



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 574 OF 2014

EDWIN KOSGEI

CLAIMANT

v

METKEI MULTI-PURPOSE COMPANY LTD

RESPONDENT

JUDGMENT

1. For determination in this Cause are the questions, *whether the dismissal of the Claimant was unfair and appropriate remedies*. The Court will also address the question posed by the Claimant that his right to fair administrative action was violated.
2. The Cause was heard on 2 December 2015 and the Respondent filed its submissions on 2 February 2016 (the Claimant's submissions which ought to have been filed before 2 January 2016 was only filed on 7 March 2016).
3. The Court will set out each party's respective cases while examining the identified issues.

Whether dismissal was unfair

Procedural fairness

4. The Claimant testified that he was involved in an accident on 9 December 2013 while in the course of work and that after finishing with the Police he went to the work place but was instructed to go home and wait to be called.
5. On 10 February 2014, he was called and issued with a dismissal letter outside the gate. He denied receiving a letter dated 31 January 2014 inviting him to appear for a disciplinary hearing.
6. The Claimant further denied being invited to a meeting of the Respondent's Board on 6 February 2014.
7. The Respondent's Plant Manager testified. He stated that on 10 February 2014, he assigned the Claimant and his co-driver other duties pending deliberations by the Board but they declined and left and therefore, the Claimant was dismissed for absconding work.
8. He also stated that he sought explanations from the Claimant on the accident on 10 December 2013 but he did not offer any, and therefore the Board instructed him to invite him to appear before it and he invited him through a letter dated 31 January 2014, but he failed to appear on 6 February 2014.
9. When challenged to state how the letters were delivered to the Claimant, the witness stated that they were posted.
10. The Court has two inconsistent narrations as to whether the letters to the Claimant were delivered to him or not.
11. Considering the minutes of the Board and that there was no suggestion that the Board did not meet as contended, the Court would accept the Respondent assertion as more plausible that the Claimant was afforded an opportunity to make representations, but he did not and therefore he

cannot impeach the process followed by the Respondent before the dismissal.

Substantive fairness

12. The immediate cause of the Claimant's dismissal, according to the Respondent was desertion. Both the Claimant and Respondent's witness agree that the Claimant was last at work on or around 9 December 2013.
13. According to the Claimant, he was instructed to go home and wait to be called. He was only called on 10 February 2014 on his mobile phone and issued with the dismissal letter.
14. With the finding that the Respondent's witness version is more plausible, that letters were sent out, the Court is satisfied that the Claimant had evinced an intention not to resume duty and that he snubbed the opportunities to make explanations, and therefore the Respondent had and has proved valid and fair reasons for the dismissal.

Right to fair administrative action

15. The Claimant in his submissions advanced an argument that his right to fair administrative action was violated and made reference to the decisions in *Shankar Saklani v DHL Global Forwarding (K) Ltd* (2013) eKLR quoting the holding in Nairobi Cause No. 431 of 2010, *Kenneth Njiru Njorani v Dodhia Packaging Ltd*.
16. As for me, I am not able to accept that the Respondent herein was exercising an administrative power or taking administrative action against the Claimant. The Respondent was acting as an employer.
17. The action was purely contractual and its fairness or not has to be determined within the parameters of Article 41 and not Article 47 of the Constitution. Of course there may be cases where the right to fair administrative action is implicated more so in employment contracts underpinned by public law. However, that is a debate for another day.

Appropriate remedies

Notice pay

18. This head of claim is not legally tenable in light of the findings on fairness of separation.

Compensation

19. This remedy also does not lie considering the findings above on dismissal.

Service pay

20. The letter of appointment provided that the Claimant's wages were subject to statutory deductions and this would include contributions to National Social Security Fund.
21. With the material placed before Court, the Court is unable to determine whether the Claimant is entitled to service pay in terms of section 35(5) and (6) of the Employment Act, 2007.

Leave pay

22. The Respondent as the employer ought to have produced employment records to meet the claim for leave but it did not.
23. In terms of section 10(3) of the Employment Act, 2007 the Court finds in favour of the Claimant in the sum of Kshs 32,000/- as pleaded.

Conclusion and Orders

24. The Court finds and holds that the dismissal of the Claimant was not unfair and dismisses the Cause, except for an award of Kshs 32,000/- on account of accrued leave.

25. The Claimant having failed to file and serve submissions within the agreed timelines is denied costs.

Delivered, dated and signed in Nakuru on this 8th day of April 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mogambi instructed by Wambua Kigamwa & Co. Advocates

For Respondent Mr. Akelo instructed by A.K. Chepkonga & Co. Advocates

Court Assistant Nixon