



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 307 OF 2014

ISAAC NYAMOSI NYANGAU

CLAIMANT

v

GILANI'S SUPERMARKET LTD

RESPONDENT

JUDGMENT

1. Isaac Nyamosi Nyangau (Claimant) was employed by Gilani's Supermarket Ltd (Respondent) on 8 February 2012 as a general worker.
2. On 10 July 2014, the Claimant commenced legal proceedings against the Respondent, and he stated the issues in dispute as

1. Unfair termination
2. Notice
3. Off duties
4. Public holidays
5. One annual leave
6. Salary for 11 days (March 2014).

3. The Response was filed on 1 August 2014 and this prompted the Claimant to file a Reply to the Response on 15 August 2014.

4. The Cause was heard on 4 March 2015 and 2 November 2015. The Claimant filed written submissions on 12 November 2015 (instead of before 13 November 2015), while the Respondent's submissions were filed on 19 February 2016 (the same ought to have been filed before 30 November 2015).
5. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the termination of the Claimant's employment was unfair, whether the Claimant is owed overtime (normal and public holidays, rest days(off)), whether Claimant has accrued annual leave, whether there is a competent Cause before the Court, and appropriate remedies/orders.*

Whether termination of employment was unfair

Procedural fairness

6. The Respondent informed the Claimant of the termination of his employment through a letter dated 10 March 2014. The reason given was unsatisfactory performance.
7. The letter also informed the Claimant that he had been served with a show cause letter dated 6 March 2014 but he refused to acknowledge the notice, and therefore his services were being terminated in accordance with section 44(4)(e) of the Employment Act, 2007.
8. In his testimony, the Claimant stated that on 6 March 2014, he was on duty with other employees loading when at about 2.00pm he (and other employees) were asked by the Stores Manager to go and see the Human Resources Manager, and that the Human Resources Manager asked them to return after 2 days.
9. When he returned after the 2 days, the Human Resources Manager instructed him to return the next day (10 March 2014), but again he was not attended to. On 11 March 2014, he sought out the Director but the Director sent him back to the Human Resources Manager. But it was nothing doing, and he therefore sought assistance from the Labour Office.
10. The Claimant denied that he was issued with a show cause letter dated 6 March 2014 or that he was given the termination of employment letter.
11. During cross examination, the Claimant confirmed that the Respondent operated a biometric attendance system and that the Labour officer recommended that he paid final dues.
12. The parties have given two inconsistent accounts as to what process exactly occurred before the termination.
13. The Respondent annexed to its pleadings several warning letters and show cause notices previously issued to the Claimant, all within a span of about 2 years. Also produced were minutes of the conciliation before the County Labour Officer held on 22 April 2014.
14. The raft of warning letters suggests that the Claimant was a problematic employee. He did not even respond to show cause letters he acknowledged receipt of such as the ones dated 5 January 2014 and 3 February 2014.
15. The minutes of the Labour Officer note that the Claimant admitted before the Labour Officer that he was given the show cause letter but he declined to acknowledge the same.
16. Putting into consideration the warnings and previous show cause notices, the Court is predisposed to believe the Respondent's account that the Claimant refused to acknowledge the show cause dated 6 March 2014. The show cause had requested the Claimant to show cause within 7 days why disciplinary action should not be taken against him.
17. The Court in the event reaches a conclusion that the Claimant was given an opportunity to be heard before disciplinary action was taken, but he instead ignored the chance.
18. The Court wishes to observe that there is an implied term in every employment contract that an employee will cooperate with an employer in the course of a disciplinary process, and the employee ought not to frustrate the process.

