



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 854 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 20th December, 2018)

NICHOLAS MUTUA MULI.....CLAIMANT

VERSUS

HOGGERS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein Nicholas Mutua Muli filed his Memorandum of Claim on 6/6/2013 through the firm of Namada & Company Advocates alleging unfair and unlawful termination of his employment and failure by the Respondent to pay him his terminal dues and compensatory damages.
2. The Claimant's case is that he was employed by the Respondent on 1-8-2004 as a Rider and continuously worked for Respondent at a salary of 13,000/= per month.
3. He avers that on 15/3/2012, the Respondent's Human Resource and Transport Manager suspended him from duty on false allegations that he had fought with a colleague while on duty. He avers that on 27.3.2012 when he was verbally asked to explain why he fought with his colleague, he clearly stated and proved that there was no fight between him and his colleague. The colleague even vehemently denied such allegations.
4. The Claimant avers that without holding any further inquiry and investigations, the Respondent summarily dismissed him on 28.3.2012 vide a letter dated a similar date on the same allegations of fighting with a colleague.
5. The Claimant avers that he was unfairly dismissed as he fought no one and the dismissal letter was backdated to 19.3.2012. He seeks payment of 1 month salary in lieu of notice, unpaid leave and compensation for unfair termination all totaling Kshs.195,000/=.
6. The Respondent on their part filed Memorandum of Response on 28/9/2015 through Michuki and Michuki Advocates. The Respondents admit the employment relationship with the Claimant and aver that the Claimant's dismissal was fair based on evidence produced after a fair hearing as set out in the Notice to show cause (NTSC) and letter of termination. They also aver that the Claimant is not entitled to payments of terminal dues as prayed.
7. The Respondents further submissions that the Claimant was terminated summarily for fighting with a colleague and was asked to defend himself and was found to have committed gross misconduct, which led to his termination.
8. I have considered the evidence and submissions of all the parties. From the evidence before me either the Claimant had a disagreement with a colleague and they had an exchange of bitter words or that he fought with a colleague. This is from the 2 statements produced by the Respondent. One of the 2 statements indicate that the Claimant fought with a colleague and the other that they had exchanged words.
9. The Claimant was summoned by his superior after the incident and even suspended. He was then asked to indicate if he wanted an oral hearing of the case in 3 days. It appears, he did not make this indication and was therefore dismissed.
10. The Respondent may have had a good reason to dismiss the Claimant for either fighting or quarreling with his colleague.
11. It is however unlike the provisions of Section 41 of Employment Act to ask an employee that an employer is seeking to terminate whether they wanted to be heard on their case.

12. Section 41 of Employment Act states as follows:-

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

13. My understanding of Section 41 of Employment Act is that such a hearing is mandatory and the Respondent have the duty to summon their employee for hearing whether he chooses to or not. They can therefore exercise their right to terminate if the employee fails to attend the oral hearing.

14. In the case of the Claimant, the Respondent opted not to summon the Claimant for a disciplinary hearing but asked the Claimant to indicate whether he wanted such a hearing. This in my view breached the provisions of Section 41 of Employment Act 2007.

15. Section 45(2) of Employment Act 2007 states as follows:-

2. **“A termination of employment by an employer is unfair if the employer fails to prove:**

a) that the reason for the termination is valid;

b) that the reason for the termination is a fair reason:-

i. related to the employee’s conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c) that the employment was terminated in accordance with fair procedure..”.

16. Since the Claimant was not subjected to any disciplinary hearing, I find his termination unfair and I award him as follows:-

1. 1 month salary in lieu of notice = 13,000/=.

2. 6 months salary as compensation for unfair termination = 13,000 x 6 = 78,600/=

TOTAL= 104,600/=

3. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 20th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Mukeli for Claimant – Present

Musyoki holding brief Muchuki for Respondent – Present