



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 121 OF 2016

(Before D. K. N. Marete)

JONES YOYA.....CLAIMANT

VERSUS

DUP INVESTMENTS LIMITED.....RESPONDENT

JUDGEMENT

This matter comes to court vide a Memorandum of Claim dated 15th July, 2016. The issues in dispute are therein cited as;

- a. Whether the claimant was unlawfully, unprocedurally and unfairly terminated from employment by the respondent;*
- b. Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from the employment as prayed for in this memorandum of claim;*
- c. Whether the claimant is entitled to an award of a certificate of service;*
- d. Who should pay costs and interests of the suit?*

The respondent in a Replying Memorandum dated 18th November, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times to this cause, he was employed by the respondent as a Cleaner on permanent terms with effect from 5th May, 2014. At the time of his unfair termination, he earned Kshs.12,000.00 exclusive of house and other allowances.

The claimant served with loyalty, diligence and full dedication until 1st June, 2016 when he was wrongfully, unprocedurally and unlawfully terminated from service without payment of terminal dues.

The claimant's further case is that his termination from employment was on ground of breach of contract but this is denied. He avers that this was illegal, unfair and or unlawful and violates the provisions of Section 41 (1) 44(4), 45 (2) and 43 of the Employment Act, 2007 as follows;

- 7. Section 41 (c) of the Employment Act, 2007 provides that when an employee intends to dismiss or terminate the employment of an employee from among other reasons misconduct, it must*

explain to the employee from among other reasons misconduct, it must explain to the employee in a language he/she understands the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. The claimant submits that the respondent failed to explain to the claimant the reason for termination from employment contrary the aforesaid provision of the Employment Act.

8. Section 43 (1) of the Employment Act imposes a mandatory obligation on the employer to proof reason or reasons for termination failure to which the termination of employment is unfair within the meaning of Section 45 of the Employment Act.

Section 45 (2) of the Employment Act states that an unfair termination occurs when the employer failed to proof:-

- a) That the reason for termination is valid.*
- b) That the reason for the termination is a fair and*
- c) That the employment was terminated in accordance with fair procedure*

It is the claimant's case that the respondent failed to discharge the obligation imposed upon him by the aforesaid provisions of the Employment Act and therefore his dismissal is unfair.

He cites the following as grounds of illegality of termination of employment;

- a) The respondent terminated the claimant's employment without following the laid down procedure in the Employment Act.*
- b) The respondent did not give the claimant termination notice as provided under Section 35 of the Employment Act.*
- c) The respondent dismissed the claimant without proving that the reason for the termination was valid.*
- d) The respondent failed to pay leave allowances to the claimant contrary to the Section 28(1) of the Employment Act.*
- e) The respondent failed to pay service gratuity to the claimant contrary to Section 35(5) of the Employment Act.*
- f) The respondent failed to pay the claimant his 12 months wages for loss of employment as provided under section 15 (c) of the Labour Institution Act.*
- g) The respondent never explained to the claimant the reasons for termination as required under Section 41 (1) of the Employment Act.*
- h) The respondent did not act in accordance with justice and equity in terminating employment contrary to Section 45 of the Employment Act.*
- i) No warning notices were ever issued to the claimant for breach of duty.*
- j) The claimant worked overtime without pay and that the claimant worked extra days without pay contrary to the law.*
- k) No certificate of service was issued to the claimant contrary to Section 51 of the Employment Act, 2007.*

l) The respondent failed to reduce the claimant's oral contract to writing as per section 10 (7) and 74 of the Employment Act, 2007.

He again submits that this was a violation of Article 41 of the Constitution of Kenya, 2010.

He claims as follows;

a) Pay in lieu of notice

Basic salary + House allowance

12,000/- (Basic Salary) + 1800/- (House allowance).....Kshs.13,800/-

b) Leave dues for the entire period of service at 21 days per year.

Calculations made pursuant to Section 28 (1)(a) of the Employment Act, 2007.

12,000/30 x 21 x 2 yrs.....Kshs.16,800/-

c) Compensation for unfair termination

Section 49(c) Employment Act, 2007

Gross pay x 12 months

13,800 x 12 months.....Kshs.165,600/-

d) Service pay

15 days salary x years served.....Kshs.12,000/-

e) Overtime dues

Calculation made pursuant to Section 27 (1) of the Employment Act, 2007.

a) From 5/5/2014 to 1/6/2016

45 hours per week (statutory hours as per regulation of wages general order)

Claimant worked from 6am to 6pm daily making 12 hours

12 hrs x 6 days= 72 hrs – 45 = 27 hrs overtime per week.

