



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.99 OF 2015

STEPHEN MUTUNGA MBUVICLAIMANT

Versus

HEBATULLAH BROTHERS LIMITEDRESPONDENT

JUDGEMENT

1. The issue in dispute is the unlawful and unfair dismissal of the claimant.
2. The Claimant filed the memorandum of claim on 29th January 2015, summons were served upon the respondent, and appearance was entered on 13th March 2015. No defence was filed. A mention notice was served for 18th January 2016 to take a hearing date, an affidavit of service was filed to this effect but the respondents did not attend despite acknowledging receipt of the notice. A hearing notice was served and acknowledged by the respondents but failed to attend at the hearing on 7th March 2016.
3. The claim is that in August 1992 the Claimant was employed by the Respondent as a Welder and was later promoted to a Mechanic in 1994. The Claimant was terminated while earning a salary was Kshs.13, 258.00 after working for 22 years. On 23rd January 2014, one of the respondent's vehicles developed a mechanical problem around Mlolongo areas of Machakos County and per the practice, the driver called the Claimant to repair it. Upon return to Nairobi, the vehicle brakes failed causing the vehicle to ram into a trailer and the Claimant suffered a concussion. The Claimant was treated at Kenyatta national Hospital for a week due to the injuries suffered. On 28th January 2014 the Claimant reported to work and the human resource officer issued him with letter of summary dismissal. There was no notice or hearing and the Claimant was not given an opportunity to defend himself. As a result the dismissal was unfair.
4. The Claimant is for compensation; notice pay and costs.
5. The Claimant testified in support of his case. That he had an accident while in the Respondent vehicle that had mechanical problems and while undertaking a mechanical test. The Respondent said that the Claimant was careless and thus dismissed him from employment. He was not given notice or called for hearing. The sudden dismissal affected the Claimant and his family and the young children who depended on his salary for their livelihood. The termination was unfair and malicious. No terminal dues were paid.
6. The Claimant also filed submissions. He submits that the dismissal was unfair as held in the case of **David Gichana Omuya versus Mombasa Millers Ltd [2004] eKLR**. The provisions of section 43 of the employment Act place the statutory burden of prove upon the employer to demonstrate the reasons for termination. Such reason must be valid and fair. In this case, the Claimant had an accident while

undertaking his work and for it he was summarily dismissed.

7. The Claimant also submit that the dismissal was unprocedural contrary to section 41 of the employment Act. Without the Claimant being given a hearing to state his defence, the resulting dismissal had no validity and was not fair as required under section 43 of the employment Act. The remedies sought are due.

8. The claim is unopposed as no defence was filed. However, I note from the pleadings and evidence of the Claimant that he was summarily dismissed after he left hospital following an accident involving Respondent vehicle while he was on a mechanical test.

9. I find sufficient evidence that the Termination of the Claimant was summary in disregard of the provisions of section 41 of the Employment Act which dictates that before termination or dismissal from employment, an employer must give an employee a hearing. At such a hearing, the employee must be allowed to state their case in defence and only then can the employer take the decision to sanction an employee as appropriate. Without such procedural adherence, the resultant termination or dismissal is procedurally unfair. As held by this Court in the case of **Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Sacco Limited [2014] eKLR**;

10. In the case of **Mary Mwangi versus Sofia Mangina t/a Athens Leather Products, Cause No.1254 of 2013** the court held that;

Even in cases of gross misconduct which render an employee liable to summary dismissal, the procedural fairness requirements set out under section 41 of the Employment Act must be followed as they are mandatory. The requirement is to call the employee to attend hearing in the presence of a fellow employee of his choice where his defence is submitted for consideration by the employer.

11. Without hearing the employee, the Respondent went contrary to mandatory provisions of section 41(2) of the Employment Act. Such violation rendered the summary dismissal unlawful and under section 45, such is an unfair practice.

Remedies

12. Noting the summary dismissal of the Claimant was unlawful, compensation is due under section 49 of the Employment Act. The Claimant earned a gross salary of Kshs.13, 258.00 and is awarded compensation at 12 months gross pay all being Kshs.158, 096.00.

13. Notice pay is due in a case of unlawful dismissal. The Claimant is awarded one month's gross salary under the provisions of section 35 of the employment Act all being kshs.13, 258.00.

14. A Certificate of service is due under the provisions of section 51 of the Employment Act. Such a Certificate should accompany a letter of dismissal or termination. The certificate is to issue immediately and unconditionally to the claimant.

15. The Claimant is also awarded costs of the suit as due.

In conclusion, Judgement is entered for the Claimant in the following terms;

- c. **I declare the termination was unfair;**
- d. **Compensation awarded at Kshs.158,096.00;**
- e. **Notice pay Kshs.13, 258.00;**
- f. **Certificate of Service be issued within 14 days;**
- g. **Costs of the suit.**

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF APRIL 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

.....

.....