



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO. 221 OF 2015

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

CORNEL OTIENO OTIENO 1ST CLAIMANT
DOMINIC NYANGENA MAGETO2ND CLAIMANT

VERSUS

MIDLAND ENERGY LIMITEDRESPONDENT

JUDGMENT

1. The Statement of Claim dated 5th March, 2015 filed by M/S Maina Wachira and Co. Advocates cites unfair and unlawful termination as the issue in dispute.

2. From the Statement of Claim, the Claimants sought :

- i. A declaration that the Claimants' dismissal was irregular, unfair and in breach of the law;*
- ii. A sum of Kshs. 10,420/= for each of the Claimants being one month's salary in lieu of notice as well as interest thereon;*
- iii. Total deductions made from the Claimants' salary in the form of NHIF/NSSF contributions for the entire period of employment being Kshs. 11,340/= each and interest thereon;*
- iv. The Claimants' outstanding one year leave and interest thereon;*
- v. Gratuity for the period of employment and interest thereon;*
- vi. General damages for breach of contract and wrongful dismissal calculated at an amount equal to 12 months' salary under Section 49(1)(c) of the Employment Act and interest thereon;*
- vii. Punitive damages for victimization of the Claimants by the Respondent;*
- viii. Cost of this suit and interest thereon;*
- ix. Any other/further relief that this Honourable Court may deem fit to grant in interest of justice;*

Claimants Case

3. On or around the 14th of September, 2012 and 21st September, 2012 respectively the Respondent herein employed the Claimants as Truck Loaders at an agreed monthly salary of Kshs. 10,420/=.
4. On the 2nd of January, 2014 the Claimants received letters of dismissal claiming that they knowingly loaded two extra cylinders of gas into the truck Registration Number KBS 409D, which was an attempt to steal from their employer but Claimants stated that the said ground of termination is frivolous and vexatious as the said cylinders had been improperly counted and loaded onto the said truck as an honest mistake.
5. That the termination of the Claimants' employment by the Respondent was done in lieu of notice in contravention of Section 36 of the Employment Act and the Claimants have thereby lost their salaries, which they would have derived from continuing in the Respondent's service, and have been unable to obtain their employment, remaining unemployed from that date to the date of filing their claim.
6. The Claimants claim that their monthly salary had been subjected to statutory deductions as NHIF and NSSF contributions, which were meant to be channeled into the Claimants' Health Insurance and retirement benefits packages respectively. However records from the NHIF and NSSF department reveal that this was not complied with by the Respondent.
7. The Claimants sought the intervention of the government through the Ministry of Labour, Social Security and Services and despite demands made to the Respondent by the Ministry to settle the Claimants' dues, the Respondent has failed to heed to the call.
8. The Respondent did not respond to a demand letter written by the Claimants' advocate followed by a reminder requesting it to make good their entitlements.
9. They pray that the Court awards as prayed.

Respondents Case

10. In response the Respondent through the firm of Okao and Company Advocates filed a Memorandum of Reply dated 18th June, 2015.
11. The Respondent denied that the termination of the Claimants' was frivolous and vexatious because the Claimants indicated and admitted that they were using their own company to transact their own business instead of the Respondent's as per paragraph 5, 6 and 7 of the Memorandum of Claim.
12. The Respondent averred that the Claimants were invited to come and pick their salary for the days worked and notice after reconciliation at labour office but they declined.
13. The Respondent averred that all the statutory deductions as NHIF and NSSF contributions were channeled into the Claimants' benefits.
14. The Respondent also denied breaching Claimants' rights and indicates that they followed the due process of termination and treated the Claimants fairly and in a human way during their employment and at the point of termination of the same despite the Claimants' various shortcomings and wrongdoings. They indicate that the Claimants were given many opportunities to improve their performance but failed to do so.
15. The Respondent prays that the Court upholds its action to terminate the employment contract of the Claimants on grounds of gross misconduct and poor work performance and dismiss the Claimants' claim for unfair termination and compensation. That in view of the Claimants' conduct and subsequent refusal to abide by Section 47(1) of the Employment Act they be condemned to meet the costs of this suit.

Reply to Statement of Response

16. The Claimants responded to the Memorandum of Reply by filing a response to Memorandum of Reply dated 10th July, 2015 whereby they reiterate their case and deny that they were ever invited to receive their benefits by the Respondent as alleged.

Submissions

17. The Claimants submit that the Respondent's Memorandum of Reply as well as the witness statement of Respondent's employee, Augustus Kimondo dated 22nd June 2016 confirm the employment dates of the Claimants as well as the termination date.

18. They submit that the Respondent did not provide them with a written contract of service neither did it produce a written contract of employment with the Claimants as required by Section 9(2), 10(6) & (7) of the Employment Act;

“...the employer is required in mandatory terms, to be responsible for drawing the employment contract and not only to keep it but also to produce it in any legal proceedings.”

19. The Claimants submit that they served the Respondent with loyalty and diligence within the period of employment. That no incident of misbehavior or neglect at work was ever reported against them.

