



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO. 220 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 31st May, 2017)

PETER MATATA CLAIMANT

VERSUS

MIDLAND ENERGY LIMITEDRESPONDENT

JUDGMENT

1. The Claimant filed suit on 2nd March, 2015, and amended on 18th July, 2016, through the firm of Maina Wachira & Company Advocates seeking damages for unfair and unlawful termination.
2. He states that he was employed by the Respondent to distribute the Respondent's gas products at an agreed monthly salary of Kshs. 20,000/=.
3. That on the 8th September, 2014, the Claimant received a letter of summary dismissal claiming that he ran a parallel business to that of his employer causing a conflict of interest contrary to his employment contract. The Claimant contends that these allegations were false as the business in question was owned by a company known as Unique Gas Supplies Limited which is not owned by the Claimant.
4. The Claimant further alleges that he was dismissed without notice, not paid in lieu of notice, not paid for days worked in September 2014 and that statutory dues deducted were never remitted to the respective bodies.
5. He states that he sought intervention from the Ministry of Labour, Social Security Services and despite demands from the Ministry, the Respondent has failed to settle his dues. He prays for the Claim to be allowed.
6. The Respondent filed a Memorandum of Reply through the firm of Okao and Company wherein they admit the employment relationship and that the Claimant was dismissed summarily.
7. They however deny that the grounds of termination were frivolous and vexatious because on the Claimant's own admission he was using his own company to transact his own business instead of the Respondent's.
8. The Respondents deny that they owe the Claimant any money and any money not paid to him was on account of his own failure to collect it. That all statutory deductions were remitted to the relevant bodies

and the Respondent is not liable as such. The Respondent prays for the claim to be dismissed with costs.

9. The parties led evidence in accordance with their pleadings and proceeded to file written submissions.

10. The Claimant submitted that termination was unfair as the procedure set out in Section 43(1) and 45(4) (b) of the Employment Act was not followed. He states that the reason cited in his termination letter was that he was running a parallel business to that of the Respondent causing a conflict of interest. The Claimant denied owning any business and as such the allegation was frivolous and vexatious.

11. The Claimant further submits that he was not taken through fair procedure on termination. He states that this was unlawful and cites the case of **Walter Ogal Anuro vs. Teachers Service commission 2013 eKLR**; wherein it was 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.”

12. The Claimant holds the position that the Respondent did not have a reason for dismissal and neither did they follow procedure in effecting the termination.

13. He further submits that termination was unlawful as procedure was not followed which fact was confirmed by the Respondent’s witness during the hearing. He relied on the case of **Elias Benedict Mahaga vs. Northern Nomadic Disabled Persons Organization (2016) eKLR** where the Court stated inter alia that:

“This Court has held on several cases that once an employee has been suspended, such is to serve as a removal from the office of the employer to enable the employer conduct investigations and where found culpable such an employee must be recalled for hearing and where such does not yield sufficient explanations a show cause must issue for the employee to know what charges they are faced with and for the employee to organize their defence... upon suspension, a show cause is issued upon an investigation of allegations against an employee The subject employee must answer to the show cause and where the response is not satisfactory , then the employee must be called to a hearing.”

14. It is the contention of the Claimant that none of the criteria set out in the aforementioned case was followed and as such the termination should be declared unlawful. The Claimant prays for the reliefs sought in the Claim to be allowed as drawn.

15. The Respondent submit that the process followed in terminating the Claimant was substantially fair and that due process was followed as stipulated under Section 41, 43 and 45 of the Employment Act and as such the suit ought to be dismissed with costs.

16. I have considered evidence and submissions of both parties and issues for determination are as follows:

1. Whether there were valid reasons to warrant termination of the Claimant.

2. Whether due process was followed before Claimant was terminated.

3. What remedies to grant in the circumstances.

17. On the 1st issue, the Claimant was served with a letter of summary dismissal dated 8/9/2014. The reasons given for the dismissal is as follows:

“SUMMARY DISMISSAL: CONFLICT OF INTEREST

We refer to previous deliberations on the above subject matter and your subsequent feedback on the same. Investigations have revealed that you are running a parallel business with your employer which causes conflict of interest. This is contrary to the agreement you signed and the letter of offer clauses. Consequently, the company has decided to dismiss you from service in accordance with the provisions of Midland Energy Human Capital Policies and Employment Act 2007 on conduct of employees.....”.

18. This letter does not however state the business name or company under which Claimant is carrying out the parallel business.

19. The Respondents in their evidence have averred that the Claimant admitted to carrying out a parallel business as per paragraph 5, 6 and 7 of Memorandum of Claim.

20. However, 5, 6, and 7 of the claim deny the Claimant did any business in conflict with the Respondent and annexed PM3 - a copy of business permit of the business in question which shows that the said business called Unique Gas Supplies was issued with a business permit in 2014 and carried out in Dandora Phase IV. There is no indication that the Claimant was registered owner of the business in question.

21. The contention that the Claimant did alternative business which caused conflict of interest is therefore not proved.

22. Under Section 43 of Employment Act:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

23. The reason/s the Respondents rely on for dismissal must be real reasons and not reasons imagined or emanating from suspicion.

24. In the case of the Claimant, the reason the Respondent relied on to dismiss Claimant is imagined or based on suspicion and so the same is not valid.

25. On the issue of due process, the process envisaged is as provided for under Section 41 of Employment Act which states as follows:-

“(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

26. This process is also envisaged where there are valid reasons for dismissal.

27. In the case of the Claimant, this process was also not followed. It therefore follows that the dismissal

of the Claimant was unfair and unjustified. This is in tandem with provisions of Section 45 (2) of Employment Act 2007 states as follows:

2. "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; and

c. that the employment was terminated in accordance with fair procedure.

28. It is therefore my finding that the Claimant is entitled to the following remedies:

1. 1 months' salary in lieu of notice = 20,000/=;

2. 1 year leave not taken = 20,000/=;

3. Unpaid salary for 8 days worked = $8/30 \times 20,000 = 5,333/=$;

4. 12 months' salary as damages for unlawful termination = $12 \times 20,000 = 240,000/=$.

Total 285,333/=

5. Plus costs and interest payable with effect from the date of this judgment.

Read in open Court this 31st day of May, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kagunda for Claimant – Present

Orwa holding brief for Okao for Respondent