



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 684 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 10th December, 2018)

JOHN MUTUKU MUTUA.....CLAIMANT

VERSUS

BUSH ROVER LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant represented by the firm of Nchogu, Omwanza & Nyasimi Advocates filed suit on **14th May, 2013**, seeking damages for wrongful, unfair dismissal and refusal by the Respondent to pay terminal dues due and owing to him. The Claimant through his Advocates on record and with the leave of the Court amended his Memorandum of Claim filed on 17th June, 2014.
2. He states that on or about January 2000, he was employed by the Respondent as a permanent and pensionable employee in the capacity of a Workshop Manager.
3. He avers that he commenced employment in January 2000, and that he served the Respondent dutifully and diligently until 18th September 2012, when the Respondent unlawfully and unfairly terminated his services.
4. The Claimant further avers that at the time of termination he was earning a basic salary of Kshs. 35,000 per month as per attached payslips.
5. The Claimant avers that during the course of his duties on 15th September 2012, a client brought his vehicle for servicing however, the mechanics present on the said date were unable to service the vehicle and the same was released back to its owner in the same state and being a Saturday the workshop closed at noon.
6. The Claimant further avers that when he resumed work on 18th September, 2012, he was summoned by Salim Wali Mohamed and was accused of being responsible for the disappearance of oil filter, air filter and 8 litres of engine oil and was terminated on that basis without any notice or investigations to ascertain his culpability.
7. The Claimant avers that the appropriate legal process of termination was not adhered to as required under the Employment Law, International Labour Organisation Conventions no. 158 and the Employment Act.
8. He avers that following the alleged loss at the Respondent Company, he was arrested and prosecuted in Criminal Case Number 6336 of 2012 at the Kibera Law Courts but he was acquitted under Section 215 of CPC.
9. The Claimant prays for his claim to be allowed as prayed with costs.
10. The Respondent in its Memorandum in Reply and Submissions filed in Court on 27th June, 2013 admits that the Claimant was its employee. The Respondent goes on to state that the Claimant did not perform his duties to its satisfaction and was in violation of his terms of employment, occasioning the Respondent financial loss.
11. The Respondent further avers under the Claimant's watch the firm lost several items valued at Kshs. 87,000 forcing the Company to report the loss at Karen Police Station. It was on this account that the Claimant was summarily dismissed for gross misconduct.

12. The Respondent avers that the Claimant in a ploy to mask his actions absented himself from duty without proper justification. The Respondent further states that the Claimant was given an opportunity to defend himself but opted to abscond from duty.

13. The Respondent contend that the Claimant is not entitled to any of the reliefs prayed for in his Memorandum of Claim and they pray for the claim to be dismissed with costs and allow its counterclaim of Kshs. 87,000 with costs.

Evidence

14. The Claimant in evidence reiterated the contents of his Amended Memorandum of Claim adding that Judgment in Criminal Case Number 6336 of 2012 was delivered in 2014 acquitting him.

15. The Claimant urged the Court to allow his Claim in terms of the prayers therein.

16. The Respondent did not participate in the hearing despite being present at the call over and time allocation issued. The Respondent's case was closed.

17. The Court directed that parties file and exchange written submissions.

Claimant's Submissions

18. The Claimant submits that he is entitled to the prayers as prayed in the Memorandum of claim.

19. It is the Claimant's submissions that he was summarily dismissed in a very inhumane manner. He was neither informed of the charges he was facing with sufficient information nor was he investigated in disciplinary hearing.

20. It was further submitted that the dismissal was unfair. He relies on the case of **Anthony Mkala Chitavi v Malindi Water and Sewerage Company Limited (2013) eKLR.**

21. It is the Claimant's further submission that the Respondent did not avail any disciplinary proceedings before the Court in order to ascertain that the Respondent accorded the Claimant a hearing. There was no Notice to show cause, No termination letter served on the Claimant from the Respondent herein. The dismissal was done verbally. For emphasis, the Claimant relied on the case of **David Wanjau Muhoro v Ol Pejeta Ranching Limited (2014) eKLR.**

22. The Claimant submits that the counterclaim by the Respondent for Kshs. 87,000 is incompetent as it is not properly drafted as it was not supported by a Verifying Affidavit. Secondly, the counterclaim was not prosecuted. The Claimant prays that the counterclaim be dismissed with costs.

23. It is the Claimants submission that in the circumstances that the claim in its entirety be allowed with costs.

24. The Respondent despite being allowed to file submissions by Court failed to file any.

25. I have examined the evidence of the Claimant which remains uncontroverted by the Respondent. There is no evidence that the Claimant was issued with a Notice to Show Cause and accorded any hearing before the dismissal.

26. The Respondent in their pleadings had contended that the Claimant was accorded a hearing and he chose to abscond duty but there is no letter inviting Claimant to any disciplinary hearing.

27. What therefore emerges is that the Claimant was denied any hearing before dismissal as envisaged under Section 41 of employment Act 2007 which 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”.

28. Section 45 of Employment Act 2007 also 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..”.

29. Given that the reasons for dismissal are not proved and that the Claimant was dismissed without due process, I find that the Claimant's dismissal was unfair and unjustified and I declare it so.

30. In terms of remedies, I find for Claimant as prayed and I award him as follows:-

1. Salary for September 2012 – 35,000/=

2. 1 month salary in lieu of notice 35,000/=

3. 8 months' salary as compensation for unlawful termination = 8 x 35,000 = 280,000/=.

4. House allowance for 3 years not paid and not affected by the limitation period = 15% x 35,000 x 36 = 189,000

5. 1 year leave = 35,000/=

TOTAL = 574,000/=

6. Issuance of a Certificate of Service.

7. The Respondent will 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 10th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ochogo for Respondent – Present

Njiru holding brief for Momanyi for Claimant – Present