



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE. NO. 1526 OF 2014

JOHN MUASYA ISIKA.....CLAIMANT

VERSUS

ELLAMS PRODUCTS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 2.9.2014 alleging that he was unlawfully and unfairly dismissed from employment by the respondent on 26.5.2014 and prayed for Kshs.1,116,936 made up of terminal dues plus compensation for unfair termination. The respondent denied the alleged unfair termination and averred that the claimant was dismissed for gross misconduct after being accorded disciplinary hearing in the presence of his union officials. She therefore prayed for the suit to be dismissed with costs.

2. The suit was heard on 20.2.2018 when the claimant testified as Cw1 and the respondent called her Personnel Officer Mr. Guyviran Omondi Nduma as Rw1. Thereafter both parties filed written submissions.

Claimant's Case

3. The claimant testified that he was employed by the respondent as a Machine Operator in 1997 and worked until May 2014. He explained that on the Saturday of 9th or 10th May 2014, he was caught carrying away a packet of milk from the company. He further explained that such milk was given to him daily because he was using dangerous chemicals in his printing duties. He further explained that he hide the milk behind a gas cylinder after the kitchen staff denied that they gave him the milk. He explained that on the following Monday he was told by the Personnel Officer that there was no work for him until he showed him where he hide the packet of milk which he did and he was suspended for 2 days.

4. Cw1 further testified that he reported back to work after the 2 days and a meeting was held in the presence of his union officials where it was agreed that because he had no previous warning, he should resume work. He was however shocked to receive a dismissal letter and a certificate of service dated 26.5.2014. He admitted that he was paid all his salary for May 2014 but not his terminal dues even after service of demand letter. He prayed for the terminal dues plus compensation as prayed in his suit.

5. On cross examination, Cw1 admitted he was initially employed under an oral contract until 28.2.2003 when he was issued with a written contract. He further admitted that on the fateful day in May 2014, he was caught by security guards called Mwangi carrying away company milk which was not given to him in a lawful manner. He further admitted that he wrote a letter confessing that he was caught carrying away the milk and hide it. He however maintained that it was normal for him to be given milk because of the nature of his job.

6. Cw1 further admitted that he was called to a hearing by the HR officer in the presence of the shop steward, Deputy shop steward and another employee called Regina. He further admitted that during the hearing he was given a chance to speak.

Defence Case

7. Rw1 testified that he joined after the claimant had left the respondent. He however contended that the claimant was lawfully terminated after being caught attempting to steal a packet of milk from the respondent. He further contended that after the termination the claimant was paid all his dues. He however admitted that he was not present when the claimant stole the packet of milk and he never attended the claimant's disciplinary hearing.

Analysis and Determination

8. After careful consideration of the pleadings evidence and submissions presented to the Court the issues for determination are:

(a) Whether the termination of the claimant was unfair and unlawful;

(b) Whether he is entitled to the reliefs sought.

Unfair termination

9. Under section 45(2) of the Employment Act, termination of employment is unfair if the employer fails to prove that it was grounded on a valid and fair reason, and that it was done after following a fair procedure. In this case the reason for terminating the claimant's services was attempted theft of a packet of milk. The claimant admitted in evidence as he did during the disciplinary hearing at the shop floor level that he indeed was caught by security guard called Mwangi while carrying away a packet of milk on his way home. He further admitted that although he was normally given Milk by the employer due to the nature of his job which involved dangerous chemicals, the packet of milk he was carrying away on the fateful day was not given to him in a lawful manner. In view of his said admission, I find, as I should, that the respondent has proved on a balance of probability that, she terminated the claimant employment for a valid and fair reason. The reason was valid because under section 44(4) the Employment Act, employer is entitled to dismiss his employee stealing his property.

10. As regard to fair procedure, the claimant has admitted under oath that he was accorded a disciplinary hearing by the Personnel Officer of the respondent in the presence of 2 union officials and another employee called Regina. He further admitted that during the said hearing he was given a chance to make his representations before being issued with a termination letter and a certificate of service. The said procedure in my view was in consonance with the provisions of section 41 of the Act which requires that, before terminating the contract of service of an employee on account of misconduct, poor performance or physical incapacity, the employee is entitled to be explained the reason for which termination is contemplated. The said explanation must be done in a language he understands and in the presence of another employee or shop floor union representative of his choice. Finally, the employee and his chosen companion are entitled to air their defence for consideration before the termination is decided.

11. In view of the finding herein above that the claimant was dismissed for a valid and fair reason and that a fair procedure was followed, I proceed to hold that the termination of his services was lawfully and fairly done within the meaning of section 45 of the Act.

Reliefs

12. The claim for salary in lieu of notice and compensation for unfair termination is dismissed. The claim for holidays worked for 17 years and Travelling Allowance for same period lacks particulars and evidence and it is likewise dismissed. Finally, no basis for the claim of gratuity was laid either through evidence or submissions.

Conclusion and Disposition

13. For the reasons that the termination was fair and lawful and that the remedies sought have not been proved, I proceeded to dismiss the suit with. Each party to bear his own costs.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July, 2018

ONESMUS N. MAKAU

JUDGE