20. The Claimants cite the case of **David Kipkosgei Muttai vs. Green Palms Academy (2014) eKLR**, where Court held that unfair termination occurred where the employment was terminated without a valid and fair reason and without following a fair procedure.

21. The Claimant submits that a reason for termination can only be valid if it is in line with Section 43 & 45 of the Employment Act. They particularly cited Section 43(1) of the Act:

“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.”

22. The Claimants submit that the termination of their employment was done unfairly as their letter of summary dismissal dated 31st December 2013 attached to the Claimants' list of documents as “CD1” did not have sufficient grounds for their summary dismissal as it stated the reason being that the Claimants had knowingly loaded two extra cylinders with gas into truck KBS 409D and aver that this would be unreasonable since the truck had to go for checking after they had loaded.

23. In cross examination the Respondent admitted having no evidence to prove that the Claimants had knowingly loaded the two extra cylinders and hence the reason for the Claimants' dismissal was not justified.

24. The Claimants therefore submit that the Respondent's reason for their termination did not meet the requirement of Section 43(1) of the Employment Act hence termination was unfair within the meaning of Section 45 of the Act.

25. The Claimants submitted that they were not taken through a fair procedure of termination as the Respondent confirmed at hearing that he simply handed them with the letter of summary dismissal and the Claimants were not accorded an opportunity to defend themselves. That the Respondent does not have evidence to show that he ever invited the Claimants to a hearing.

26. They cited the case of **Walter Ogal Anuro vs. Teachers Service Commission (2013) eKLR** as applied in the case of **Emily Muhonja vs. Ken-Knit (K) Limited (2016) eKLR** where it was held as hereunder;

“...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.”

27. The Claimants therefore submitted that there was no valid and fair reason for their termination and that the Respondent did not follow a fair procedure of termination hence the Claimants’ termination was unfair.

28. In defining wrongful termination the Claimants cited the case of **David Kipkosgei Muttai vs. Green Palms Academy (2014) eKLR** where the Court stated that:

“Dismissal is wrongful when the terminating party breaches Section 36 of the Employment Act or the contract of employment by failing to serve notice of termination or serving a shorter notice than the one stipulated.”

29. That the Respondent terminated the Claimants’ contract of employment without serving one month notice and the Respondent has not controverted it anywhere hence the termination is in direct contravention of Section 35(1) (b) and (c) of the Employment Act which expressly demands the issuance of notice by either party terminating a contract of employment.

30. They cited the case of **David Kipkosgei Muttai vs. Green Palms Academy (2014) eKLR** where the Court strongly asserted that:

“This Court has pronounced itself severally that an employer has the same right as an employee to terminate employment contract under Section 36 of the Employment Act without citing any reason thereof. The basis of the foregoing is premised on the fundamental principle of freedom of contract. The only legal obligation is that when the terminating party fails to serve the notice provided for under the contract of service or section 35(5) of the Act he or she must pay salary or wages in lieu of the notice.”

31. The Claimants further submitted that the Respondent admitted that no payment in lieu of notice was ever given to the Claimants as per the testimony of the Respondent’s agent Augustus Kimondo where he confirmed in cross examination that he did not have evidence to prove that he ever invited the Claimants to collect their payment in lieu of notice. Hence their termination by the Respondent was wrongful.

32. That the Claimants’ termination was unlawful as it did not live up to the laid down procedures of termination as provided in the law. They relied on the decided case of **Elias Benedict Mahaga vs. Northern Nomadic Disabled Persons Organization (2016) eKLR** where the Court stated *inter alia* that;

“This Court has held in 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 defense. ... 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.”

33. The Claimants therefore submitted that their termination was unlawful and it does not meet the requirements of the law and prayed they be awarded as prayed and Respondents bear costs of the suit.

Respondents submissions

34. The Respondent on its part submit that the issue giving rise to this claim arose where the Claimants

were requested to load a specified number of gas cylinder on a truck for deliveries away from the premises and the two conspired to load two extra cylinders in an apparent attempt to steal the same from the Respondent. When the incident was discovered the two Claimants were called for disciplinary hearing at Human Resources office and asked to explain themselves. The employer considered their explanation and found them to be inadequate and further decided to terminate their employment on grounds of attempted theft.

35. That the Claimants were given adequate opportunity to defend themselves from the accusations levied against them and the accusations of attempted theft against them were proved beyond doubt and the right procedure was followed in regard to the termination of their employment. To that effect they were given their letters of termination of employment the following day.

36. The Respondent submitted that the matter was referred to the Ministry of Labour and in the joint conciliation meeting resolved that the Claimants be paid a total sum of Kshs. 19,826/= each consisting of their arrears of underpayments as evident by attachment number "CD2" in the Memorandum of Claim but the Claimants declined to take the payment then brought the suit. Since due process was followed and there was justification for the employer's action, no payment in lieu of notice was given.

37. That the Claimants did render oral testimony and also proceeded to adopt as evidence the documents attached to the Claim and were hard pressed to explain the reason why they loaded more than the required or instructed number of cylinders on the truck contrary to their employer's instructions.

38. The Respondent submitted that what is in contention is whether the Claimants were dismissed from work fairly and procedurally. That their evidence was uncontroverted and unchallenged by the Claimants.

