



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 691 OF 2014

CHARLES ODUOR MIRIMO **CLAIMANT**

V

GILANI'S SUPERMARKET LIMITED RESPONDENT

JUDGMENT

1. The Claimant contends that the Respondent unfairly terminated his employment on 4 August 2014, while the Respondent maintains that it lawfully dismissed the Claimant.
2. The Claimant testified on his own behalf while the Respondent called its Human Resources Manager.
3. The Court has considered the pleadings, evidence and submissions and collapses the issues for determination as, *whether the dismissal was unfair and appropriate remedies* (although Court directed on 27 January 2016 that Agreed Issues be filed, the issues were not agreed and the Claimant filed his version with 13 issues).

Procedural fairness

4. The procedures which an employer considering terminating the employment of an employee should comply with are set out in sections 35 and 41 of the Employment Act, 2007.
5. The sections provides the minimum conditions and these are written notification of termination, informing the employee of the allegations and allowing the employee to make representations in response to the allegations.
6. Where a face to face hearing is conducted, the employee is entitled to be accompanied by a colleague, or union representative (if a member of a union).
7. The settled jurisprudence now is that the process contemplated by section 41 of the Employment Act, 2007 can either take the form of correspondence or an oral hearing or a combination of both.
8. In the instant case, the Claimant was suspended from work through a letter dated 28 July 2014 pending further action. The suspension letter informed the Claimant that there were allegations that he was involved in carrying unauthorised goods including stolen goods and sharing the monies received therefrom with those in the trip (while on a trip to deliver goods in Busia).
9. In the course of investigations, the Claimant recorded several statements with the Respondent's security officer (on 5 August 2014 and 2 statements on 6 August 2014).

10. Come 11 August 2014, the Respondent took a decision to summarily dismiss the Claimant from employment. The Claimant received the dismissal letter on 12 August 2014.

11. In determining whether the Respondent complied with the peremptory requirements of procedural fairness, the Court has looked at the documentation produced in the form of the 3 statements recorded by the Claimant, and the testimony of the Respondent's Human Resources Manager that there was a Disciplinary Committee in place to hear disciplinary cases, and come to the conclusion that the same did not meet both contractual and the statutory elements of procedural fairness.

12. The process taken by the Respondent, in the view of the Court, were investigatory and were meant to establish the facts upon which to confront the Claimant. The Respondent did not tender any evidence as to when the Disciplinary Committee met, who comprised membership and venue of the hearing. Even minutes were not produced.

Substantive fairness

13. Pursuant to the provisions of sections 43 and 45 of the Employment Act, 2007, an employer has the burden to prove the reasons for terminating the services of an employment, and the validity and fairness thereof.

14. The Claimant in his recorded statements admitted the substance of the allegations against him and indeed sought for forgiveness.

15. The Court would therefore find that the Respondent had valid and fair reasons to dismiss the Claimant from employment.

Remedies

Compensation

16. It is the procedural aspects of the dismissal that the Court has found did not meet statutory muster and considering that factor, and the fact that the Claimant served the Respondent for about 18 years, the Court is of the view that the equivalent of 6 months gross wages as compensation would be appropriate and fair (gross wage as of contract dated 10 May 2012 was Kshs 10,200/- and pleaded monthly wage of Kshs 14,200/- was not proved).

Pay in lieu of notice

17. Having failed to comply with the procedural fairness requirements, the Respondent should pay the Claimant the equivalent of 1 month pay in lieu of notice.

Wages for July 2014

18. The Claimant sought Kshs 14,200/- on account of wages for July 2014. However, among the documents produced by the Respondent as exhibits, it is clear that the wages for July 2014 were paid and acknowledged by the Claimant.

Outstanding leave for 2013

19. The Claimant sought Kshs 9,940/- on account of leave for 2013. The document referred to in the previous paragraph show the Claimant was paid for 7 leave days for 2013 and 12.25 leave days for 2014.

Certificate of Service

20. This is a statutory right and the Respondent should issue one to the Claimant within 14 days from today.

Conclusion and Orders

21. The Court finds and holds that although the Respondent had valid and fair reasons to dismiss the Claimant, the dismissal was procedurally unfair and awards him and orders the Respondent to pay him

a. Compensation Kshs 61,200/-

b. Pay in lieu of Notice Kshs 10,200/-

TOTAL Kshs 71,400/-

22. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 20th day of January 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mburu instructed by Wachira Wanjiru & Co. Advocates

For Respondent Mr. Murimi instructed by Murimi, Ndumia, Mbago & Muchela & Co. Advocates

Court Assistant Nixon/Daisy