27 hrs x 4 weeks = 108 per month

Daily rate is Kshs.460/- making hourly rate Kshs.57.5/-

108 x 1.5 (overtime rate) x 57.5/- = 9315/- per month

9315 x 12 months x 2.1 years.....Kshs.234,738/-

f) Unpaid rest days for the entire period of service

Daily rate is Kshs. 460 x2 (double rates on rests days) x 4(days per month) = 3680/-

3680 x 25 (number of months served).....Kshs.92,000/-

TOTAL.....KSHS. 534,938/-

In the penultimate, he prays as follows;

- a) *Declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstance the claimant is entitled to compensation of his terminal dues as outlined herein above;*
- b) *The sum of Kshs.534,938/- as set out herein above;*
- c) *Certificate of service*
- d) *Cost of this suit and interests at court rates from time of filing the suit until payment in full and*
- e) *Any other further and better relief the Honourable Court may deem just and fit to grant.*

The respondent's case is a denial of the claim. It is the respondent's other case that in all situations upon being contracted by the claimant, he was dismissed from duty for gross misconduct after several warnings to stop interfering with the security of the trucks in the yard.

The respondent's further case is that this suit is unnecessary as the claimant deliberately vacated or left his work place without being given a letter of termination. It is her penultimate case that the claimant has no cause of action against the respondent and that this claim is an abuse of the process of court and should be dismissed with costs.

The matter came to court variously until the 20th January, 2017 when it was heard *inter partes*;

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this cause?

The 1st issue for determination is whether the termination of the employment of the claimant wrongful, unfair and unlawful? The parties take opposed stances on this. The claimant in his written submissions dated 2nd February, 2017, submits as follows;

The Employment Act applies in the case of both oral and written contracts. Section 8 of the Employment Act, 2007 provides that;

“The provision of this Act shall apply to oral and written contracts”

The claimant was in employment for more than three months your lordship. Section 9 of the Employment Act, 2007 obligates an employer to reduce into writing a contract of service which is for more than 3 months or number of working days in the aggregate amounting to three or more months. Section 9 (2) provides that:-

“An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with sub – section (3)”

Again;

Section 10(7) of the employment Act also provides that:-

“Where an employer fails to produce a written contract in legal proceedings then the employer must prove or disprove an alleged term of the employment relationship”

The respondents have not proved that the claimant was not an employee in their company.

Your lordship the respondents in paragraph 3 of their replying memorandum, dispute that the claimant was an employee of the respondent. They argue that the claimant is put to strict proof.

However my lord, the respondents have annexed thereto a copy of a letter of termination of employment dated 1st June, 2015 allegedly communicating termination of the claimant’s services to the claimant. If we may ask, can

such correspondence be communicated to a stranger?

... it is the claimant’s submission that despite the fact that the letter shows that the claimant was employed by the respondent, we dispute receipt of such letter since it does not bear the claimant’s signature. My lord, the contents of the letter state that the claimant was terminated from employment on 22, June 2016 and yet the letter is dated 1st June, 2016. The discrepancy on the face of it has not been explained by the respondent.

Without prejudice to the fore stated, it is the claimant’s submission that the said letter was never received by the claimant; in fact, it is not signed by him to acknowledge receipt. The said letter has been manufactured by the respondents and is meant to mislead this honourable court.

The claimant further seeks to rely on Section 45 (1) and 45 (4) (b) of the Employment Act, 2007 which provide that:

“No employer shall terminate the employment of an employee unfairly.”

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;

c) That the employment was terminated in accordance with fair procedure”

Section 45 (4) (b) of the Employment Act, 2007 provides as follows;

..... that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee.

He again seeks to rely on the authority of **Walter Ogal Anuro vs Teachers Service Commission (2013)eKLR** where the court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.

It is the claimants other submission that based on the above submissions and the evidence of the claimant and the response to the claim herein, it is evident that there was no valid reason given at all over the termination of the claimant from his employment. The Respondent failed to establish a valid reason for the termination of the Claimant’s employment as required under Section 45(2) of the Employment Act,

2007 since the reason put forth by the respondent that the claimant breached the terms of the contract is malicious and untrue. Put another way, there was no substantive justification for the termination of the Claimant's employment.

