



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

CAUSE NO. 2265 OF 2014

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IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2265 OF 2014

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

DAVID NYANJUI MBURU..... CLAIMANT

VERSUS

SUNMATT LIMITEDRESPONDENT

JUDGMENT

1. Before the Court is a Memorandum of Claim dated 18th December 2014, where the Claimant prays for a judgment against the Respondent for:

a) A declaration that the Claimants' dismissal from employment was unfair, illegal and un-procedural;

b) An order for the Respondent to pay the Claimant terminal dues and compensatory damages in the sum of Kshs. 918,362.50 particularized as

(i) One months' pay in lieu of notice..... Kshs 33,395.00

(ii) Compensation for wrongful and unfair termination of employment calculated at twelve months gross

salary being 12 x 33,395.00Kshs 400,740.00

(ii) Service pay for 5 years computed at 15 days

for every completed year of service Kshs 83,487.50

(iv) Damages for trauma suffered by the Claimant as result of arrest by police under the

Respondents' instigation calculated at twelve

months gross salary being 12 x 33,395 Kshs 400,740.00

TOTAL CLAIM..... Kshs. 918,362.00

c) Interest on (b) above from the date of filing this claim until payment in full.

d) Costs of the claim.

2. The Claimant herein was employed by the Respondent as a Driver from 13th February 2007 where he carried out his duties dutifully and diligently up to 23rd January 2012 when he was unlawfully terminated.

3. The Claimant states that he was accused of having stolen "assorted cloth materials", was arrested by the police, locked up and had his house ransacked and subsequently detained for the night of 26th December 2011 only to be released on the 27th December 2011 with no charges having been preferred against him.

4. The Claimant states that he was suspended vide letter dated 28th December 2011 for a period of two weeks which did not indicate a reporting date, and later received a letter dated 23rd January 2012 dismissing him on account of absconding of duty.

5. He states that he was never notified as to the outcome of the allegation investigation nor was he given the opportunity to be fairly heard and defend himself. He states that his dismissal was malicious, illegal, and un-procedural but also contrary to the Laws of Natural Justice. He states that these violations failed to comply with the Law specifically the provisions of Section 41 of the Employment Act 2007 as he was condemned unheard.

6. He states that the Court should award as prayed.

7. The Respondents have filed a Memorandum of Reply dated 27th March 2015.

8. The Respondent states that the Claimant was employed as a Driver on or about the 1st of July 2007 where he was working as a Driver. Further they state that his salary was computed at 29,328.00 and not 33,395.00 as alleged and produces a copy of the Claimant's appointment letter and pay slip confirming the position and pay.

9. The Respondent submits that the Claimant was asked to show cause why disciplinary action should not be taken against him which explanation was to reach him within 7 days. The Claimant did write a letter dated 3rd January 2012, received by the Respondent on the same date, and suspended him for a two week period which was indicated on the letter and as such the Claimant ought to have reported back on the 11th of January 2012.

10. The Respondent states that as the Claimant did not report he was summarily dismissed which was the sole reason for his dismissal. They state that their actions were well within Section 44(4) (a) of the Employment Act warranting the Claimant's dismissal from employment.

11. The Respondent state that they acted within the law and allegations of malice, illegal and un-procedural dismissal are totally denied. They state that the present claim is ill-advised and the Claimant is not entitled to any of the reliefs sought, further that as a contributor to National Social Security Fund, he is not entitled to service pay.

12. They pray that the claim be dismissed with costs.

Submissions

13. The Claimant submits that the suspension letter of 28th December 2011 did not specify a resumption date, but was awaiting a phone call advising him as to the date to resume duty. He submits that none came. In open Court, the Claimant testified that he was also not paid his last month salary.

14. They submit that the results of the investigations remain unknown and as no effort was made to contact him and no charges preferred, the actions remain malicious and unfair.

