



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 337 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JOHN MUNYAO MUSIKU.....CLAIMANT

VERSUS

ATHI RIVER MINING LIMITED.....RESPONDENT

JUDGMENT

The Claim herein is filed by Jonah Munyao Musiku alleging unfair and unlawful termination of employment by the Respondent contrary to section 45 of the Employment Act, wrongful summary dismissal and failure to pay terminal dues, severance pay, accrued benefits and salary arrears contrary to Section 18 of the Employment Act. He seeks the following reliefs:

- (i) That this Honourable Court finds the Claimant's termination from employment by the Respondent was unjustified, unlawful, unfair, wrongful and illegal.
- (ii) To order the Respondent to pay the Claimant his statutory entitlements and/or terminal dues totalling to Kshs.313,330 with interest at court rates
- (iii) Costs of this suit with interest thereof
- (iv) Any other reliefs the Honourable Court may deem fit.

The Respondent filed a Reply to the Memorandum of Claim in which it admits that the Claimant was its employee. The Respondent contends that the termination was on the grounds of gross negligence of duty and loss of confidence in his continued service.

On 18th July 2018, the Claimant in his testimony stated that he was employed by the Respondent herein on or about 23rd December, 2010 as a security officer. It was his evidence that he worked for a total of 11 months until 7th November 2011, when he was accused of stealing cement from the Respondent Company.

It was his evidence that he was arrested on 8th November, 2011 while on duty and detained at Athi River Police Station before arraignment in Court on 11th November 2011 under Criminal Case Number 1726 of 2011 at Machakos Chief Magistrate's Court.

CW1 further stated in his evidence that the Criminal Case was dismissed on 10th February 2012 and that after the suit was dismissed he reported back for duty but was informed that his services were no longer needed. He was issued with a letter of dismissal that was prepared 7 days after his being charged in Court and that he was never called to defend himself and further that no show cause letter was issued to him.

On cross examination the Claimant stated he was not paid any money at the time of termination. He further stated that he was issued with a certificate of service.

Mr. Muigai counsel for the respondent opted not to call any witness and closed the respondent's case on 18th July 2018. The parties thereafter filed and exchanged written submissions.

Claimant's Submissions

In the written submissions the Claimant reiterated the contents of the Memorandum of Claim and his oral evidence in Court.

The Claimant submitted that the termination was unfair and unlawful as it did not conform to the provisions of Section 35,41,43,44 and 45 of the Employment Act.

The Claimant relied on the authority of FRANCIS MBUGUA BORO –VS- SMARTCHIP DYNAMICS LTD (2017) eKLR where it was held: -

“...It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 and missing that essential ingredient and a hearing the court reaches the conclusion that the summary dismissal of the claimant was procedurally unfair.”

Similarly in the case of DAVID NJOROGE MUIRU -VS- ELSA LIMITED (2014) eKLR it was held that:

“It is obvious that the claimant was not given notice of misconduct or a hearing before the termination. The court finds that the dismissal was unfair under Section 41 of the Employment Act 2007. The reason for removal has not been shown to have been established to exist at the time of termination.”

The Claimant submitted that the instant cause be allowed as prayed.

Respondent’s Submissions

The Respondent submitted that the Claimant’s termination was on grounds of loss of confidence in his continued service, that the respondent has shown that the reasons for termination were valid and fair procedure was followed.

It is further submitted that Section 44 (4)(g) of the Employment Act, 2007 was adhered to while summarily dismissing the Claimant and that the Claimant did not avail himself for the disciplinary hearing.

The Respondent further submitted that under Section 44 of the Employment Act one of the grounds for summary dismissal is that an employee commits or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property. The Respondent relied on the case of Agnes Kavata Mbiti v Housing Finance Company Limited [2017] eKLR where it was stated that: -

“Section 44(4)(c) of the Employment Act provides that an employee wilfully neglects to perform any work which it urns his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract to have performed carefully and properly.”

