



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 181 OF 2014

ANTHONY NJENGA KURIA.....CLAIMANT

v

BATA SHOE COMPANY (K) LIMITED.....RESPONDENT

JUDGMENT

1. Antony Njenga Kuria (Claimant) filed 6 proposed Issues for trial on 11 February 2016. Bata Shoe Company (K) Ltd (Respondent) suggested on 9 March 2016 that the Issues as proposed by the Claimant be adopted for hearing.

2. The Cause was heard on 25 January 2017 when the Claimant testified, and on 6 March 2017 and 27 March 2017 when the Respondent's 2 witnesses testified.

3. The Claimant filed his submissions on 11 April 2017 while the Respondent filed its submissions on 30 May 2017.

4. The Court has considered the pleadings, evidence and submissions and will examine the same within the context of the *Agreed Issues*.

Whether Claimant was an employee of the Respondent within the meaning of the Employment Act, 2007

5. Although presented as a contested fact, this issue was conceded by the Respondent in its pleadings and through the testimony of the Respondent's first witness, the Human Resources Manager.

Whether termination of Claimant's employment was unfair

6. Issues 2, 3 and 4 went to the fairness of the termination of the Claimant's contract, procedurally and substantively.

Procedural fairness

7. The primary statutory framework governing disputes relating to termination of employment is found in sections 35, 40, 41, 43, 45 and 47 of the Employment Act, 2007.

8. The point to start the discourse is section 47(5) of the Employment Act, 2007 which provide that

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on

the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

9. The above statutory provision lays a very low threshold of proof on an employee, but in any case a threshold which an employee must meet in the first instance when complaining of unfair termination or wrongful dismissal before an employer is called upon to discharge the onerous burden placed on the employer by sections 40, 41, 43 and 45 of the Employment Act, 2007.

10. There was no suggestion that the Respondent issued the notice contemplated by section 35 of the Employment Act, 2007, and the Court therefore concludes that the Claimant met the burden placed upon him by section 47(5) of the Act, 2007.

11. The burden therefore shifted to the Respondent as an employer to demonstrate that it complied with the duty imposed upon employers by section 41 of the Employment Act, 2007. The provision imposes a duty on an employer and therefore concomitantly an employee becomes a rights bearer as far as procedural safeguards are concerned. In terms of section 41(2) of the Employment Act, 2007, a hearing is mandatory in cases of summary dismissal.

12. The Respondent's case was that this was a case of summary dismissal and its Human Resources Manager stated that he summoned the Claimant for a disciplinary process through phone on 17 January 2012 and the morning of 18 January 2012 to Limuru but he declined or failed to attend. According to him, he had received information that the Claimant had become unruly.

13. The witness also testified that a discussion was held and it was agreed that the Claimant's contract be terminated and in that regard a dismissal letter was issued on 20 January 2012.

14. The question therefore begs whether the narrative by the Respondent would pass legal muster under section 41 of the Employment Act, 2007.

15. The Claimant placed on record a charge sheet which show that he was arrested by the Police on 17 January 2012 without warrant and was taken to Court on 18 January 2012.

16. The Respondent's Human Resources Manager admitted that the Claimant was arrested and charged with a criminal offence but said the matter was handled by the Respondent's Legal Department. He did not know when the Claimant was arrested (the Claimant was eventually acquitted under section 215 of the Criminal Procedure Code).

17. He further conceded that the audit report which culminated in the dismissal of the Claimant was released on the evening of 17 January 2012.

18. The testimony of the Respondent's Human Resources Manager as to the procedures before dismissal of the Claimant does not add up.

19. If the audit report was released on the evening of 17 January 2012, it is not probable that he could have summoned the Claimant before the release for purposes of disciplinary action on 17 January 2012.

20. Further, it is not possible that the Claimant, having been arrested at the complaint of the Respondent's auditors on 17 January 2012 could have attended a disciplinary session in Limuru the next day, 18 January 2012. The Respondent's management cannot and could not feign lack of knowledge of the arrest of the Claimant the previous day.

21. The Court can therefore conclude that the Respondent did not comply with the procedural safeguards/protections assured the Claimant by section 41 of the Employment Act, 2007 before the dismissal on 20 January 2017.

Substantive fairness

TOTAL

Kshs 262,211/-

33. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 20th day of July 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kipkoech instructed by Gordon Ogola, Kipkoech & Co. Advocates

For Respondent Ms. Bonyo instructed by Obura Mbeche & Co. Advocates

Court Assistant Nixon/Daisy