



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 752 OF 2017

FEROZ ALI OMAR.....CLAIMANT

VS

ECU WORLDWIDE LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant’s claim brought by a Memorandum of Claim dated 14th September 2017 and filed in court on even date is for unlawful termination of employment and failure to pay terminal dues. The Respondent filed a Memorandum of Response on 25th January 2018 to which the Claimant responded on 14th February 2018.
2. At the trial the Claimant testified on his own behalf and the Respondent called its Director, Benjamin Kioko Nzoka. The parties also filed written submissions.

The Claimant’s Case

3. The Claimant was employed by the Respondent on 6th November 2002 first in the position of Accountant and later as Head of Clearing and Forwarding Department. The Claimant’s monthly salary rose progressively from Kshs. 23,000 up to Kshs. 103,703.86 as at the time he left the Respondent’s employment.
4. On 4th August 2017, the Claimant was issued with a show cause letter which also suspended him from duty until 14th August 2017. The Claimant sought legal counsel and his Advocates wrote to the Respondent seeking the following:
 - a) A concise statement of all charges leveled against the Claimant;
 - b) All relevant material in support of the said charges;
 - c) A clear date and time when the Claimant ought to appear before the Disciplinary Committee.
5. The Respondent wrote back to the Claimant’s Advocates on 16th August 2017 stating that the Advocate’s letter reached the Respondent after the Disciplinary Committee had deliberated on the Claimant’s case. The Claimant’s employment was terminated by letter dated 17th August 2017.
6. The Claimant contends that the termination of his employment was unlawful and unfair. He states that there was no valid reason for the termination and that he was not given an opportunity to defend himself. He adds that he was not supplied with concise information on the charges leveled against him nor relevant material and time to mount his defence.
7. The Claimant’s claim against the Respondent is for:
 - a) One month’s salary in lieu of notice.....Kshs. 103,703.86
 - b) 12 months’ salary in compensation.....1,244,446.32
 - c) Overtime worked @ 3 hours per week for 7 years.....740,310.48

d) Costs plus interest

The Respondent's Case

8. In its Memorandum of Response dated 23rd January 2018 and filed in court on 25th January 2018, the Respondent admits having employed the Claimant. The Respondent states that following internal investigation, irregular release of shipment to clients occasioned by the Claimant was discovered. As a result, the Respondent lost the sum of USD 41,016.02 as well as irregular transport charges in the sum of Kshs. 576,325.75.

9. The Claimant was issued with a show cause letter on 4th August 2017 asking him to show cause why disciplinary action should not be taken against him for the alleged misconduct. The Claimant received the said letter but did not respond.

10. The Claimant was invited for a disciplinary hearing on 14th August 2017 at 1300 hrs. The Respondent avers that the Claimant failed to show up for the disciplinary hearing only for the Respondent to receive a letter dated 14th August 2017 from the Claimant's Advocates demanding for:

- a) Concise statement of charges leveled against the Claimant;
- b) Relevant material in support;
- c) A date and time within 14 days for the Claimant to appear for the disciplinary hearing.

11. The Respondent states that it received the letter on 16th August 2017 and responded to the Claimant's Advocates to the effect that the letter had been received after the disciplinary hearing and had therefore been overtaken by events. On 17th August 2017, the Respondent proceeded to terminate the Claimant's employment on grounds of fraudulent dealings.

12. The Respondent avers that prior to termination, the Claimant was paid his terminal dues totaling Kshs. 232,832.37 as well as his pension amounting to Kshs. 1,890,499.68.

Findings and Determination

13. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

14. The Claimant's employment was terminated by letter dated 17th August 2017 stating as follows:

"Dear Feroz,

TERMINATION OF EMPLOYMENT

Reference is made to show cause letter dated 4th August 2017 where you were asked to show cause why disciplinary action should not be taken against you for fraudulent dealings as stated on the said letter.

You were further invited for a disciplinary hearing on 14th August 2017 in order to give you an opportunity to explain yourself and to defend the allegations levelled against you.

Unfortunately you did not respond to the show cause and neither did you attend the disciplinary hearing despite being informed of your right and importance of doing so.

Following your omissions/commissions above, the company has been left with no alternative but to terminate your service with effect from the date of this letter.

Please return all the company property that you still have in your possession like desk keys, business cards, staff ID card, cell phone, calculator etc. after completing NOC form herewith enclosed.

You will also need to fill in your pension exit form as your last contribution was in July 2017.

Incase you have not used any of your medical insurance and your dependants; (sic) we shall organize to cancel it.

The company has agreed to pay your final dues as per attached workings.

Thank you for your service and good luck in your next endeavor.

Sincerely,

(Signed)

Benjamin Kioko Nzoka

Director”

15. Prior to the termination, the Claimant was suspended from duty by letter dated 4th August 2017. The letter under the subject ‘*Show Cause Letter*’ also instructed the Claimant to appear before the Disciplinary Committee on 14th August 2017 at 1300 Hours.

16. The Claimant did not respond to his employer’s letter nor did he appear before the Disciplinary Committee as instructed. Instead, his Advocates wrote to the Respondent on 14th August 2017, the same day the Claimant was to appear before the Disciplinary Committee asking for:

- a) Concise statement of charges leveled against the Claimant;
- b) Relevant material in support;
- c) A date and time in about 14 days for the Claimant to appear before the Disciplinary Committee.

17. The Respondent states that by the time this letter was received in its office, the Claimant’s fate had been sealed. There was contention between the parties on this issue. What is clear however is that the Claimant did not respond to the show cause letter issued to him and did not attend the disciplinary hearing as scheduled. It was all very well for the Claimant to ask for information and to seek extension of time. The question is why did he wait until the date of the disciplinary hearing to do so?

18. Internal disciplinary proceedings are essentially between an employer and its employee and even though an employee may be allowed to be accompanied by their Advocate at the shop floor, the burden to respond rests with the employee. An employee who receives notice of disciplinary proceedings does not insulate themselves by going to an Advocate. Only the Court can in appropriate circumstances, halt a disciplinary process.

19. The Court was referred to its decision in *Mary Wagikuyu Komu v The Kenya Hospital Association T/A The Nairobi Hospital [2016] eKLR* where the following was stated:

“The procedural fairness requirements set out under Section 41 of the Employment Act, 2007 are fulfilled by asking an employee facing disciplinary action to respond to a show cause letter and to attend an oral disciplinary hearing. The employee is not at liberty to decline to respond to the allegations leveled against them and if they have any issues with the process, they must raise them directly with the employer within the timelines provided.”

20. The Claimant told the Court that he did not respond to the show cause letter because he needed to consult a lawyer and that he got one on 13th August 2017. This was too late in the day and the Court finds and holds that the Claimant acted irresponsibly. In *Jackson Butiya v Eastern Produce Limited (Cause No 335 of 2011)* the Court pronounced itself thus:

“An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say, ‘I refused to talk with those people and therefore I was not heard, order them to pay me.’ It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law.”

21. *Jackson Butiya* (supra) remains good law and I have no reason to depart from it. The Claimant now before me locked himself out of the internal disciplinary process availed by his employer and the Court cannot help him. Consequently, his claim for unlawful and unfair termination must fail.

22. The Claimant admitted having been paid one month’s salary in lieu of notice. The claim thereon is therefore without basis. The claim for overtime compensation was not proved and is dismissed.

Final Orders

23. Ultimately, the Claimant’s entire case fails and is dismissed with costs to the Respondent.

24. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF OCTOBER 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Ngonze for the Claimant

Miss Opolo for the Respondent