



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 442 OF 2014

IBRAHIM ALIKANO MOHAMEDCLAIMANT

V

KENYA NUT COMPANY LIMITED..... RESPONDENT

JUDGMENT

1. Ibrahim Alikano Mohamed sued Kenya Nut Company Ltd (Respondent) on 16 September 2014 alleging unfair termination. The Respondent filed a Response on 10 November 2014 and this prompted the Claimant to file a rejoinder on 11 November 2014.
2. The Cause was heard on 21 October 2015 when the Claimant testified. The Respondent opted not to call any witness. It was directed to file and serve submissions before 3 November 2015 but the same were only filed on 21 December 2015.
3. The Claimant's case is that he was employed by the Respondent as a horse rider/Supervisor in 1994. On 27 May 2013 he reported to work and was called to the office and handed a letter of termination of employment.
4. The reason given in the letter was wanting performance and negligence. The letter also referred to abdication of duty and giving wrong information.
5. According to the Claimant, he was not granted an opportunity to make representations before the decision to dismiss him was taken nor was he given notice of intended termination of employment.
6. The Claimant was paid by the month and pursuant to section 35(1)(c) of the Employment Act, 2007, the Respondent ought to have given him advance written notice of at least 28 days.
7. The Respondent did not produce any evidence that such notice was given. The termination of employment was effective from the date of the letter.
8. The Claimant has therefore satisfied the burden of showing there was unfair termination of employment in terms of section 47(5) of the Employment Act, 2007.
9. However, section 36 of the Act allows an employer to terminate an employment upon payment in lieu of notice, while section 44 envisages an employer terminating the services of an employee without notice or less notice than provided for if an employee has fundamentally breached an obligation arising under the contract of service (summary dismissal).
10. Therefore, the burden shifted to the Respondent to justify the summary dismissal and prove the validity and fairness of the action.
11. Termination of employment with or without notice though permissible under the prevailing statutory framework is subject to compliance with the procedural fairness safeguards of section 41 of the Employment Act, 2007 if it is based on *misconduct, poor performance or physical incapacity*.
12. The reasons given in the present case fall under misconduct and performance.
13. Section 41(2) of the Employment Act decrees that in cases of summary dismissal, like in the instant case, the employer must hear and consider the representations to be made by the employee

- before taking the decision to dismiss summarily.
14. There was no evidence led by the Respondent that a hearing as contemplated by the cited section was held before the summary dismissal.
 15. In termination of employment disputes both the procedural safeguards and substantive justification are mandatory and must be met.
 16. However valid and fair the reasons for termination of employment are in the view of the employer, a hearing even in cases meriting summary dismissal is a *sine qua non* condition.
 17. The Claimant also testified that he was a member of a Union, Kenya Union of Commercial, Food and Allied Workers which had a collective bargaining agreement with the Respondent. A copy of the agreement was produced.
 18. The terms of the collective bargaining agreement therefore applied to him. And even if he was not a member of the Union as suggested by the Respondent in its submissions, he was entitled to enjoy the terms thereof by operation of law (section 59(1)(b) of the Labour Relations Act).
 19. Further sections 43 and 45 of the Employment Act, 2007 require the employer to prove the reasons for termination of employment and that the reasons are valid and fair.
 20. The Respondent did not lead any evidence to demonstrate that it complied with the peremptory requirements of sections 41, 43 and 45 of the Employment Act, 2007, or with the contractual agreement in terms of the collective bargaining agreement.
 21. The only conclusion the Court can reach in the circumstances is that the summary dismissal of the Claimant was unfair.

Appropriate remedies/orders

Wages for May 2014

22. The Claimant sought Kshs 19,446/- under this head. The Respondent's computation of the same was Kshs 19,977/30. By dint of section 49(1)(b) of the Employment Act, 2007, the Claimant is entitled to the wages earned.

1 month wages in lieu of notice

23. Under this head of claim the Claimant sought Kshs 21,607/-. The Respondent calculated the same as Kshs 22,197/-. With the conclusion reached that the dismissal was unfair, the Claimant is entitled to the pay in lieu of notice.

Severance pay

24. The Claimant was not declared redundant and is not entitled to severance pay. If by severance pay, the Claimant meant service pay, he is not entitled to the same by virtue of section 35(5) of the Employment Act, 2007. His pay slip indicates he was a member of the National Social Security Fund.

Compensation

25. Compensation is a primary though discretionary remedy where there is a finding of unfair termination of employment. The factors the Court ought to consider have been outlined in section 49(4) of the Employment Act, 2007.
26. The Court has reached a conclusion that the termination of the Claimant's employment was unfair.
27. The Respondent in its submissions and relying on the decision of Rika J in *Daniel Sirengo Wakhungu v Sawa Sawa Academy* (2015) eKLR urged that compensation equivalent to one month's wages would be fair in cases where termination of employment is found wanting because of a procedural lapse.
28. The *Wakhungu* case circumstances are materially different from the ones obtaining in the present dispute. Mr. Wakhungu was on a 2 year fixed term contract. In the dispute at hand, the Claimant had served the Respondent for about 19 years and it appears he was on a contract of indefinite

