

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 113 OF 2016

PAUL NZIOKI MWAYA.....CLAIMANT

VERSUS

DEL MONTE KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued his erstwhile employer for recovery after he was dismissed by the Respondent. He was issued with a show cause letter prior to dismissal. He thus sought payment of general and special damages; salary from the date of termination till the date of determination of this claim; a declaration that the termination was unlawful and order payment of terminal dues; any other orders/remedies the court may deem fit.

2. The Respondent was opposed to the claim and filed a response in which it averred that the Claimant was assigned duties in one field and went to work in another field without the permission of the supervisor and contrary to the supervisor's lawful and proper command, drove the Respondent's equipment without proper care and attention which amounts to gross misconduct on his part leading to the summary dismissal as per Section 44(4)(e) of the Employment Act. The Respondent averred that this action was taken after according the Claimant fair administrative action. The Respondent asserts that the Claimant was given a notification and a hearing under Section 41(1) of the Employment Act 2007 and heard before the dismissal. The Respondent sought the dismissal of the claim with costs.

3. The Claimant's testimony was adduced by way of affidavit evidence before my predecessor Ongaya J. The Claimant stated that he was employed by the Respondent as a tractor driver and that on the material day he was ferrying workers between two fields when some boys attacked him causing him serious injuries leading to his hospitalisation at Thika Level 5 hospital. His discharge summary from the hospital and medical reports from various doctors and hospital indicate he suffered injuries to the head and loss of an eye. He was subjected to a show cause by the Respondent and was dismissed from service.

4. The Respondent's testimony was that the Claimant drove the equipment at an unauthorised area about 10 km away where he had the accident leading to his injuries. The Respondent proceeded to dismiss the Claimant summarily after the disciplinary hearing. Gerald Matoke the head of HR stated that the Claimant had been given specific tasks at field 37 and the accident occurred at field 42 where he was not assigned any work. He stated that he chaired the disciplinary hearing convened and that the Claimant was heard on 1st November 2013 after the show cause and duly signed the record of the proceedings. He clarified that the injury occurred in January 2013 and the Claimant was taken through the disciplinary process in November 2013 after treatment. He testified that the Claimant's spouse did not communicate with the office. He stated that the summary dismissal of the Claimant was pursuant to the provisions of Clause 11(c) of the CBA because of failing to obey a lawful order and that the dismissal was also within Section 44 of the Employment Act. The Claimant was paid under WIBA and terminal benefits per the letter were paid.

5. In cross-exam, the witness for the Respondent testified that the Claimant was operating the tractor and earned Kshs. 36,128/- a month by the time of the dismissal. He testified that the Claimant was seen by various doctors and on being referred to a report by Dr. Rono of 14th March 2013, he stated that the doctor had declared the Claimant not *compos mentis* and that the report the Respondent relied on stated that the Claimant had both long and short term memory intact. He stated the Claimant was fit to report to work and that the Claimant was not dismissed for being drunk but for disobedience of instructions. He stated that the Claimant had 2 hearings conducted on 1st November and 8th November 2013 and that minutes were recorded.

6. In re-exam he testified that the Claimant was represented by shopstewards from his union at the disciplinary hearing. He stated that the Claimant was dismissed properly.

7. The parties were to file submissions and the Claimant submitted that the 3 issues for determination were whether the Claimant engaged in gross misconduct, whether the procedure to dismiss the Claimant was lawful and whether there are dues owing to the Claimant. It was submitted that the Respondent did not produce a job card to prove the Claimant was supposed to be at area X and ended up in area Y without explanation and that no records were produced to show the Claimant's geographical area of operation. It was submitted that the Respondent was cold hearted and ruthless as the dismissal of the Claimant was despite doctors indicating that the Claimant had hearing loss, loss of memory and sight of the left eye. It was submitted that the Respondent did not produce a single report to show that the Claimant was fit to go through the disciplinary proceedings. It was submitted that the disciplinary proceedings were fraudulent as the record was not proper with pages paginated by hand and the names of the attendees missing. The Claimant sought damages for the dismissal which he quantified in his submissions as salary for November 2013 – Kshs. 37,000/-, 3 months salary in lieu of notice Kshs. 111,000/-, accrued leave Kshs. 37,000/-, gratuity for 27 years Kshs. 999,000/- long service pay @ Kshs. 185 per month * 324 months Kshs. 59,940/- compensatory damages (12 months) Kshs. 444,000/- making a grand total of Kshs. 1,687,000/-. The Claimant also sought costs of the suit.

8. The Respondent submitted that the Claimant in his pleadings pleaded that he was assigned duties at field 37 and that the accident occurred

at field 42. The Respondent submitted the issues for determination were whether the Claimant had proved his case on a balance of probability; whether the Claimant attended the disciplinary proceedings on 1st and 8th November 2013; whether the procedure for termination was fair; whether the reasons for termination were valid and whether the termination was fair or unfair. It was submitted that the court record indicates that the Claimant's memory had substantially lapsed and therefore could not testify. The Respondent did not get an opportunity to cross-examine the Claimant and therefore the Respondent submitted that the Claimant had not proved his case. The Respondent submitted that the Claimant was of sound mind when the disciplinary process was conducted otherwise he would not have filed the suit in person. The Respondent submitted that the procedure undertaken to dismiss was the proper one in law as the provisions of Section 41(1), (2), 44(3) and (4) of the Employment Act were complied with. The Respondent submitted that under Section 44(4)(e) the dismissal of the Claimant was lawful. Reliance was placed on the case of **Banking Insurance and Finance Union (K) v Standard Chartered Bank of Kenya Ltd [2013] eKLR** where Ndolo J. cited with approval the holding of Radido J. in **Alphonse Mwachanga Mwachanya v Operation 680 Ltd [2013] eKLR** on procedural fairness. The Respondent also cited the case of **Amos Ogamba Bosire v Wakenya Pamoja Savings Credit Society Ltd [2017] eKLR**.

9. The Claimant was dismissed after an accident that led to his serious injuries. He has already obtained a judgment for those injuries. In regard to his dismissal, it was asserted that he was not taken through the disciplinary process. The argument advanced by the Claimant's counsel is that the Claimant was not fully recovered and that the Claimant was not *compos mentis*. That is a self-defeating argument because if the Claimant was, and is not, *compos mentis*, he lacked and lacks the legal capacity to initiate the suit herein. Taken another way, if he is not of sound mind, he cannot have capacity to sue as he did without a legal guardian or a next friend. As he sued presumably being of sound mind, the argument that in November 2013 he was not fit to undergo the disciplinary process is doubtful. He did not challenge the disciplinary process at its institution on basis that he was not fully recovered hence unable to attend to it. In the record of proceedings on 1st and 8th November 2013, the Respondent availed therein the attendance sheet duly signed by the Claimant. If he was not *compos mentis* how did he comprehend the same, write in his name and sign? The fact that the record of the disciplinary hearing was not reduced into typed minutes does not derogate from its being conducted. The Claimant was subjected to a disciplinary process which culminated in his dismissal. The tenets of substantive and procedural fairness are met where the employer affords the employee an open chance to offer a defence in regard to the accusations. Regarding the assertion that the Claimant was not proved to have been at another place of work, he averred that he was assigned duties at field 37. In his witness statement accompanying the memorandum of claim he states that the accident occurred at field 42 where he had gone to drop a colleague who had begged for a lift.

10. The Claimant's suit is devoid of any merit and I will dismiss it. However, given the suffering he has undergone to the point of memory loss, each party will bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 24th day of September, 2018

Nzioki wa Makau

JUDGE