He further relies on the case of **Alphonse Machanga vs Operation 680 limited (2013)eKLR**, the court summarized the legal fairness requirements set out in

Section 41 of the Employment Act as follows:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered.*
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;*
- c) That the employer has heard and considered any explanations by the employee or their representatives;*
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.*

The respondent in his written submission dated 14th February, 2017, reiterates his case. She denies unlawful termination of the employment of the claimant and submits that the claimant was accorded a chance to dispute the correctness of the accusations made against him before summary dismissal. He did not and is therefore not entitled to the claim or relief sought. It was therefore valid, reasonable and procedural for the respondent to terminate his employment.

The respondent further seeks to rely on the authority of **Leonard Nyongesa vs Derrick Ngula Righa, Mombasa CACC NO. 168 of 2008** where Kasango, J. observed as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

The claimant, in a Claimant's Response to the Respondent's Submissions dated 19th February, 2017 reiterates his case of unfair and unlawful termination and cites the following particulars;

The termination letter attached to the claimant's claim page 11 and dated 1st June, 2016 does not;

- a. Make any reference to any disciplinary hearing that the claimant was subjected to;*
- b. It does not mention any processes used to terminate the claimant.*
- c. The said letter was issued on 1st June, 2016 terminating the claimant on the same date.*
- d. It does not make any references to any show causes issued to the claimant prior to his termination;*

Further, the claimant submits as follows;

- a. He was never issued with notices to show cause as alleged by the respondent and/or heard prior to his termination.*
- b. The respondent's purports they issued a notice to show cause to the claimant. Your lordship, a keen look at the show cause letter which the claimant denies receipt of the same or any at all annexed to the respondent's reply depicts malice and dishonesty on the face of it;*

c. The contents in the show cause letter dated 20th May, 2016 are different from those of the termination letter dated 6th June, 2016;

d. In the further list of documents of the respondent, the show cause letter denotes to an alleged absence of duty, while the termination letter refers to the claimant interference with security and lost (sic) wheels of motor vehicles.

e. Furthermore, no signature of the claimant appears to show that he actually received the show cause letter dated 29th May, 2016.

f. The claimant denied receipt of the show cause letter and onus of proof of receipt thereof is placed on the respondent. The respondent failed to proof;

The claimant further submits that having not received the show cause letter, this has no effect as he did not have any reason to believe that he had absconded duty. Again, and as a further shadow to the respondent's case, the claimant observes and submits that it was not possible that he was responsible for loss of tyres on 22nd June, 2016 when indeed his employment had been terminated on 1st June 2016. It is his case that the respondent's case remains unproven as follows;

- i. There is no evidence of the duties the claimant was employed to perform
- ii. No report was made (to the police?) in regard to the two missing tyres allegedly lost on 22nd June, 2016, at the company premises
- iii. There is no acknowledgment of a payment of Kshs.23,000.00 for the lost tyres as claimed
- iv. There is no evidence that the claimant acted in excess of his scope of duty by signing a security book releasing the night guards, which is denied, and resulting in the loss of two lorry tyres.

The claimant's case in the circumstances overwhelms that of the respondent. The claimant in his written submissions casts a shadow on the respondent's case in that he denies receipt of the notice to show cause or even that he was subjected to any disciplinary process, or at all. Again, the claimant brings out a case of allegations of having interfered with the security arrangements of the respondent on 22nd June, 2016 when indeed he was out of employment by virtue of a termination on 1st June, 2016.

The claimant further submits that the respondent's case is not proven and largely based on falsehoods and concoction of evidence and data. I agree. I therefore find a case wrongful, unfair and unlawful termination of the employment of the claimant by the respondent. And this answers the 1st issue for determination.

With a finding of unfair and unlawful termination of employment, the claimant becomes entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

- i. A declaration be and is hereby issued that the termination of the employment of the claimant by the respondent was wrongful, unprocedural, unfair and unlawful
- ii. One (1) month's salary in lieu of noticeKsh.12,000.00
- iii. Leave dues for two yearsKshs.16,800.00
- iv. Service pay.....Kshs.12,000.00
- v. Ten (10) months compensation for unlawful termination of

employmentKshs.120,000.00

Total of ClaimKshs.160,800.00

6. The respondent be and is hereby ordered to issue a certificate of service to the claimant in fourteen days

7. The cost of this claim shall be borne by the respondent

Delivered, dated and signed this 23rd day of March 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimant.

2. Mr. Wabomba holding brief for Mr. Kibii instructed by Terer &Company Advocates for the respondent.