



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 361 OF 2016

BENJAMIN NZAMBA KILLEI.....CLAIMANT

VERSUS

DENIS MATHEW T/A MATBRONZE.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal benefits plus compensation for unfair and unlawful termination of the claimant's contract of service by the respondent on 8.9.2015. It is the claimant's case that the termination was without any lawful cause and without prior hearing or payment of terminal dues.

2. The respondent has denied the alleged unfair and unlawful termination and averred that the termination was properly done on ground of gross misconduct and after following a fair procedure. It is the defence case that the claimant failed to report to the management theft of copper from her workshop where the claimant was in charge. It is further defence case that she undertook impromptu spot-check after the Head of Security reported the missing copper and discovered that over one tonne 190 kilograms of copper was missing and the claimant was aware of, participated in the loss, or was a beneficiary thereof. She therefore counterclaimed for the value of the lost copper against the claimants case and prayed for the suit to be dismissed with costs.

3. The claimant denied the counterclaim and averred that he was not in charge of the copper but Mr. Mugo and Ms Catherine Everald. He further denied that the day watchman, Mr. Koech was not reporting to him. He prayed for the counterclaim to be dismissed with costs. The main issue for determination is whether the claimant was dismissed unfairly and unlawfully.

Claimant's Evidence

4. Claimant testified as Cw1 and stated that he was employed by the respondent on 4.1.1992 as a casual labourer and later rose to be in charge of finishing Bronze Products. He worked for 23 years and his gross salary was Kshs.84,896 as per the payslips for August 2015. In his work, he only dealt with Bronze.

5. On 8.9.2015, he was involved in a traffic accident while riding on his motorcycle and fracture his leg. He then reported the matter to the respondent through his colleagues on 9.9.2015. Due to the serious injuries suffered, he was put on plaster and he could not walk. On 24.9.2015, he was called to the office by his boss Mr. Mathews who accused him of loss of copper but he denied because he was not in charge of copper. His boss threatened him that if he failed to admit the offence he would fire him and when he insisted on his innocence, the boss told him that he could continue serving but his salary would be reduced by Kshs.10,000 and his allowances and bonuses for one year would be forfeited. When again he refused the offer, the boss told him to go home and think about the offer and he complied because of his broken leg.

6. Cw1 further testified that the boss called him to the office on another day and when he refused to accept the offer to forfeit his said benefits, he was fired and denied his terminal dues. Thereafter he served demand letter through his lawyer because the termination was unfair for being denied a hearing and for lack of a valid reason. He denied the alleged loss of copper and stated that the persons in charge of copper at the factory were Mr. David Mugo and Ms. Catherine Everald who were in charge of Wax department and the staff therein. He denied that he had the custody of keys to the copper store.

7. In addition Cw1 contended that after service of the demand letter, the respondent acknowledged that she terminated his employment effective 8.9.2015 for the reason that the claimant had failed to report the loss of copper. Cw1 contended that he only overheard the Security Officer Mr. Koech telling a group of employees that David Mugo had told him that copper had gone missing. He denied ever receiving any personal notice of the lost copper and further denied that he was in charge of security matters. He contended further that any alleged loss of

copper should have been reported to the Management and not him.

8. He admitted that after the demand letter, he was paid Kshs.200,290 including one month salary in lieu of notice, salary for September 2015, 28 days leave and bonus due. He however contended that the said sum was not all his terminal dues considering that he had served for 23 years and that the salary used to calculate the dues was less the correct pay. He also prayed for compensation for unfair termination.

9. On cross examination, Cw1 stated that the colleagues who took him to the hospital are the ones who notified his boss of the accident on 8.9.2015. He further stated that on 24.9.2015 he went to the office with the medical documents including X-rays and Receipts and he was still on plaster from the thigh downwards. He contended that when he was punching identity numbers on the keys to the cooper store, his boss Mr. Mathews was present after which he carried them away.

10. He testified that on 24.9.2015 he met with Mr. Mathews alone and he was not invited with a fellow employee of his choice. He further testified that on the said date, he was verbally dismissed by Mr. Mathews after he declined to take pay cut and forfeit some benefits as consideration for him to continue serving. He maintained that if there was loss of copper Mr. Koech should have reported the same to the management and not him.

Defence Case

11. Mr. Denis Mathews, the proprietor of the respondent testified as Rw1. He confirmed that he received information about the claimant's accident and the injury suffered. He however contended that no official reporting was made and no written medical treatment notes were ever provided. He contended that the claimant was employed as the Head of Chasing Department which ranked him as the head of the Workshop reporting to the Workshop Manager M/s Catherine Everald or himself directly.

12. On 19.9.2015, Mr. Mugo reported to him by SMS that some copper had gone missing. An investigation was done and over one Tonne of the copper was found missing. A report was made to the police and on 24.9.2015, the claimant recorded a statement. On the same day, he held a meeting with the claimant and M/s Catherine where after enquiry, the claimant denied knowledge of the lost copper but when Mr. Koech was called to the meeting, the claimant admitted that he knew about the missing copper and contended that he had reported the same to M/s Catherine. Rw1 further contended that M/s Catherine denied that the claimant had reported the lost copper to her.

13. Rw1 testified that due to the huge loss incurred, he offered the claimant a reduction of salary in exchange to termination but he requested for more time to think about the offer. On 23.11.2015 the claimant returned to say that he was preferring termination to a salary cut but again requested for time to think about the matter and return on 5.12.2015 but he never came back. On 3.6.2016, the claimant served a demand letter and he responded to it by offering to pay terminal dues.

