



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1072 OF 2014

ANDREW NGOYA WANJUNU.....CLAIMANT

v

TILE AND CARPET CENTRE.....RESPONDENT

JUDGMENT

1. Andrew Ngoya Wanjunu (Claimant) was offered employment as a general labourer by Tile and Carpet Centre (Respondent) with effect from 1 September 2004.
2. The Claimant served until 26 November 2013 when the Respondent wrote to him informing him that he was being summarily dismissed on grounds of fraud.
3. The particulars were that the Claimant had misused a fuel card by fuelling a vehicle without authority and failing to produce receipts.
4. In a Memorandum of Claim lodged in Court on 4 July 2014, the Claimant alleged that the dismissal was unfair.
5. The Respondent denied the pleas by the Claimant in a Response filed in Court on 28 March 2018.
6. The Cause was heard on 23 July 2018 and 1 November 2018. The Claimant and an employee of the Respondent testified.
7. The Claimant filed his submissions on 15 November 2018 while the Respondent filed its submissions on 4 December 2018.
8. The Court has considered the pleadings, evidence and submissions and condensed the Issues arising for determination as
 - (i) whether the summary dismissal of the Claimant was unfair and
 - (ii) Appropriate remedies/orders.

Unfair termination of employment

Procedural fairness

9. Section 35 of the Employment Act, 2007 envisages written notice of termination of employment unless it is a case of summary dismissal while section 41 of the Act contemplates a hearing (may be oral or through record depending on the circumstances obtaining).
10. The Claimant's testimony was that he was instructed by his manager to go and see the Human Resource Manager who in turn informed him that his services were no longer required, and that he was not issued with a dismissal letter (stated he saw a copy of the letter after institution of these Court proceedings). He stated that there was no hearing.
11. The Respondent's witness did not disclose his position within the Respondent. He stated that a verbal notice of termination of employment was given, and that a formal hearing was held but not minuted.
12. Under re-examination, the witness stated that the hearing was conducted by the human resources manager.
13. This being a case of summary dismissal, the notice envisaged under section 35 of the Employment Act, 2007 was not practical, but the hearing envisaged by section 41(1) & (2) of the Act was mandatory.

14. If such a hearing was held, the Respondent did not disclose the name of the human resource officer who conducted, it, where it was held, when it was held and the name of the Claimant's colleague who accompanied him.

15. In the circumstances, the Court finds that the Respondent did not comply with the mandatory requirements of section 41(2) of the Employment Act, 2007, thus the dismissal was procedurally unfair.

Substantive fairness

16. With the conclusion on the procedural fairness, it is not necessary for the Court to examine whether the Respondent discharged the burden placed on employers by sections 43 and 45 of the Employment Act, 2007, save to note that the Claimant testified that during the period in question he was assigned vehicle KAR 056P and not KBC 162M.

17. Further, the Court notes that the Respondent's witness stated that it was possible to establish who drove which vehicle at any particular time from delivery notes, and that no such delivery notes were produced in Court to connect the Claimant to KBC 162M during the period in question.

Appropriate remedies

Compensation

18. The Claimant served the Respondent for about 9 years, and in consideration of the length of service, the Court will assess compensation equivalent to 9 months gross wages (pay slip for October 2013 show gross wage of Kshs 41,465/-).

Service pay

19. The pay slip produced by the Claimant show he was contributing towards the *National Social Security Fund* and therefore by virtue of section 35(5) & (6) of the Employment Act, 2007, he is not entitled to service pay.

Pay in lieu of notice

20. Pursuant to section 35(1)(c) of the Employment Act, 2007, the Court, the Court will allow 1 month pay in lieu of notice.

Certificate of Service

21. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant.

Conclusion and Orders

22. The Court finds and holds that the summary dismissal of the Claimant was unfair and awards him

(a) Compensation Kshs 373,185/-

(b) Pay in lieu of Notice Kshs 16,853/-

TOTAL **Kshs 390,038/-**

23. Certificate of Service to be issued within 10 days.

24. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 13th day of December 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ayieko/Ms. Kihenjo instructed by Kairu Mbuthia & Kingati Advocates

For Respondent Mr. Thiongo instructed by McKay & Co. Advocates

Court Assistant Lindsey