39. That the Respondent did not terminate the Claimants' employment on wild and unsubstantiated allegations that they intended to steal from their employer. That the Claimants were accorded a fair hearing before a decision to terminate their employment was arrived at. That the Conciliator did find in favour of the employer and recommended that appropriate terminal benefits for summary dismissal be made but the Claimants declined to adhere to the recommendation of the Conciliator.

40. The Respondent submitted that the evidence tendered shows that the Claimants' termination of employment process used by the Respondent that culminated to summary dismissal was as per the applicable employment laws and constitutional rights of the Claimants.

41. They further submit that the process followed in dismissing the Claimants was legally proper and procedural and that they have validated and given lawful reasons for the termination. They urged this Court to relook at Section 41(1) of the Employment Act which states:

"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."

42. The Respondent submitted that they complied with Section 41(1) by issuing a dismissal letter and they informed the Claimants of the meeting to show cause and were given the reasons for the consideration of termination of employment explained to them having been caught in the act and that the Respondent also accorded them a hearing. That there were issues warranting dismissal existing at the time of termination of the employment.

43. That the Respondent has tendered satisfactory evidence to prove on a balance of probability that indeed the Claimants had acted in a way to warrant termination of their employment services. That they have shown that there were sufficient or reasonable grounds to terminate the employment services of the Claimants. They cited Section 44(3):

“Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service” and Section 44(4) (g) “an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property.”

44. They submit that the Employment Act overemphasizes that termination of employment should be fair and Courts are obligated to find unfair termination of employment in situations *inter alia* where:

- a) ***The employer has failed to prove that the reason for termination was valid.***
- b) ***The employer has failed to prove that there is a fair reason for termination relating to the employee’s conduct, capacity or compatibility or that the fair reason is based on the employer’s operational requirements.***
- c) ***The employer fails to prove that a fair procedure was used prior the decision to terminate the employment of the employee.***
- d) ***The employer in all circumstances of the case did not act in accordance with justice and equity in terminating the employment.***

45. The Respondents submitted that they did abide by the provision of Section 45(5) of the Employment Act which states;

“In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider:

- a) ***The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;***
- b) ***The conduct and capability of the employee up to the date of termination;***
- c) ***The extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under Section 51 and the procedural requirements set out in Section 41;***
- d) ***The previous practice of the employer in dealing with the type of circumstances which led to the termination; and***
- e) ***The existence of any previous warning letters issued to the employee.”***

46. That the Respondent did offer to make appropriate payments as recommended by the Conciliator and misapplied the law and facts in regard to the Claimant herein. That they did pay them their salary for days worked and what is outstanding is the underpayments and the leave days due which amount to Kshs. 19,826 each and they should not be blamed for Claimants’ refusal to take the sums as per the Conciliator and noted that the Claimants have not specifically pleaded in their pleadings for the claim but tabulated the few in the prayers.

47. They further submit that this is not a proper pleading worthy of considering and pray that the suit be dismissed with costs.

48. Having considered submissions from both parties, I first down issues for determination as follows:

1. ***Whether there were valid reasons to warrant dismissal of the Claimants.***

2. Whether due process was followed.

49. On the issue No. 1 above, the reasons given for dismissal of Claimants was theft of 2 cylinders. The Claimants explained the circumstances under which the 2 cylinders were found in the truck and their evidence is that it was an honest mistake and in any case the cylinders were to be recounted at an exit gate and so this mistake would still have been detected.

50. There is no proof that these cylinders were intended to be stolen as the recounting would have detected the miscount.

51. Under Section 43 (1) of Employment Act:

“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.”

52. The Respondents failed to prove this reason of theft and I find there was no valid reason to warrant termination.

53. On the 2nd issue of due process, Section 41 of Employment Act provide 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”.

54. A hearing is necessary in this case. Even in case of summary dismissal, there is need to explain to the employee reason for dismissal and give them a chance to respond. This is the position taken by this Court in several cases.

55. I find the termination of the Claimants was unfair and unjustified as provided for under Section 45 of Employment Act which provides as follows:

(1) “No employer shall terminate the employment of an employee unfairly.

(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.

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that

he has been unfairly terminated.

(4) A termination of employment shall be unfair for the purposes of this Part where:

(a) the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider:

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(e) the existence of any previous warning letters issued to the employee.

56. It is for this reason that I award the Claimants their prayers and order that the Respondent pay the Claimants as follows:-

1. 1 month's salary in lieu of notice Kshs. 10,420/= each.

2. The claimants' outstanding one year leave at Kshs. 10,420/= each and interest thereon.

3. Service pay being 15 days for each year served being $15/30 \times 10,420 = 5,210/=$ for each Claimant

4. General Damages for breach of contract and wrongful dismissal at an amount equal to 12 months' salary under section 49 (1) (c) of the Employment Act being $12 \times 10,420/=$ each 125,040/=

Total for each Claimant = 151,000/=

5. The Respondent to pay costs of this suit and interest at Court rates 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

Miss Orwa holding brief for Okao for Respondent – Present