



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAKURU
CAUSE NO. 261 OF 2015
STANLEY NDUNGU NGUNDO.....CLAIMANT

v

MIDLANDS LIMITED.....RESPONDENT

JUDGMENT

1. Midlands Limited (Respondent) dismissed Stanley Ndungu Ngundo (Claimant) from employment through a letter dated 12 November 2014.
2. On 15 September 2015, the Claimant commenced legal proceedings alleging that the dismissal was unfair in that he was not afforded an opportunity to be heard. He also made complaints in regard to *unpaid leave, unremitted NSSF and Sacco contributions* and other entitlements.
3. The Respondent on its part contended that the dismissal was fair and was on account of gross incompetence and/or misconduct.
4. Both parties led oral testimony during the hearing on 22 September 2016 and 14 November 2016. The Claimant filed written submissions on 15 December 2016 while the Respondent's submissions were not on file by this morning.
5. The Court has considered the pleadings, evidence and submissions and extracted therefrom the issues for determination as, *whether the dismissal of the Claimant from employment was unfair and appropriate remedies* including entitlements accruing from the employment relationship.

Whether dismissal was unfair

Procedural fairness

6. Pursuant to section 41 of the Employment Act, 2007, an employer is expected to inform an employee of any allegations which may lead to termination of the relationship and afford the employee an opportunity to make representations.
7. The Claimant's testimony was that he was called by the Respondent's then Chief Executive Officer on phone at about 6.00pm on 12 November 2014 and informed that he had been dismissed and should go collect the dismissal letter which had been emailed to the General Manager. He stated that he was not afforded an opportunity to be heard.

8. The Respondent's 2 witnesses, an Accounts Assistant and Procurement Officer testified that they were not involved in the Claimant's dismissal procedures. The person involved was not called to testify as to whether the Claimant was afforded an opportunity to make representations before the dismissal in terms of section 41 of the Employment Act, 2007.

9. It is the burden of the employer to demonstrate that it complied with the procedural fairness requirements of section 41 of the Employment Act, 2007, a burden which the Court finds the Respondent has failed to discharge.

10. The Court therefore finds that the dismissal of the Claimant from employment was procedurally unfair.

11. With that conclusion, it is not necessary for the Court to reach a finding on the validity and fairness of the dismissal in terms of sections 43 and 45 of the Employment Act, 2007.

Counterclaim

12. The Respondent counterclaimed against the Claimant for Kshs 2,240,000/- alleged to be the value of potatoes lost due to negligence.

13. The Respondent did not lead any evidence as to how the amount was reached and or the unit cost of the potatoes.

14. The counterclaim therefore fails.

Appropriate remedies (including employment entitlements)

Compensation

15. By dint of section 49(4) of the Employment Act, 2007 and considering that the Claimant served the Respondent for about 2 years, the Court is of the view that the equivalent of 3 months gross wages would be appropriate compensation.

Reinstatement

16. The Claimant testified that he was not seeking reinstatement because he had secured alternative employment.

Wages for November 2014

17. The Claimant is entitled as of right to wages up to date of dismissal. But because there was no attempt to quantify the same, the Court declines this head of relief.

1 month pay in lieu of notice

18. With the finding that the dismissal was unfair, the Claimant is entitled to 1 month pay in lieu of notice in terms of sections 35 and 36 of the Employment Act, 2007.

Unpaid leave

19. The Claimant did not lay any evidential basis for this head of relief and it is declined.

Unremitted NSSF contributions

20. The NSSF Act has provisions for dealing with deducted but unremitted contributions and the Claimant should exhaust those procedures first.

Unremitted Sacco contributions

21. The Claimant's testimony that 6 months contributions amounting to Kshs 3,000/- was not remitted to the Sacco was not challenged and he is entitled to a refund of the same.

Certificate of Service

22. This is a statutory right and the Respondent is ordered to issue one to the Claimant within 14 days.

Conclusion and Orders

23. The Court finds and holds that the dismissal of the Claimant was procedurally unfair and awards him and orders the Respondent to pay him

(i) Compensation	Kshs 180,000/-
(ii) Pay in lieu of notice	Kshs 60,000/-
(iii) Sacco contributions	Kshs 3,000/-
TOTAL	Kshs 243,000/-

24. Claimant to have costs.

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

Radido Stephen

Judge

Appearances

For Claimant Mr. Kahiga & Mr. Kibet instructed by Mirugi Kariuki & Co. Advocates

For Respondent Mr. Githara instructed by Githara & Associates

Court Assistant Nixon/Daisy