



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 672 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 17th December, 2018)

MAURICE MUMO KILU.....CLAIMANT

-VERSUS-

MUFADDAL GLASS

DISTRIBUTORS LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit through the firm of Njogu and Associates seeking damages for unfair termination and payment of terminal benefits arising out of an employment relationship with the Respondent.

2. He avers that he was an employee of the Respondent Company from April, 2011, upto 14th November, 2014 engaged as a glass cutter earning a salary of 16,500/= per month. He avers that he discharged his duties effectively, diligently and satisfactorily upto the point when his services were terminated without notice or any reason being advanced. He prays for damages for unfair termination, service pay, salary in lieu of notice and leave pay.

3. The Respondent filed a statement of response on 8th January, 2017, wherein they admit the employment relationship but deny that they unfairly terminated the Claimant as the Claimant tendered his resignation on 21st November, 2014, citing medical reasons. That they acknowledged the said resignation and notified the Claimant that his last working day would be 21st November, 2014, and he was sufficiently remunerated for all the days and hours that he worked for the Respondent.

Evidence

4. The Claimant in evidence stated that the letter of resignation was written after he had been sacked. He alleges that he had been sick for 1 ½ weeks prior to his termination. That he wrote the resignation letter so that the Respondent could pay him his dues.

5. That in 2014, he had written to the Respondent to convert his terms of engagement from permanent and pensionable to casual in order to be paid weekly to enable him meet his obligations which was never effected.

6. The Respondent in evidence called one Yusuf Ali Moiz, the Respondent's General Manager, Operations, who stated that he knew the Claimant as their employee. That the Claimant had written a letter for his status to be converted to casual basis but he resigned before the same could be effected citing medical reasons. That prior to his resignation they dismissed the Claimant on 14.11.2014 on the ground of absenteeism.

Submissions

7. The Claimant submits that no reason existed for his termination and that the provisions of Section 41, 45 and 47 of the Employment Act, 2007, were not followed and therefore the termination was unlawful and unjustifiable. He urges the Court to allow the Claim as set out in his Memorandum of Claim.

8. The Respondent submits that the Claimant was not unlawfully terminated but rather he resigned. That Section 45 of the Employment Act is to the effect that resignation by an employee cannot amount to unfair termination. They cite the case of **Benson M. Nyamai vs Teachers Service Commission (2015) eKLR** and **David K. Cheruiyot vs Barclays Bank of Kenya Limited (2015) eKLR** to buttress this position.

They urge the Court to dismiss the claim with costs.

9. I have examined all the evidence and submissions of both parties. The issues for this Court's determination are as follows:-

1. Whether the Claimant resigned or was terminated.

2. If Claimant was terminated, if there were valid reasons and whether due process followed.

3. Whether the Claimant is entitled to the remedies sought.

10. On the 1st issue, the Claimant indicates that he wrote the resignation letter after the sacking so that he could be paid his terminal dues. Indeed the resignation letter is part of the documents filed by the Respondent and is dated 21/11/2014 and a response accepting the resignation letter is dated 22/11/2014.

11. However, the Respondent's witness told Court in his evidence that prior to the resignation they had dismissed the Claimant on 14.11.2014 due to absenteeism.

12. RW1's evidence thus corroborates the Claimant's position that he had been dismissed before he wrote the resignation letter. In answer therefore to issue No. 1 above, I find that the Claimant was dismissed by the Respondents.

13. There is no letter of dismissal served upon him but RW1 indicated that he was dismissed due to absenteeism. The Respondent failed to produce the register showing attendance of workers at work which could prove the absenteeism alleged. In view of this, the position that the Claimant was absent from work remains a mere allegation not supported by any evidence. The Claimant was also not subjected to any disciplinary process nor given any notice before the dismissal or termination.

14. Section 43 of Employment Act 2007 states as follows:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

15. Section 41 of Employment Act 2007 on the other hand 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”.

16. In view of the fact that there were no valid reasons to warrant dismissal of Claimant and that no fair disciplinary process was accorded the Claimant, it is my finding that the Claimant was unfairly and unjustly dismissed as provided for under Section 45(2) of Employment Act.

17. Having found as above, I find for the Claimant and award him as follows:-

1. 1 months' salary in lieu of notice = 16,500/=.

2. 8 months' salary as compensation for unfair termination = 16,500 x 8 = 132,000/=.

Total = 148,500/=

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 17th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Owino holding brief Njogu for Claimant

Wesonga Masinde for Respondent – Present