15. The Claimant submits that the Respondent did not take any steps to seek him out asking why he did not resume duty and as such his dismissal was unfair. He cites the case of **Geoffrey Anjere vs. Unique Suppliers Limited [2015] eKLR** which held that before an employer terminates an employee on grounds of absconding duty, the employer was required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. They urge the Court to be guided by the same.

16. The Claimant submits that he was not afforded a hearing and that his termination letter was titled that he was terminated from employment due to gross misconduct. He goes on to submit that procedure as laid out in Section 41 should have been followed notifying him of the reasons for termination as well as hearing him and considering any explanation he brings forth.

17. They cite the case of **Abdi Halake Garamboda vs. Fidelity Security Services Limited [2015] eKLR** where it was held that even in cases of absconding duty an employee was still entitled to a hearing.

18. They urge the Court to consider these factors and declare that his termination was unfair and order for payment of his terminal dues.

19. The Respondents have filed their submissions dated 16th January 2017.

20. The Respondent rely on their pleadings and reiterate that the dismissal of the Claimant was due to failure to resume work after absconding at the lapse of the suspension period. They submit that his submission that he was awaiting a phone call was one that they heard for the first time at trial and cannot be verified.

21. The Respondent also submits that the allegation that his last salary was unpaid was not pleaded in his claim and as parties are bound by their pleadings should not be adjudicated upon by the Court. To this end they rely on the matter of **IEBC & ANOTHER vs. STEPHEN MUTINDA MULE & ANOTHER CA NO 219 of 2013** where this Court cited the decision of the Supreme Court of Malawi in **MALAWI RAILWAYS LTD vs. NYASULU [1998] MWSC 3** where the role of the trial Court in a jurisdiction of a legal system similar to ours was encapsulated as follows:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic pleadings... for the sake of certainty and finality , each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves.....”

22. They submit that had the Claimant resumed work, he would have been informed as to the outcome of the investigation and if any further investigation was to be taken against him. They submit that the action to dismiss was well within the law, and they also rely on Section 43(2) of the Employment Act 2007 which states that:

“the reason or reasons for termination of a contract are the matters that the employer at the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee”.

23. They submit that the Claimant does not deny the receipt of the letter of summary dismissal and he did not ask the Respondent to reconsider its decision to dismiss him. He submits that the Claimant is not entitled to terminal dues and damages as prayed.

24. They submit that should the Court find the Respondent liable which is denied, they ask the Court to consider the provision of Section 49 as read with Section 50 of the Employment Act, 2007. The consideration on the damages payable were clearly laid out in the case of **CMC AVIATION LIMITED vs. CAPTAIN MOHAMMEED NOOR** where the learned judges therein held as follows:

“40. We now turn to the award of US\$108,000 being twelve months gross salary as compensation for unlawful loss of employment. In arriving at that sum, the trial Court computed the Respondent’s monthly salary at US\$9,000, although we have already established that the Respondent’s last salary was US\$5,075. We have already set out the remedies for wrongful dismissal and unfair termination as stipulated under Section 49 of the Act. The trial Court did not state why it opted to give the remedy provided under Section 49 (1) (c) that is, twelve months gross salary, and not the other remedies under Section 49 (1) (a) or (b). The Court should have been guided by the provisions of Section 49 (4) but the trial Judge said nothing about the reasons that led him to exercise his discretion in the manner he did. Although the Respondent had prayed for an award of “damages” in the sum of US\$108,000 for unfair and wrongful termination of employment, it appears to us that in giving that award the trial Court was not awarding damages as sought. The Court stated that it was twelve months gross salary which is what Section 49 (1) (c) provides as one of the remedies for wrongful dismissal.

41. The Respondent was serving a two year contract of employment which was terminable by one month’s notice or one month’s salary in lieu of notice. Had the appellant complied with the requirements of Sections 41 and 45 of the Employment Act, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure the dismissal was found to be unfair, which we agree. Taking all this into consideration, we think that the Respondent was not entitled to twelve months gross pay as compensation for wrongful dismissal. In our view, since the contract of employment was terminable by one month’s notice, we believe that an award of one month’s salary in lieu of notice would have been reasonable compensation. The trial Court awarded that, albeit at a higher rate of US\$9000 instead of US\$5,075 plus twelve months salary amounting to US\$108,000. We hereby set aside the award of US\$9000 as one month’s pay in lieu of notice and substitute therefore US\$5075. The award of US\$108,000 is set aside in its entirety”.