14. On cross examination, Rw1 admitted that he issued the claimant with a certificate of service stating that the claimant worked upto 8.9.2015. He further admitted the claimant was paid salary upto the end of September 2015 but the termination letter was issued on 26.2.2016. He further admitted that he never accorded the claimant any hearing before the termination. He further admitted that the claimant never dealt with copper but Bronze after casting.

15. Rw1 further admitted that he was the custodian of the copper store assisted by Catherine. He also admitted that he did not suspect the claimant of theft of the copper but only blamed him of not reporting the missing copper. In his view, the theft was only hearsay as there was no evidence only allegation that the copper seemed less. He contended that on 23.11.2015, the claimant wanted termination but he refused and told him that he will continue serving but with a salary cut. The claimant never returned to the office again thereafter.

Claimant's Submissions

16. The claimant submitted that the termination of the claimant was unfair because the respondent has not proved that the security officer Mr. Koech reported the loss of copper to him. He further contended that the respondent has not proved that the alleged lost copper was in the custody of the claimant. He further submitted that the respondent did not prove that he was dealing with copper and that the Rw1 had indeed admitted that the claimant never dealt with copper.

17. Finally, the claimant contended that the termination was done without being given any disciplinary hearing. He relied on *Kabenge Mungo Vs Syngenta East Africa Ltd [2013]eKLR* and *Nicholas Otinyu Muruka Vs Equity Bank Ltd [2013]eKLR* where the court held that the employer has no discretion to terminate contract of service on account of misconduct in disregard of due process of notification of the reason and hearing under section 41 of the Employment Act. He therefore prayed for Judgment for the respondent as prayed in the suit.

Respondent's Submission

18. The respondent submitted that although the claimant had committed misconduct under section 44(4)(g) of the Employment Act, she never dismissed him summarily but on the claimant's own request she terminated his services on 26.2.2016 which according to her amounted to a resignation. It is her submissions that the termination letter was given as an after thought after receiving the claimant's letter demanding for terminal dues.

19. In addition to the foregoing, the respondent submitted that, after the accident on 8.9.2015, the claimant absconded duty. In her view, the claimant never formally applied for any sick leave by producing a certificate of incapacity from a medical practitioner. She submitted that, he instead went to work for a business competitor. She further submitted that, she did nothing wrong by consulting with the claimant on the reduction of his salary to mitigate the loss of 1,190kg of copper incurred.

20. In her view, section 10(5) of the Act requires that the employer must consult with the employee before changing the terms of his contract of service. She therefore prayed for the suit to be dismissed because the claimant was never dismissed from employment and also because the dues he is seeking have either been paid or he is not entitled to the same. He relied on *Elijah Kipkoros Tanui Vs Ngara Opticians T/a Bright Eyes Limited [2014]eKLR* where the Court held that an employee is disqualified from service pay under section 35(6) of the Act if he is a member of a registered pension or provident fund scheme, or gratuity or service pay scheme or NSSF.

Analysis and Determination

21. After careful consideration of the evidence, and the submissions, the following issues arose for determination:

- (a) Whether the termination of the claimant by the respondent was unfair and unlawful.
- (b) Whether he is entitled to any remedy.

Unfair Termination

22. Under section 45(2) of the Act termination of employees' contract is unfair if the employer, fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure.

In this case the claimant alleged that he was terminated in September 2014 much earlier than the termination letter dated 26.2.2016 which was given after service of demand letter by his counsel. The respondent on the other hand alleges that she had no intention of terminating claimant's employment but only told him that he was going to reduce his salary and forfeit some other benefits which offer was declined by the claimant and he absconded work.

23. In my view, the claimant had the right of declining the pay cut but the respondent had no right of dismissing him unfairly for declining the same. Under section 10(5) of the Act, an employer has no right to change terms of service without prior consultation. Such consultation goes to the freedom of contract such that, as the employee cannot force the employer to increase salary, similarly the employer cannot force a salary cut on an employee without his consent or justification. In this case no justification has been shown. In fact Rw1 admitted that the alleged loss of copper was without any evidence of the actual loss. In addition, Rw1 admitted that the claimant never dealt with copper and that it was he (Rw1) and M/s Catherine Everaldo who were the custodians of the copper and the keys to the copper store.

24. On the other hand, the claimant contended and Rw1 admitted that the termination was done before a disciplinary hearing was accorded to him. Under section 41 of the Act, before terminating the employee's contract of service on account of misconduct, the employer must first explain the reason for which termination is being considered. The said explanation must be done in a language of the employee's understanding and in the presence of another employee or shop floor union representative of his choice, and the employee and the companion are entitled to air their representations for considerations before the termination is finally decided. That process is couched in mandatory terms but it was never observed herein and the termination was therefore rendered unfair and unlawful within the meaning of section 45 of the Act.

Relief

25. Under section 49 of the Act I award the claimant Kshs.576,000 being 12 months salary as compensation for unfair termination. In making the said award I have considered the fact that he worked for the respondent for 23 years without any record of indiscipline. The claim for one month salary in lieu of notice, sick leave and accrued leave are dismissed because they were paid on 26.2.2016 totalling to Kshs.200,290. Finally, the claim for service pay is dismissed because, from the payslips produced as exhibits, it is clear that the claimant was a contributing member of the NSSF and therefore disqualified by section 35(6) of the Act from the said benefit.

Conclusion

n and Disposition

26. For the foregoing reasons that the claimant was unfairly and unlawfully dismissed by the respondent, I enter judgment for him in the sum of Kshs.576,000 plus costs and interest less statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 17th day of August, 2018

ONESMUS N. MAKAU

JUDGE