



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 91 OF 2016

(Before D. K. N. Marete)

STEPHEN JUMA NDEGE.....CLAIMANT

VERSUS

NAKUMATT HOLDINGS LIMITED.....RESPONDENT

JUDGEMENT

This matter comes to court vide a Memorandum of Claim dated 11th May, 2016. The issue in dispute is there in cited as;

“Unfair and wrongful dismissal of Mr. Stephen Juma Ndege”

The respondent in a Response to Memorandum of claim dated 1st September, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant’s case is that on 8th December, 2000, he was engaged by Sunmatt Holdings Limited, an umbrella of Nakumatt Holdings Limited in the position of “Shop Assistant” at a starting basic minimum salary of Ksh4,140.00 per month exclusive of Housing Allowance. He was thereupon placed on a five (5) months probation period with effect from 8th December, 2000 to April, 2001 and thereafter was confirmed as a permanent employee.

The claimant’s other case is that he was declared redundant in October, 2002 having worked for one year and eleven months and was paid his severance pay, accrued annual leave and other benefits and at the time was earning a basic minimum salary of Ksh 4,440.00 instead of Ksh 4,749.00 as per the Legal No. 86 of 2002 (Exclusive of Housing Allowance).

It is the claimant’s further case that the actions of the respondent to cause dismissal of the Claimant herein was a direct interference of his right as a union member and shopsteward through discrimination, restrain and coercion against recognized trade union activities, and victimization of abuse of his authority as a shopsteward, that which resultant action was taken by the duly contravened Clause 26 of the Collective Bargaining Agreement.

He prays as follows;

1. THAT, the dismissal of employment services of the Claimant herein was unprocedural, wrongful, unlawful and unfair, hence, NULL and VOID

2. ***THAT***, the Respondent “REINSTATE” the Claimant herein to his position and or an equally suitable position, with all his back salaries, allowances and any other legal dues, owed to him forthwith.

“Alternatively”

3. ***THAT***, the Claimant herein be paid the Total Amount of Kshs1,963,262.30/= by the Respondent as tabulated at paragraph 17 under Submissions, forthwith.

4. ***THAT***, the Respondent herein pays the Claimant herein compensation for the lost income at the rate of Kshs.36,049.85/= per month, from 30th June, 2015, the effective date of the wrongful and unfair dismissal to the date of judgement of this suit.

5. ***THAT***, the Respondent herein pays interests on the total amount at Court rates.

6. ***THAT***, the Respondent herein pays a twenty per cent (20%) interest on the Award every month, until settlement is cleared.

7. ***THAT***, the Respondent issue the Claimant herein with the “***CERTIFICATE OF SERVICE***” within the meaning mandatory provisions of Section 51 of the Employment Act, 2007, Laws of Kenya, forthwith.

8. ***THAT***, the costs of this suit be provided for by the Respondent.

9. ***THAT***, any other further and better relief that this Honourable Court may deem fit to grant, be granted.

The respondent’s case is that the claimant was employed by the respondent from 11 February, 2010 and appointed a Cashier Trainee.

It is her further case that the claimant was never discriminated by the management as a shop steward but instead became arrogant and hostile to the said management on his election to union affairs. He became disrespectful to the senior management officer and would close his till without authority.

The respondent’s other case is that the claimant was served with a warning letter for being disrespectful on 8th May, 2014 which letter was based on an email dated 5th May, 2014 at 1735 hours and he replied to this on the same date. Another incident occurred on 1st January, 2015 at 1115 hours where a case of disrespect and closing of till without permission was reported. This also included a report that the claimant spent most of his time on phone instead of work. He was issued with a notice of show cause as to why he should not be terminated from employment and his response is dated 9th February, 2015.

Further, on 23rd November, 2015 at 1318 hours, the claimant was implicated in a report that he had colluded with an employee called Maureen to change prices on the sticker of a product, Aloe Vera Gel costing Kshs.1,055.00 and not Aloe Vera Balm costing Kshs.584.00. The claimant cashed Kshs.584.00 for Aloe Vera Balm when the same was for the gel. This amounted to theft by servant and not mere negligence as the products are different and the claimant knew or ought to have known this.

The respondent’s other case is that based on this incident of theft by servants, the claimant was issued with a notice of show cause and requested to appear before a disciplinary committee on 27th November, 2015, which he did. On hearing him, it was recommended that he be dismissed. She therefore enters a case of fair termination of the employment of the claimant.