The Respondent submitted that the statutory burden of proving that a termination was unfair rests on the employee relying on section 47 of the Employment Act under which it is provided that,

“For any complaint of unfair termination of employment...the burden of proving that unfair termination of employment or wrongful dismissal has occurred shall rest on the employee...”

On what constitutes valid grounds for termination, the Respondent drew the Court’s attention to the case of **MIRIAM SIWA -V- POSTBANK LIMITED [2014] eKLR** in which the court found negligent performance of duty by an employee to constitute valid ground for termination.

The Respondent further submitted that the termination was lawful and that the Claimant is not entitled to the reliefs sought in his memorandum of Claim.

On the issue of terminal dues, it is the Respondent’s submission that the Claimant is not entitled to the same as the Respondent settled the terminal dues owing to the Claimant at the time of termination of employment.

Determination

Having considered the pleadings, evidence, submissions and authorities cited by the parties the following are the issues for determination:

1. Whether the termination of the Claimant’s employment was valid both procedurally and substantively
2. Whether the Claimant is entitled to the reliefs sought
3. Who bears the costs of the suit.

On Issue Number 1

The Law

The law relating to fair termination is contained in Section 41, 43 and 45 (2) of the Employment Act.

Section 41 of the Employment Act provides for the procedure for termination while section 43 of the Employment Act provides that the employer must prove valid reason.

Based on the evidence before the court as set out herein above it is my finding that the termination was unfair both procedurally and substantively.

From the facts of this cause it is clear that the Claimant was not issued with any show cause letter. Secondly, the Respondent accuses the Claimant of not performing his duties diligently as there was an attempted theft of 300 bags of cement while the Claimant was on duty. This was a subject of criminal proceedings against the Claimant in Machakos CMCC No. 1726 of 2011, which case was later dismissed.

The Respondent indicated to the Court that it did conduct a disciplinary hearing but the Claimant was not present. No witness was availed to the Court by the Respondent to attest to this. No minutes of such a hearing were produced by the Respondent to support this position. No letter was produced and evidence led by respondent to prove that the claimant was invited to attend any disciplinary hearing.

The fact that there was a criminal case against the Claimant did not stop the Respondent from conducting its own investigations in the matter and having a disciplinary hearing to ascertain the culpability of the Claimant before proceeding to terminate his services.

In the case of *Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR* the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

Further in the case of *Nicholus Muasya Kyula V Farmchem Limited Industrial Cause Number 1992 of 2011; (2012) LLR 235 (ICK)* the court held that;

“It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.”

The Respondent did not conduct its own investigation nor did any hearing take place to ascertain the Claimant’s culpability as seen above.

The foregoing being the case, I find that the claimant’s employment was terminated unfairly.

Reliefs

The claimant prayed for service pay of Kshs.12,730. Having not worked for a complete year, he is not qualified for the same as service pay is payable per year of service, with the qualifying period being one year of service.

The claimant further prayed for salary arrears of Kshs.12,739. The respondent did not adduce any proof that the claimant was paid for the month of November 2011. Having been terminated by letter dated 18th November 2011, I award the claimant salary up to date of termination in the sum of Kshs.12,738.50.

The claimant further prayed for salary in lieu of notice having been terminated and not dismissed and further having found the termination unfair, I award the claimant one month’s salary in lieu of notice in the sum of Kshs.18,400.

The claimant having worked for eleven (11) months is entitled to pay in lieu of 19.25 days leave at Kshs.13,623 which I award him.

The claimant did not adduce any evidence to support his prayer for rest days and the same is dismissed as it was not proved.

Having worked for about a year, and further taking into account the fact that the claimant was subjected to unnecessary punishment by being taken through criminal proceedings which the respondent failed to avail witnesses for, I award the claimant three months’ salary as compensation in the sum of Kshs.55,200.

In the final analysis I enter judgment for the claimant against the respondent in the total sum **of Kshs.99,961.50/=**. The decretal sum shall attract interest at court rates from date of judgment.

The respondent shall pay claimant’s costs for this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE