



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 135 OF 2015

(Before D. K. N. Marete)

VINCENT KIPCHUMBA TUM.....CLAIMANT

VERSUS

JALARAM MERCHADISE LIMITED.....RESPONDENT

JUDGEMENT

This matter was brought to court by way of a Memorandum of Claim dated 2nd May, 2016. The issue in dispute is therein cited as;

Compensation for wrongful, unlawful, unprocedural and unfair termination of employment.

The respondent in a reply to Memorandum of Claim dated 12th June, 2015 denies the claim and prays that the same is dismissed with costs.

The claimant's case is that on 2nd June, 2002 he was employed by the respondent as a conductor at a salary of Kshs1,200.00 he rose through the ranks to the position of driver and as at the time of termination on 15th December, 2013 he earned a gross salary of Kshs.9,500.00.

The claimant's other case is that he served the respondent dedicatedly, unsavory and without any meaningful or lawful warning until the date of dismissal. He was dismissed on grounds that he was drunk, rude and lazy. This termination was summary and unprocedural and a violation of section 41 (1), 44 (4) and 45 (2) of the Employment Act as follows;

6. The Respondent violated Sections 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 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 contends that the respondent never explained to him precisely the reasons for the intended dismissal.

7. Section 44 (4) of the Employment Act lists matters which amount to gross misconduct and which would entitle an employer an employer to summarily dismiss an employee; however the same provides that an employee should be given an opportunity to dispute the truthfulness of the accusation. The Claimant submits that the Respondent did not give him a chance to dispute the correctness of the accusation before dismissing him.

8. **THAT** the claimant avers that the allegations by the Respondent that he was lazy, rude and drunk was malicious and well calculated to form a basis to unlawfully terminate him from employment on the following grounds:-

- i. No evidence of investigation was availed to the Claimant;
- ii. No notice to show cause was availed to the claimant to dispute the said allegations.
- iii. Particular of the alleged drunk and rude practices as alleged by the respondent were never availed to the Claimant;
- iv. The Claimant was never accorded a hearing nor an opportunity to call in his defence;
- v. The Respondent had in the past 10 years while in duty entrusted the claimant with most of the work therein and no warning of being drunk
- vi. and being rude and lazy was ever made to him.

9. **THAT** the Claimant avers that the termination was unfair because the Respondent did not act in accordance with justice/equity and it failed to prove that the reason for termination was valid thus violated Section 45(2) of the Employment Act 2007

He prays for;

1. A Declaration that the termination of employment was discriminative, malicious, unlawful, unfair, unprocedural and a fundamental violation of the right of the Claimant and thus the claimant is entitled to compensation.
2. A Declaration that the claimant is entitled to compensation for the loss of prospective future earnings for 24 years base on the last Gross salary earned;
3. A maximum compensation as per Section 49 (c) of the Employment Act and section 15 of the Labour Institutions Act;
4. A Certificate of Service as per Section 51 of the Employment Act;
5. Costs and interest of this suit

The respondent's case is that the claimant was employed at her shop as a casual labourer and was allocated duties at the hardware shop. His pay was casual and dependent on work done and completed before the end of the day.

The respondent's further case is that the claimant's services began in 2009 and this was always limited to a loader at the hardware shop and not a driver as claimed.

Further, it was a term of service the claimant would be diligent at his work, be of good conduct and respectful but on the contrary, the claimant became rude, was

negligent and lazy often reporting to work while drunk and could no longer perform his duties. He was therefore summarily dismissed.

The respondent's other case is the claimant had had several verbal warnings and even counseling session and was remorseful and promised to change but did not. This led to his dismissal.

Again, the respondent contends that termination of employment was properly within the provisions of the Employment Act, further that indeed justice and equity was employed at all material times for the

following reasons:-

- a) *The conduct of the claimant warranted him to be summarily dismissed in accordance to Section 40 of the Employment Act.*
- b) *Prior to termination on 17/6/2013 the claimant was given warning in writing and all informed of his conduct.*
- c) *That all through such period of employment respondent gave him a chance to proceed with his duties in the interest of justice despite his said behavior.*
- d) *The with his continued gross misconduct despite the aforesaid engagements by the respondent which included counseling by management in a bid to make him reconsider his ways, the respondent had no other option but to terminate employment by summarily dismissal*
- e) *That at the time of such summary dismissal the claimant was informed in writing of his gross misconduct after which he even wrote an apology letter and in the circumstances understood allegations against leveled him, and which allegation he did not rebut.*

The issues for determination therefore are;

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

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent wrongful, unfair and unlawful. The claimant in his written submissions dated 8th March, 2017 sets out and reiterates his case as pleaded. This, however, do not come out to establish a case of unlawful termination of employment. Through and through, the claimant has not established a concrete case of unlawful termination as claimed.

The respondent in her written submission dated 20th February, 2017 faults the claimant's for being hollow and unsubstantiated. She reiterates her case that the claimant was dismissed for his failings and misconduct at the work place which fact is evidenced by the list of documents dated 8th July, 2015. I therefore find a case of lawful termination of the employment of the claimant by the respondent and hold as such. And this answers the 1st issue for determination.

The 2nd issue is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, he is disentitled to the relief sought.

I am therefore inclined to dismiss the claim with costs to the respondent. And this answers all the issues for determination.

Delivered, dated and signed this 26th day of April 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa and Mr. Instructed by Mwakio Kirwa & Company Advocates for the Claimant

2. Mr. Mutei Instructed by Tom Mutei & Company Advocates for the Respondent.