



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 171 OF 2015

HOSEA AKUNGA OMBWORI

CLAIMANT

v

BIDCO OIL REFINERIES LIMITED

RESPONDENT

JUDGMENT

1. Hosea Akunga Ombwori (Claimant) was employed by Bidco Oil Refineries Ltd (Respondent) on a 1 year contract (4 September 1998 to 4 September 1999) as a Laboratory Analyst.
2. It appears that the contract was renewed severally though none of the parties presented before Court any documents to demonstrate formal renewal.
3. On 15 December 2014, the Respondent summarily dismissed the Claimant (with immediate effect).
4. Aggrieved with the dismissal, the Claimant launched legal proceedings against the Respondent on 30 June 2015 alleging unfair termination of employment (illegal, premature termination without notice or reasons).
5. The Respondent filed a Memorandum of Reply on 10 March 2016 and the Cause was heard on 26 January 2017.
6. The Court has considered the pleadings, evidence and submissions and the *Statement of Agreed Issues* as proposed by the Claimant and identifies the substantive issues in dispute as being two, to wit, *whether the summary dismissal of the Claimant was unfair and appropriate remedies/orders*.

The facts

7. Around 26 November 2014, the Claimant and others were informed of an imminent stock take exercise and the Claimant was also requested to choose employees to participate in the exercise from his department.
8. On 27 November 2014, an employee by the name of Sara Nyingi informed acting Team Leader (Ms. Sneha) that she had been granted permission to be away by the Claimant and therefore she would not be present for the stock take.
9. The information prompted Ms. Sneha to call a meeting with the Claimant and others to deliberate on the Claimant's conduct (granting leave to an employee who was expected to participate in the stock take and failing to nominate a replacement).

10. The issue was taken up as one of indiscipline and after being cascaded to management, it was decided that a warning letter be issued to the Claimant.

11. The Respondent thus issued the Claimant with a *Stern Warning Letter* dated 28 November 2014. The substance of the warning was that the Claimant had granted an employee he was supervising compassionate leave despite an imminent stock take without informing other team members and also without providing an alternative employee to assist in the exercise.

12. On 3 December 2014, the Respondent issued a *Reminder 1* to the Claimant expressing dissatisfaction with his failure to sign a warning letter and requesting him to put his concerns in writing.

13. Come 10 December 2014, the Respondent again issued a *Stern Warning Letter* to the Claimant noting that he had failed/refused to obey a proper and lawful command, refusing to acknowledge a disciplinary communication on 1 December 2014, 3 December 2014 and on 9 December 2014 after being accorded an opportunity to explain himself.

14. Matters came to a head on 15 December 2014 for the Respondent dismissed the Claimant from employment and the reasons given were *failing to inform management of granting an employee leave, failing to sign a disciplinary letter and, failing to obey proper and lawful command by putting concerns in writing.*

15. According to the letter the Claimant's conduct amounted to gross misconduct warranting summary dismissal in terms of section 44(4)(e) of the Employment Act, 2007 as read with the Part IV(iii) of the Respondent's Rules and Regulations.

The law on termination of employment

16. The primary anchor on disputes regarding unfair termination of employment are in the Employment Act, 2007 wherein by dint of section 35 advance written notice ought to be given; section 41 which envisage an employer informing an employee of allegations where termination is being contemplated on account of *misconduct, poor performance or physical incapacity*, and affording the employee an opportunity to make representations (procedural fairness); section 43 which places a burden upon the employer to prove the reasons for dismissal and section 45 which obligate the employer to prove the reasons as valid and fair (substantive fairness).

17. As to the evidential burden placed on the parties, section 47(5) of the Act require an employee to in the first instance, demonstrate that an unfair termination of employment took place before the employer is called upon to justify the reasons.

Claimant's case

18. The Claimant's testimony was that he did not receive the warning letter dated 28 November 2014, the reminder dated 3 December 2014 or the last warning of 10 December 2014.

19. On the granting of the compassionate leave, the Claimant contended that he had the authority to grant employees under him leave and that he indeed informed his immediate supervisor, Ms. Sneha of the leave.

20. On the process after dismissal, the Claimant challenged the process on the ground that he was not informed of a right of appeal against the dismissal.

Respondent's case

21. The Respondent's case on the other hand was that the Claimant was dismissed for gross misconduct in that he breached the Respondent's rules (it is unfortunate that a copy of the Rules and Regulations were not produced) by paralysing a stock take exercise and therefore no notice was required.