Substantive fairness

19. The ground given for the termination of the Claimant's employment was gross misconduct. The reason(s) were poor performance and absenteeism and the immediate reason was refusal to acknowledge receipt of a show cause letter.
20. This is the reason the Respondent had to prove as both valid and fair. That is the requirement of sections 43 and 45 of the Employment Act, 2007.
21. The Court has already made reference to an implied term that an employee has the duty to cooperate with the employer even during a disciplinary process.
22. The Court has reached a conclusion that the Claimant did not cooperate with the Respondent.
23. The Respondent therefore had a valid reason to take disciplinary action against the Claimant.
24. The Court's next duty is to examine whether the reason was a fair one to terminate the services of the Claimant.
25. The Claimant did not dispute the previous warnings and show cause notices issued to him. It appears he was a problematic employee. He was afforded an opportunity to make representations which he wasted.
26. Considering the previous warnings and show cause notices, which amount to aggravating circumstances, and the personal nature of a contract of service and more so, in the circumstances of this case where the Claimant appear not to have related well with his supervisors, the Court

reaches the conclusion that the termination of the Claimant's employment was for valid and fair reasons.

Overtime (normal and public holidays)

27. The Claimant produced several pay slips which indicate that the Respondent was paying for overtime work.
28. The Claimant during testimony did not lead any evidence as to the contractually agreed working hours, but the appointment letter produced by the Respondent set out the working hours.
29. The public holidays worked but not paid were also not disclosed.
30. The final dues computation by the Respondent indicated that the Claimant was owed Kshs 291/- on account of overtime. He would be entitled to the same.

Offs

31. The Claimant sought Kshs 66,786/- on account of offs (rest days).
32. The Respondent produced extracts from attendance records and they show that the Claimant was not working Monday to Monday.
33. The records show weekly breaks. The Court is therefore unable to concede to the Claimant's case that he was not getting weekly rest days.

Annual leave

34. The Claimant sought accrued annual leave for 2013 to 2014 quantified as Kshs 7,455/-.
35. The Respondent produced a computation of the Claimant's final dues and included were 21 leave days for 2013 and 3.5 days for 2014.
36. The commuted amount is Kshs 9,205/- and this is what the Claimant would be entitled to account of leave.

Wages for March 2014

37. The Claimant would be entitled to earned wages for March 2014. He computed the same as Kshs 3,905/-. The Respondent calculated the same as Kshs 4,524/-.

Pay in lieu of notice

38. The letter of termination of employment informed the Claimant that he was being given 1 month notice of termination, but there was no evidence to suggest that he was allowed to serve the 1 month notice period or that he was offered payment in lieu.
39. Indeed, the Respondent's witness admitted in cross examination that the Claimant was not summarily dismissed.
40. The Court therefore finds the Claimant would be entitled to Kshs 9,153/- being the basic wage at time of separation.

Competency of the Cause

41. The Claimant admitted in cross examination that he did not swear or sign the verifying affidavit accompanying the Memorandum of Claim.
42. On addressing this issue, the Respondent cited several decisions from the High Court and this Court.
43. Although those decisions suggest unanimity in striking out of cases relying in defective verifying affidavit, an in depth examination of the topic suggests there has been no unanimity in the High Court.
44. Okwengu J (as she was then) discussed the rival positions taken by different Judges in *International Air Transport Association & Ar v Sure Connection Ltd & Ar* (2008) eKLR and agreed with the position taken by Ringera J (as he was then), and held that

although the requirement for the filing of a verifying affidavit is mandatory, this Court has the powers where necessary to reject a defective affidavit and order the filing of another affidavit so as to comply with the mandatory requirement.

45. On the basis of the admission by the Claimant, the case at hand is not one of a defective verifying affidavit, it is one of a false affidavit, a more serious issue calling for more severe action on those involved apart from striking out the Claim.
46. As the Memorandum of Claim was predicated upon a false affidavit, the Court reaches the conclusion that it ought to be struck out with an order that Mr. Korongo, Esq., Advocate personally bears the Respondent's costs of defending the Cause assessed as Kshs 49,000/- (based on amount quantified in the Claim).

Conclusion and Orders

47. The Court finds and holds that the Cause is incompetent and orders that it be struck out.

48. Mr. Korongo Esq., Advocate is ordered to meet the Respondent's costs assessed as Kshs 49,000/-.

Delivered, dated and signed in Nakuru on this 26th day of February 2016.

Radido Stephen

Judge

Appearances

For Claimant

Ms. Kerubo instructed by M. Korongo & Co. Advocates

For Respondent
Muchela Advocates

Mr. Murimi instructed by Murimi, Ndumia, Mbago &

Court Assistant

Nixon