted by the parties, the suit herein commenced before the Chief magistrate's Court at Nairobi vides Civil Suit No.2150 of 2007. The suit was then transferred to this court in 2011.

12. On 26<sup>th</sup> June, 2006 the claimant was summarily dismissed from his employment with the respondent on the grounds of failing to report on duty after taking his annual leave and such was without due cause and that he used abusive and insulting language against respondent managers when the issue was addressed with him. The claimant does not deny that indeed he failed to report to work on 26<sup>th</sup> June, 2006. His reasons are varied.

13. On the one hand the claimant testified that as he was on his way to work, he met his colleagues and who told him there was no electricity and therefore he should not go to work. This was challenged by the respondent on the grounds that the claimant's duties did not require his use of electricity.

14. Indeed, the claimant does not identify the persons who gave him misleading information about not reporting to work. Also, the claimant having been in the employment of the respondent for many years

ought to have had reasonable understanding of systems and procedures when he was not required to be at work. Meeting with third parties not his employer or supervisor and accepting information that was not from the employer and acting on it is not what a reasonable and diligent employee ought to do.

15. The claimant also testified that he failed to report to work because he got delayed in his travel when his bus broke down and had to spend the night at Mumias Police Station. The claimant produced a letter from the police station. However, the claimant had been granted time to take leave. He knew when he was required to report back to work. By traveling late and getting a letter from a police station, this does not aid his case at all.

16. Also the claimant testified that he got sick after his travelling. There is no record of what illness he was ailing from. In any event, under the Employment Act, Cap 226 Laws of Kenya (now repealed) where an employee got sick and was absent from work, he had to produce a medical certificate. This is not done by the claimant.

17. Section 17 of the Employment Act Cap 226 Law of Kenya, now repealed allow an employer to summarily dismiss an employee for gross misconduct. Where an employee was absent from work for no lawful cause, where an employee used abusive language, such were serious breaches of the law and of the employment contract. The resulting misconduct being gross, summary dismissal was allowed.

18. With summary dismissal, no benefits are due to the claimant. The defences given to his absence from work I find them to be lame. He cannot have been at several places at the same time. On the one hand his evidence that he got late for work because he met colleagues who misled him but at the same time he travelled and delayed and was at Mumias Police station is neither here or there. The claimant was either late because he was travelling or he was misled by his colleagues. The case of being sick further complicates his explanation. Such contradictions do not aid his case as the claimant comes out in this evidence as a petty liar.

19. The claimant also does not explain himself with regard to his use of abusive language to his manager. He does not offer any defence at all. Such is gross misconduct and even looked at alone without any other case of misconduct, such warranted summary dismissal.

20. There claimant's work record is with a litany of warnings. Such relates to gross misconduct of being absent from work; negligence of duty; negative attitude to work; and quarrelling a customer. Such a work record does not speak well of the claimant's work ethics. This coupled with his last gross misconduct as set out above; summary dismissal was not wrongful as claimed.

21. The claimant is seeking various remedies.

21. Claim for gratuity and or service pay though not set out as to how this arises is a matter that an employer and an employee can agree upon in the letter of employment or contract of service. This is also a matter unionised employees may enjoy under a collective agreement. I find not material to support this claim.

22. Notice pay is not due in a case of summary dismissal under the Employment Act Cap 226, now repealed. The claimed salary balance of June, 2006 is not articulated as to how it arose. The claimant had just completed his leave in 2006 when he was dismissed. The alleged pending leave days or pay and travel allowance are not due.

23. The claim for severance is not justified. This did not stand out as a case of redundancy. The claimant testified that he was summarily dismissed. Such does warrant a grant of severance pay.

**Accordingly, the claim must fail in its entirety. Costs to the respondent.**

**Read in open court at Nairobi this 20<sup>th</sup> day of April, 2018.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant:.....

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