This matter came to court variously until the 13th March, 2017 when it was heard with a testimony of CW-1 Stephen Juma Ndege – the claimant.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant at the hearing reiterated his claim of unlawful termination of employment in that proper disciplinary procedure was not pursued by the respondent. It is his testimony that he was dismissed on grounds of negligence and his case was not heard at branch level but at the head office where he was not given enough time to prepare a defence. This was a few hours and not two days.

The claimant's further testimony and evidence is that he was not accompanied by a shop steward during the hearing and also that the disciplinary committee was not well constituted as there was no shop steward or even the legal officer of the respondent. Further, the issue of collusion was not brought out during the hearing and there were variations of the price of the item in issue – Kshs.1,050.00, 1,010.00 and 584.00. This is reiterated in the claimant's written submissions dated 25th April, 2017.

The claimant, in his submissions seeks to rely on section 41 (1) and (2), 43 (2) and section 45 (1) (2) (4) and (5) in a demonstration of a case of unfair termination of employment as follows;

41 (1) Subject to section 42(1), an employer shall before termination the employment on the grounds of misconduct, poor performance or physical incapacity, explain to the employee in a language the employee understands the reason from which the employer 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) of (4) hear and consider any representations which the employee may on grounds of misconduct or poor performance and the person if any chosen by the employee within subsection (1) make.

Again, section 43 (2) is as follows;

43 (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.

Further, section 45 (1) (2) (4) and (5) come out thus;

45 (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 termination is valid;

b) That the reason for the termination is a fair reason –

(i) related to the employees 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)...

(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

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

He cites this as the law on the requirements of lawful termination which were flouted by the respondent and therefore the basis of his case.

The respondent did not file any written submissions on the subject. She did not testify or even participate at the hearing on 13th March, 2017. It is however notable that the respondents defence brings out a formidable case of misconduct by the claimant in the conduct of his work leading to warnings and ultimately a show cause letter and disciplinary proceedings against him.

The respondent in support of her case also has filed witness statements authored by Francis Kimuyu, a Human Resource and Development Manager and James Ouma, the Deputy Manager, Village Market Branch. Both clearly defining and elaborately bringing out her case as pleaded. These also contain the following annexures;

1. A letter of appointment of the claimant dated 11th February, 2010.
2. A letter of strong warning to the claimant dated 8th May, 2014.
3. An email to Mr. Kimotho from the Manager Village Market dated 5th May, 2014 detailing misconduct on the part of the claimant.
4. A letter of response to 3 above by the claimant.
5. A letter dated 30th January, 2015 by the claimant to the Manager Village Market explaining closing of till without permission.
6. A letter dated 9th February, 2015 by the claimant to the Manager Village Market answering a show cause for unduly closing the till.
7. An email dated 23rd November, 2015 on the irregularity of cashing the Aloe Vera Lip Balm – Kshs.584.00 instead of Aloe Vera Gel – Kshs.1,055.00.
8. A report on 7 above to the Deputy Manager, Mr. Ouma.

9. A letter by the claimant dated 22nd November, 2015 explaining to Manager, Village Branch price discrepancies
10. A letter to the claimant dated 27th November, 2015 by the Human Resource and Development Manager inviting him to a disciplinary session.
11. A letter of show cause to the claimant by the Human Resource Development Manager dated 4th February, 2015.
12. A copy of disciplinary proceedings in respect of the claimant dated 30th November, 2015.
13. A dismissal letter to the claimant dated 30th November, 2015.
14. Certificate of service.

The respondent has also annexed the above documents including a clocking time analysis for the period 1st January, 2014 to 27th January, 2015 which indicates the claimant's misconduct through rampant abstentions and no swipes in her response to the claim.

This matter tilts in favour of the respondent's case. The respondent has on a preponderance of evidence overwhelmingly proved her case as against that of the claimant. The claimant's case is hardly proven and ends up being a mere denial of the defence. His able reliance on the law establishing unlawful termination of employment is not sustainable as the claimant from the onset is disabled in tendering evidence of such unlawful termination. He does not rebut the respondent's version and evidence.

The respondent's case is a display of the various misconduct of the claimant at the work place. This culminates in disciplinary proceedings and ultimate dismissal of the claimant. The claimant does not in any way dispel this, or even explain it but chooses to merely forment a case through denial. This shall not pass.

Overall, the claimant falls short of the requirements of burden of proof as enunciated under section 47 (5) of the Employment Act, 2007 as follows;

47 (5) 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 rest on the employer.

His case therefore flops by the way side. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case for unlawful termination of employment, he is not entitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 15th day of November 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Maina instructed by Edwin Maina & Associates Advocates for the claimant.

2. Mr. Langat holding brief for Nyaberi instructed by Nyaberi & Company Advocates for the respondent.