25. They therefore submit that the Claimant’s employment was terminable by one months’ notice or one months’ salary in lieu of notice, as stipulated in paragraph c of his letter of appointment. They submit that they acted within the law and that the Claimant has failed to prove the claim. They ask the Court to dismiss the claim.

26. Having considered the evidence and submissions of both parties, this Court sets down the issues for determination as follows:

- 1. Whether there were valid reasons to dismiss the Claimant.***
- 2. Whether due process was followed before dismissal.***
- 3. What remedies to award in the circumstances.***

27. From the letter of dismissal served upon the Claimant dated 28/12/2011 states as follows:

“RE: GROSS MISCONDUCT

It has been alleged that you were involved in theft of company property in terms of assorted cloth materials measuring 137 meters worth Kshs.61,650 on 26th of December 2011. These clothes

were ferried in the company's vehicle registration number KAW 828V Isuzu canter of which you were the driver and the said clothe materials were delivered at the house of your turn boy Mr. Evans Githuo according to our internal investigations which were carried out.

This offence is punishable by dismissal from services of the company. In this regard you are required to explain in writing why disciplinary action should not be taken against you, indicating how you intend to exculpate yourself from blame.

Your explanation should reach the undersigned within seven days from the date of this letter. Meanwhile you shall remain suspended from duty effective today 28th December 2011 for a period of two weeks pending the decision of the company-----“.

28. The Claimant made his response on 3-1-2012 and on 23.1.2012 he was dismissed and reasons given were that he absconded duty by not reporting on 12th January 2012 after the period of suspension expired.

29. The Claimant contends that he didn't report back to work because his supervisor told him to wait for a call to inform him when to come back. The call never came through but he was instead dismissed.

30. From the explanation of the Claimant, the reason for dismissal was abscondment. The issue of dismissal on account of abscondment has been discussed in several case law (see Nairobi ELRC Case No.352 352/2012 – Wasilwa Judge) and Godfrey Anjere vs. Unique Suppliers Limited (Nairobi ELRC Cause 65 of 2011 – where J. Abuodha stated that:-

“In dismissal on account of absconding to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse such as illness or circumstances beyond their control and yet unable to communicate to the employer in good time----“.

31. I do agree with the position enunciated above. In case of the Claimant, there is no indication that the Respondents sought him out or tried to reach him before dismissal to try and understand why he hadn't reported back. He has explained why he didn't report back as he awaited a call from his supervisor directing him on when to report. Had he been given a chance, he would have explained this position.

32. It is my finding that the Claimant was dismissed unfairly for failure to give him a chance to explain himself as envisaged 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”.

33. In this case, Section 43 of Employment Act was flouted as there were no valid reasons to warrant his dismissal.

34. Section 45 of Employment Act 2007 states 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.

35. As envisaged under Section 45 of Employment Act I find the dismissal of Claimant unfair and unjustified and I declare that so.

36. As to compensation, I find the Claimant is entitled to the following:

1. 1 months' salary in lieu of notice = 29,328 (as per his December 2011 payslip);

2. 12 months' salary as compensation for wrongful and unlawful termination = 29,328 x 12 = 351,936/=.

Total 381,264/=

37. On account of damages for trauma for arrest by police, that is a matter that was still subject to investigation and so no damages are awarded.

38. On service pay, the Claimant having been a member of NSSF, he is not entitled to any payment as provided under Section 35(6) of Employment Act 2007.

39. The Respondent will pay costs of this suit and this judgment will earn 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:

Cheruyot holding brief for Kaburu for Claimant

Cherono for Respondent