



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1565 OF 2014

EZEKIEL MWEU MUTISYA.....CLAIMANT

v

FUEL AND SHOP LIMITED.....RESPONDENT

JUDGMENT

1. The Court is called upon to determine the questions, *whether the summary dismissal of Ezekiel Mweu Mutisya (Claimant) was unfair, whether Fuel & Shop Ltd (Respondent) was in breach of contract and appropriate remedies.*

2. The Cause was heard on 20 February 2018 when the Claimant and the Respondent's 3 witnesses testified.

3. The Claimant filed submissions on 5 March 2018 while the Respondent filed its submissions on 15 March 2018.

4. The Court has given due consideration to the pleadings, evidence and submissions.

Whether summary dismissal was unfair.

Procedural fairness

5. The Claimant's pleading and evidence was that on 18 July 2014 he was summarily dismissed through a letter of even date. He asserted that a hearing was not held.

6. The Respondent's case on the other hand was that the Claimant stormed out of the workplace when asked to explain his conduct thus the dismissal on account of gross misconduct.

7. The Respondent's first witness role was to prepare the dismissal letter and Claimant's dues on the instructions of the Director.

8. This witness was not present at the workplace (Jomo Kenyatta International Airport) where the events surrounding the dismissal occurred and therefore his evidence is not very useful.

9. The second witness however was present at the workplace.

10. According to her, the Respondent's Director had made inquiries of the Claimant concerning some invoices but instead of responding the Claimant shouted, threw the invoices on the ground and walked out. After some ten minutes, the Claimant returned a work jumper and keys and left again.

11. The Claimant did not interrogate the testimony of this witness as to what transpired.

12. The Respondent's third witness was the Director. According to him, the Claimant was tasked with setting up systems at a new shop at the Jomo Kenyatta International Airport around June 2014 and that when imperfections/errors were detected in the back office, he requested the Claimant to give explanations but he got restive, threw documents at him and walked out.

13. The witness thereafter called the Accountant (first witness) and directed him to prepare the dismissal letter.

14. Section 41 of the Employment Act, 2007 has set out the requirements to be complied with by an employer before terminating an employment contract on account of *misconduct, poor performance and or physical incapacity.*

15. The requirements include informing the employee of the contemplated termination of employment and the reasons thereof and affording the employee an opportunity to make representations, in the presence of a colleague employee.

16. In cases of summary dismissal, there is a mandatory obligation on the employer to hear the representations of the employee.

17. In the view of the Court, despite the mandatory obligation in cases of summary dismissal to hear representations from the employee, the strictures of a mini-court or criminal court proceedings are not called into unless the nature and type of the employer makes that process possible.

18. Similarly, a prudent employer ought not to act in the heat of the moment.

19. In the case at hand, there is no evidence that the Respondent informed the Claimant that his summary dismissal was being contemplated and the reasons for such action or that he could ask a colleague to be present at such a session.

20. In that regard, the Court finds that the summary dismissal of the Claimant did not pass procedural fairness muster as demanded by section 41(1) & (2) of the Employment Act, 2007.

Substantive fairness

21. The Claimant did not in any meaningful way rebut the narration by the Respondent's witnesses as to the shouting and throwing of invoices at the Director and the storming out.

22. According to the Court, the conduct of the Claimant warranted disciplinary action which could lead to dismissal.

23. For what it is worth the Court finds that the Respondent had valid and fair reasons to take disciplinary action against the Claimant but because the process was still tainted.

24. Despite the conclusion, it is the view of the Court that this is not an appropriate case to award compensation and or pay in lieu of notice due to the conduct of the Claimant.

Breach of contract

Leave

25. Leave is a statutory right.

26. The Claimant testified that he did not go on annual leave from 2011 to 2014 for which he sought Kshs 60,375/-.

27. The Respondent did not traverse this head of claim or draw the attention of the Court to any leave records amongst the voluminous documents it filed.

28. Even the 3 witnesses did not address the question of leave and the Court finds that there was breach of contract in failing to grant the Claimant annual leave for which he is entitled to commutation.

Overtime

29. The Claimant did not lay an evidential basis as to the contractually agreed working hours or the prescribed minimum working hours within the sector the Respondent operated in beyond which he would be entitled to overtime.

30. He did not even explain the amounts he used in the pleadings and their source(s).

Salary for July 2014

31. An employer is under a statutory obligation to pay wages on the due date.

32. The Respondent appeared to accept that the Claimant had not been paid because he had not cleared and that the salary was Kshs 15,154/-.

33. The Claimant is entitled to the wages.

Certificate of Service

34. A certificate of service is a statutory right and the Respondent should issue one to the Claimant forthwith.

Service pay

35. The Claimant was contributing to the National Social Security Fund and therefore is not eligible for service pay by dint of section 35(5) & (6) of the Employment Act, 2007.

Conclusion and Orders

36. The Court finds that the summary dismissal of the Claimant was procedurally unfair but declines to grant any relief therefrom.

37. The Court also finds that the Respondent was in breach of contract and awards the Claimant

(a) Commuted leave Kshs 60,375/-.

(b) July 2014 wages Kshs 15,154/-.

TOTAL **Kshs 75,529/-**

38. The other reliefs are declined/dismissed.

39. Claimant to have costs on half scale.

Delivered, dated and signed in Nairobi on this 6th day of April 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ongicho instructed by Ongicho – Ongicho & Co. Advocates

For Respondent Mr. Olao instructed by Gikera & Vadgama Advocates

Court Assistant Lindsey