



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.473 OF 2014

WILSON NDERITU.....CLAIMANT

VERSUS

NAKUMATT HOLDINGS LIMITEDRESPONDENT

JUDGEMENT

Issue in dispute – wrongful, unlawful and malicious termination of employment

1. The court allocated the hearing date in the presence of both parties following various adjournments at the instance of the respondent. On the due date on 18th October, 2017 the respondent sought adjournment on the grounds that the respondent witnesses were on strike. similar to another matter before the court in ELRC. No.471 of 2014 the court directed the parties to proceed with the hearing noting the respondent is a corporate body and the submission that the witnesses were on strike not a sufficient cause to stop the hearing of the claim.
2. The respondent opted to remain absent at the hearing of the claim.
3. The claimant being a male adult was employed by the respondent, a private limited liability company as an Account Assistant on 28th October, 1999 to 1st October, 2013 when he was dismissed from his employment with the respondent.
4. On 28th June, 2013 the claimant was sent on compulsory leave to allow for investigation of alleged irregular payments from the finance department. There were no specific claims made against the claimant.
5. On 18th September, 2013 the claimant was invited to a disciplinary hearing which consisted of fellow employees who were biased. When he requested for clarifications over allegations made against him, the respondent refused and or failed to do so. On 1st October, 2013 the claimant was issued with a letter terminating his employment and over grounds that had not been addressed with him before being gross negligence in the performance of his duties. Such grounds were fundamentally different from what was in the show cause letter or for investigations.
6. The claim is also that before the claimant was issued with the show cause letter on 21st September, 2013 he had no warning and was not given a fair chance to argue his case on matters he knew at the time of the disciplinary hearing on 18th September, 2013.
7. The claimant is seeking notice pay at Kshs.78, 121.00; Compensation for 12 months' salary; Unpaid house allowance at 15% of his gross wage; Damages for loss of employment to 60 years; and Costs of the

suit.

8. The claimant testified in support of his claim. The claimant was at the disciplinary hearing and present was the respondent's advocate. He claimant pleaded that he was not clear on the allegations made against him as there were no details. The invoices shown to him and alleged as lacking ETR details were not clear tot eh claimant. He was then issued with a show cause notice after the disciplinary hearing.

Defence

9. In response, the defence is that the claimant was terminated from his employment lawfully and in accordance with section 41 and 43 of the Employment Act, 2007. The respondent had received questions from various suppliers as to several overpayments that they had received from the respondent. the respondent sought to investigate the matters and several employees were sent on compulsory leave. Upon concluding investigations the respondent found that there had been various irregular payments whose invoices had been posted into the computer system by the claimant and there was need to confirm whether or not the exclusion of tax receipts was due to negligence or a deliberate collusion with the suppliers to evade tax compliance.

10. The defence is also that the claimant had posted invoices which bore ETR receipts, an action that would have led to either the respondent bearing the tax liability or even more seriously, the crime of tax evasion.

11. The claimant was invited to a disciplinary hearing where he was able to respond to all allegations made against him. the disciplinary committee found his responses not satisfactory and recommended that his employment be terminated for negligence and improper performance of duty. When the respondent sent the claimant on leave, investigations found there had been irregular payments by the claimant. There was a posting of invoices without confirmation of tax compliance. The termination of employment was justified and lawful. All terminal dues were fully paid.

12. The failure by the respondent to attend at the hearing left the claimant as the only one to support this case. His evidence in court was not challenged by the respondent in any material way.

13. In this case, the claimant was terminated form his employment with the respondent on 1st October, 2013 on the grounds that following a show cause letter dated 21st September, 2013 and the reply thereto there were deliberations and the reply was found unacceptable and thus the claimant was found to have been negligent and improperly performing his duties. It is common ground that the claimant had been sent on compulsory leave to allow for investigations. On 18th September, 2013 the claimant was invited to a disciplinary hearing on 21st September, 2013 and on equal date he was issued with a show cause letter to respond to various allegations.

14. in **Frederick Odongo Owegi versus CFC Life Assurance Ltd [2014] eKLR** and also reiterated in a similar case of **Amrick Consales versus Mara Ison Technologies Kenya Limited, Cause No. 2538 of 2012** and the Court held;

Ordinarily in work relations, where an employee commits acts of misconduct, such an employee may be suspended to allow the employer to carry out investigations. Such investigations are meant to give the employer a chance in the absence of the subject employee to interrogate and establish if there are grounds that warrant a show cause notice against the employee that warrant a response. Until such a process is concluded, the employee remains without a concluded case against him that warrant a defence. Once the investigation is complete, the employee must be recalled from the suspension to answer to any allegations leading to the process of hearing where the employee is to give his defence. Once hearing is concluded, a sanction follows.

15. In this case therefore, when the claimant was called for his disciplinary hearing on 21st September, 2013 was the respondent clear on the allegations made against him? what was the need and

purpose of the show cause letter issued to the claimant on equal date? Was the respondent then reopening the disciplinary hearing?

16. In this case, by allowing the claimant to show cause as to why he should not be disciplined on 21st September, 2013, I find the respondent did not close the claimant's case and hence gave him more time to show cause. His reply was then considered on an unspecified dates. The motions of section 41 of the Employment Act, 2007 should have fellow once he show cause letter issued. As the hearing did not conclude, before a sanction issued, the claimant should have been recalled and in the presence of his representative made to argue in his defence.

17. In the case of **Daniel Ouma Orawo versus Midrock Water Dilling Company Limited [2015] eKLR** the court held as follows;

*What is important to show is that in each case, an employer respects the rule of law. Due process thus requires that once an employee is placed under suspension, such an employee must be recalled to show cause and where such show cause is issued, fair administrative action must comply with the provisions of section 41 of the Employment Act. The employee must be heard in person and in the presence is his representative. Such a provision in mandatory and not subject of any alternation by any policy or law that is contrary to the Employment Act, 2007. See **David Kenani versus The AG & Another, Cause No.933 of 2013.***

18. In this case therefore, by taking summary action of terminating the claimant from his employment after a show cause letter had issued and without recalling him in acorns with section 41 of the Act and securing his rights and procedural safeguards therein, the resulting termination of employment was fundamentally flawed and unfair in terms of section 43 and 45 of the Employment Act, 2007.

19. Without any defence evidence to challenge the claimant in his evidence, I take his testimony as correct and rue.

20. The claimant is seeking notice pay, in the respondent's computation of his final dues; he was paid for two (2) month as notice pay. On the finding that the claimant was unfairly terminated from his employment compensation is hereby awarded at 10 months gross pay noting he had served the respondent without a record of indiscipline form October, 1996 to October, 2013. The claim for loss of earnings and salaries to 60 years is without any supporting evidence. On the claim for a house allowance, thought the respondent has not attached the contract of employment to show what benefits were due to the claimant, the salary earned of kshs.78,121.00 per month is way above the minimum wage. Such claim is declined.

Accordingly, judgment is hereby entered for the claimant against the respondent for compensation at Khs.781, 210.00 and costs of the suit.

Delivered in open court at Nairobi this 31st day of October, 2017.

M. MBARU JUDGE

In the presence of:

Court Assistants: David Muturi & Nancy Bor

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