



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 813 OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 26th June, 2018)

FREDRICK WASWA KHAEMBACLAIMANT

VERSUS

CHANDARANA SUPERMARKET LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed Suit on 24th May 2011 through the firm of Jusa, Ruguru & Co. Advocates seeking damages for unlawful termination and terminal dues.
2. The Claimant avers that at all material time, he was an employee of the Respondent as a Receiving Clerk as from 2nd November 2005 until December 2010 when the Respondent declared him redundant without paying him his final dues.
3. He states that he was earning a salary of 15,216.00 per month and as a result of the Respondent's termination of his services he was entitled to payment of severance pay of 15 days for each year worked for the entire period of employment.
4. He further avers that he has on various occasions sought audience with the Respondent in regard to his employment dues but the Respondent has arrogantly and contemptuously dismissed him and despite demand made and notice of intention to sue having been given, the Respondent has failed, refused and or neglected to pay him.
5. The Respondent filed their Statement of Response where they denied each and every allegation in the Claimant's Memorandum of Claim. They admitted that the Claimant was their employee but denied that he had been employed as a Receiving Clerk since 2/11/2005 or that he was declared redundant in December 2010 as alleged but rather he was employed as a Cashier on 2/11/2009 and his services were terminated on 8/12/2011 through summary dismissal for gross misconduct.
6. They aver that the Claimant was duly notified of the reasons on the basis of which the Respondent considered terminating his services and his representations thereon were considered before the final decision to terminate was made. He was also a member of the National Social Security Fund and as such any claim for service pay would have been misconceived and untenable in view of the provisions of Section 35(6) of the Employment Act, 2007.
7. They also state that they have offered to pay the Claimant for the days worked in December 2010 together with pay for 23 days on account of accrued leave but less a sum of Kshs. 9,000 paid as salary advance in December 2010 which he declined.
8. They further aver that the claim herein is premature and has been presented in violation of the provisions of Section 47 of the Employment Act, 2007. They admit receiving a demand but aver that for the foregoing reasons, it was not obligated to make good the Claimant's claim and a formal response to this effect was given.

Submissions

9. The Claimant filed his submissions where he submits that he was informed orally of his summary dismissal where he indicated that he was summarily dismissed for gross misconduct when he failed to charge a customer for the purchase of cooking gas while falsely representing to his manager that he had charged the customer on the till for that particular item. He was escorted by security out of the Respondent's premises without any pay and without being accorded a fair hearing of being confronted with the allegations and evidence against him.

10. The Respondent did not lead any evidence to support the allegations raised in their Statement of Response dated 10th June 2010 or to rebut the evidence of the Claimant. The parameters of summary dismissal were set out in the case of **Linus Barasa Odhiambo Vs Wells Fargo Limited, Industrial Court Cause No. 275 of 2012**. He urges the Court to look into the circumstances of the dismissal and find out whether it meets the standards set out in Section 41 of the Employment Act.

11. He avers that what he received from the Respondent after diligently working for them for 6 years was an expeditious efficient unlawful, unreasonable and unprocedural summary dismissal and he urges the Court to rectify that position by finding that the termination was unfair and is therefore entitled to damages sought.

12. The Respondent filed their submissions where they submit that the Claimant was justifiably dismissed for gross misconduct as per Section 44(4)(c) of the Employment Act 2007 for careless and improper performance of his employment work thus, he is not entitled to service pay as clearly set out under Section 35(5) of the Employment Act.

13. They aver that the Claimant's termination does not amount to unfair termination and or unfair dismissal. Nonetheless, they highlight the case of **CMC Aviation Ltd Vs Mohammed Noor [2005] eKLR**. Akin to the foregoing, the Claimant has not satisfied the burden of proof and the suit ought to be dismissed with costs to the Respondent.

14. I have examined the above evidence and submissions filed by both parties. I note that the Defence did not lead any evidence to rebut the Claimant's case. The Court of Appeal in Civil of Appeal No. 140/2008, at Nairobi, **JJA Visram, Mwilu (as she then was) and Otieno Odek** rendered themselves as follows:-

“in Der Raj Sharma vs Reginam 1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marled for identification and that the few exhibits should be confirmed to articles which have been fairly probed and admitted in evidence. In the Nigerian case of Michael Hausa vs the State (1994) 7-8 SCANJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial Judge and the Judge cannot use the document as evidence”.

15. The Claimant's case is uncontroverted. Based on the Claimant's pleadings, evidence and submissions, the Claimant was dismissed in December 2010 for what he claims to be redundancy.

16. However in the evidence in Court, he indicated that he was dismissed orally by his Manager. He asked for a letter of dismissal and none was issued. He was just told orally he had sold a gas cylinder without payment which he denied.

17. In view of the fact that there is no evidence as to the manner in which the Claimant was dismissed and there being no dismissal letter issued to him, it is not clear as to why the dismissal took place.

18. Failure to explain why the Claimant was dismissed by the Respondent offends the rule as to fairness. The Claimant was not given reasons for dismissal nor accorded any fair disciplinary hearing.

19. Section 43 of Employment Act states as follows:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

20. Section 41 of Employment Act on the other hand envisages as follows:-

(1). “Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity 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.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) 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”.

21. In the absence of giving reasons or in that case not having valid reasons and also not subjecting the Claimant to a fair hearing, the dismissal of the Claimant was unfair and unjustified as provided for under Section 45(2) which states as follows:-

(2) “A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

22. In terms of remedies I find for the Claimant and I award him as follows:-

1. 1 month salary in lieu of notice = 15,216/=.

2. 8 months salary as damages for unlawful termination = 8 x 15,216 = 121,278/=

3. Leave for year 2008 = 15,216/=.

4. Salary for 6 days worked in December 2010 = 6/30 x 15,216 = 3,043/=

TOTAL = 155,203/=

5. The Respondent will also pay costs of this suit plus interest with effect from the date of this judgment.

Dated and delivered in open Court this 26th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mutua for Ambani for Claimant

Akongga for Respondent