



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1204 OF 2014

JOSEPH ONYANGO ASERE CLAIMANT

VERSUS

BROOKESIDE DAIRY LIMITED RESPONDENT

JUDGEMENT

1. Issue in dispute is the unfair dismissal and non-payment of termination benefits.
2. The Claimant was employed by the Respondent from 1st march 2001 as a Parker. The monthly salary was Kshs.25, 671.00. On 25th February 2014 the Claimant reported to work and diligently did his duties as allocated. The claim is that at 4.45pm the Claimant was called by his supervisor Mr Adan and informed that he was required to see the human resource manager (HRM) Ms Grace Munugu. At the HRM office, the Claimant was shocked to be informed that he had not done his duties as allocated by his supervisor which was not true. He was asked to see the HRM the next day. On 26th February 2014 the Claimant was informed by the receptionist to go back home he would be called. On 28th February 2014 the Claimant was issued with a letter of summary dismissal on the grounds of insubordination and gross misconduct.
3. The claim is also that the reasons given for dismissal were not true. No show cause letter had been issued and he was never given a hearing. The claim is for;
 - a. *One month's salary in lieu of notice;*
 - b. *Compensation for 12 months; and*
 - c. *Costs of the suit.*
4. In evidence, the Claimant testified that when he reported to work on 25th February 2016, his supervisor Adams gave him different duties. After some time he came back and made threats that he would remove the Claimant to another department if he did not want to work. After some time this threat was repeated again but the Claimant did not understand why such threats were being made as he was doing all assigned duties. The technical manager Mr Mwangi passed by and Adams reported to him that the Claimant had wanted to beat him up. This was a common areas and nothing like that had happened. At 4pm the Claimant was directed to see the HRM which he did and she wanted to know why I had threatened to beat up Adams. She then directed the Claimant to go home. On 1st March 2014 the HRM called him and issued dismissal letter based on false allegations.

Defence

5. In defence, the respondent's case is that they employed the Claimant as a General Hand within the

production department which position he held until his summary dismissal on 2nd March 2014. The Claimant had a letter of appointment spelling out his terms of employment and was also issued with a Job Description manual. His last salary was Kshs.21, 392.00 per month.

6. On 25th February 2014 the Claimant reported to work and was allocated duties of shrink-wrapping by his supervisor, Adam Kerosi. In defiance, the Claimant refused to undertake the assigned duties and decided to seat down while talking on his cell phone for a lengthy period while his colleagues were at work. Upon noticing this conduct, his supervisor verbally cautioned him noting that this had become a habit. The Claimant became angry, unruly, and rude and boldly confronted his supervisor and shouted at him that he was not afraid of being fired and refused to undertake assigned duties. That this conduct was unacceptable where the supervisor reported to his superior as the matter was getting out of hand. Despite leaving the scene, the Claimant followed his supervisor yelling that he was not afraid of anything while pointing fingers at him but the technical manager who was passing by intervened and came to the rescues of his colleague.

7. The incident was reported to the HRM who convened a hearing at 4pm where the Claimant explained himself and pleaded that he was having domestic problems hence the cause of his anger and rage. The Claimant was not remorseful and demonstrated anger. He was advised to go home. On 28th February the Claimant was recalled back to work but he failed to turn up. When he reported back he was issued with letter of summary dismissal dated 28th March 2014. The reasons for his termination was gross misconduct, that he refused to undertake his assigned duties and that he had threatened his supervisor.

8. In evidence, the Respondent called Adam Arika Kerosi the Production Manager. He testified that he supervised the Claimant. On 25th February 2014 he reported to work at 7.45am and proceeded to allocate different staff work. He allocated the Claimant duties in a team with 2 others but 30 minutes later when he came along to check, the Claimant had not done his work while his colleagues were busy finishing their tasks. The Claimant was seated aside on his phone. Carrying of phones was prohibited while at work. When he asked the Claimant about it he confronted him shouting that he was not afraid of him and if he wished, he could fire him. The Claimant was agitated, angry and aggressive. The witness left the scene as there was another team he had to check. This was to allow the Claimant to cool down. After 30 minutes he went back to the Claimant but before he could reach him, the Claimant charged at him threatening to beat him up. The Claimant was shouting and attracted other employees out of their work. Along came the technical manager Mr Mwangi who stopped the Claimant and asked Mr Kerosi to report to HRM. The Claimant obeyed Mwangi and went back to work.

9. Mr Kerosi also testified that he did an email to the HRM giving a summary of what had happened. At 4pm the Claimant was called to state his case and the witness later learnt that he had been dismissed.

Grace Munugu also testified that she is the Respondent HRM. On 25th February she got a report of the Claimant threatening another employee. She invited the Claimant to a hearing to state his case. Both employees were called and each stated their case. It emerged at the hearing that the Claimant had been assigned work which he refused to undertake as he was on his cell phone and when asked he threatened to beat up his supervisor. The technical manager intervened and this was conduct not allowed at the work place that justified summary dismissal. The Claimant was paid all his dues.

10. The letter of summary dismissal issued to the Claimant by the Respondent is on the grounds of threatening his supervisor and insubordination when he confronted and failed to abide by directions of his superior. The Claimant challenged such termination asserting that it was unfair.

11. Summary dismissal is allowed under section 44 (4) of the Employment Act. Even in such serious cases of gross misconduct, the employer must however ensure adherence to the provisions of section 41(2) of the Employment Act thus;

(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) or (4) hear and

consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

12. The Claimant testified that when he reported to work on 25th February 2014 he was assigned duties by Adam. After 30 minutes he came back and threatened to change him to another department. At this time the technical manager Mr Mwangi came and directed the Claimant to resume his duties. He was later called for a hearing where he stated his case in defence. However in cross-examination, the Claimant admitted that he had told Adam to fire him if he had done anything wrong. When Mwangi found them, there was no fight going on but the Claimant agreed to resume his duties. The Claimant also admitted that he had a previous warning letter on a different matter.

13. The scenario set out by the Claimant is that, at the time Mwangi found him with the claimant, he was not doing his work as he had to be directed by Mwangi to resume his work. The Claimant also testified that he was earning Kshs.25, 000.00 but later admitted that this was not the case, he earned Kshs.21, 392.00. The Claimant thus comes out as a person not honest. He is willing to lie on obvious facts such as his salary. The Claimant admitted that he asked his supervisor to fire him if he had done anything wrong. Such is conduct unbecoming of an employee who is willing to take instructions kindly and abide by directions given by his superior.

14. The Claimant confirmed that he was given a hearing as required under section 41(2) of the Employment Act. Though not documented, this is confirmed by the Claimant in his sworn evidence. As submitted in the case of **George Musamali versus G4S Security Services Kenya Ltd [2016] eKLR** indeed internal disciplinary proceedings are not similar as Court proceedings or criminal trial where witnesses have to be called and confirm beyond reasonable doubt as to what happened. The shop floor is the best place to get the best evidence in a case of employer and employee misconduct and the requirement is to ensure that an employee is reasonably given a hearing to be able to give his defence.

15. Noting the above, the fact that the Claimant had a dented employment record where he got a warning, the provisions of section 45(5) of the Employment Act put into account, the case of failing to abide by his supervisor's directions and challenging him to fire him, the Claimants case lackS merit and cannot stand for an award of the remedies sought.

The claim dated 18th July 2014 is hereby dismissed. Each party shall bear their own costs.

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF APRIL 2016.

M. MBARU

JUDGE

Present

.....

.....