22. On procedural fairness, the Respondent's witness contended that a disciplinary hearing was conducted after which the Claimant declined to comply with directions given by the disciplinary committee.

Evaluation

Was there unfair termination of employment?

23. The immediate cause (principal reason) of the separation between the Claimant and the Respondent was the refusal to acknowledge or receive the warning letter(s). The other reasons (grant of leave to an employee and not nominating a replacement had causal link to the immediate cause).

24. In so far as the Respondent did not give the Claimant written notice of termination of employment for declining to sign the warning letter in terms of section 35(1)(c) of the Employment Act, 2007, the Court is satisfied that the Claimant has passed the section 47(5) of the Act test.

Procedural fairness

25. Procedural fairness can be determined on the basis of contractual agreement or the basic statutory minimums outlined in section 41 of the Employment Act, 2007 (Respondent's Disciplinary Policy in terms of section 12 of the Employment Act, 2007 was not produced in Court).

26. To satisfy the requirements of section 41 of the Employment Act, 2007, an employer issues what is called in ordinary parlance a *show cause notice/letter*. Such a letter or notice should outline the allegations or *charges* against the employee and also request him to respond within a reasonable time.

27. The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration. In other words, the notice should be set out in clear terms.

28. The Court has looked at the Warning Letters dated 28 November 2014, 3 December 2014 and 10 December 2014.

29. Being warning letters, they cannot meet the standards expected of a show cause notice primarily because a warning letter by itself is a sanction or penalty after a disciplinary process. A warning letter comes after a formal process.

30. The warning letters can only suggest that the Respondent conducted some form of disciplinary process related to the allegations outlined in the warning letters.

31. But even going beyond the test for a *show cause*, the contents of the warning letters were not expressly clear on what allegations that disciplinary action was being contemplated out of the several allegations.

32. One more thing about the warning letters was whether the Claimant received them.

33. The Respondent's witness in her testimony indicated that she did not know how the warning letters were delivered to the Claimant.

34. Further, the warning letter dated 28 November 2014 is signed by a Human Resources Assistant who entered by pen next to her signature the date 01/Dec/ 2014.

35. This entry appears inconsistent with the minutes of 28 November 2014 which suggest that a warning was issued and declined by the Claimant on that day. It is not probable that a warning was issued before its author signed it.

36. The Court, putting into consideration the aforesaid would find that the summary dismissal of the Claimant was unfair but also not in accord with justice and equity.

37. With that conclusion, it would be a mere academic exercise to examine whether the Respondent discharged the burden placed on it by sections 43 and 45 of the Employment Act, 2007.

Appropriate remedies

Terminal dues

38. The Claimant sought terminal dues which he pleaded as Kshs 333,540/-.

39. However, he did not lay any evidential, contractual or legal basis for this head of relief.

40. If by terminal benefits he meant service pay, in terms of section 35(5) and (6) of the Employment Act, 2007, he would not be entitled to the same as a copy of his pay slip in the Respondent's bundle show he was a contributor to the National Social Security Fund.

Leave days

41. Under this head of claim the Claimant sought Kshs 667,082/- for the 17 years he served the Respondent, but he did not advert to this at all during testimony.

42. Leave records filed by the Respondent in any case show the Claimant took leave or encashed leave days.

Compensation

43. This is a discretionary remedy and the factors the Court should consider have been set out in section 49(4) of the Employment Act, 2007.

44. Considering that the Claimant served the Respondent for around 17 years, the Court would award the equivalent gross wages for 12 months (maximum compensation). Claimant's gross salary at point of separation was Kshs 38,119/-.

Pay in lieu of Notice

45. With the conclusion on unfairness of termination, the Claimant is entitled to 1 month pay in lieu of notice in the sum of Kshs 21,702/- (basic pay).

Certificate of Service

46. A certificate of service is a statutory right and because the Respondent admitted one had been prepared, the Claimant should collect it.

Conclusion and Orders

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

(a) Compensation	Kshs 457,428/-
(b) Pay in lieu of Notice	Kshs 21,707/-
TOTAL	Kshs 479,130/-

48. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 24th day of March 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Oumo instructed by Oumo & Co. Advocates

For Respondent Mr. Chacha Odera instructed by Oraro & Co. Advocates

Court Assistant Nixon