



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1051 OF 2014

ONESMUS NZWILI.....CLAIMANT

VS

AGRO IRRIGATION & PUMP SERVICE LTD.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 24th June 2014 and filed in Court on even date the Claimant has sued the Respondent for unlawful dismissal and failure to pay terminal dues. The Respondent filed a Memorandum of Reply on 24th November 2015. At the hearing the Claimant testified on his own behalf and the Respondent called its Production Supervisor, John Gitau.

The Claimant's Case

2. The Claimant was employed by the Respondent on 22nd October 2006, in the position of Crush Machine Operator. In July 2010, he was given a new position of Socketing Operator. His monthly salary, at the time of leaving employment, was Kshs. 13,360.

3. On 25th March 2014, the Claimant was summoned by the Respondent's Manager, one Mr. Dinesh who verbally notified him that the management had decided to dismiss him. No reason was given for this decision. On seeking explanation, the Claimant was escorted out of the Respondent's premises by security guards.

4. The Claimant's claim is as follows:

- a) A declaration that his dismissal was wrongful and unfair
- b) One month's salary in lieu of notice.....Kshs. 13,360
- c) Leave pay for 7 years.....93,520
- d) 12 months' salary in compensation.....160,320
- e) Costs plus interest

The Respondent's Case

5. In its Memorandum of Reply filed in Court on 24th November 2015, the Respondent states that the Claimant first joined its employment as an ungraded artisan on 1st July 2008. His initial salary was Kshs. 7,500 inclusive of house allowance which was progressively increased to Kshs. 11,618 plus a house allowance of Kshs. 1,742.79 as at March 2014 when the Claimant left the Respondent's employment.

6. The Respondent pleads that on the evening of 20th March 2014, the Claimant reported for night shift duty. However, instead of performing his duties which included supervising the machinery, the Claimant went to sleep in one of the warehouse rooms. He was found sleeping by his night shift supervisor.

7. As a result of the Claimant's failure to perform his duties, the machinery which he was required to supervise and operate remained unattended with low production and eventually broke down. The Respondent states that it suffered enormous losses. The Claimant was asked by his night shift supervisor to apologise and show cause why disciplinary action should not be taken against him but he declined.

8. On 21st March 2014, the Claimant was summoned for a disciplinary hearing which he also declined to attend, prompting the Respondent to summarily dismiss him. Four days after dismissal, the Claimant filed an assault report against his night shift supervisor, at Embakasi Police Station, which the Respondent deems fictitious.

9. It is the Respondent's case that there was a valid reason for the Claimant's dismissal and that due process was observed in effecting the dismissal. Further, the Claimant was paid all his terminal dues.

Findings and Determination

11. There are three issues for determination in this case:

- a) Whether the Respondent had a valid reason for summarily dismissing the Claimant;
- b) Whether in effecting the dismissal the Respondent observed due procedure;
- c) Whether the Claimant is entitled to the remedies sought.

The Dismissal

12. The Claimant states that he was summarily dismissed without a justifiable cause. The Respondent on the other hand states that the Claimant was dismissed for sleeping while at work and thus neglecting to perform his duties.

13. Section 43 of the Employment Act, 2007 requires an employer to prove a valid reason for terminating the employer of an employee. It is now well established in law that the burden placed on an employer by this provision is to show the existence of a reason that would move a reasonable employer to terminate employment.

14. As held by this Court in *Rashid Jeneby v Prime Bank [2015] eKLR*, in applying Section 43 of the Act, the Court does not seek to replace the employer's decision with its own decision. What the Court does is to review the reason advanced and if it meets the threshold of reasonableness, then the Court will not interfere.

15. I must however add that the reason for termination must in the first instance, be established at the work place in the course of disciplinary proceedings. There is therefore always a nexus between the reason and the disciplinary process and where the latter is compromised, the employer is unlikely to be found to have acted reasonably.

16. That being the case, I will now examine the reason advanced by the Respondent for the Claimant's dismissal. A termination letter dated 21st March 2014 produced by the Respondent but not acknowledged by the Claimant states as follows:

“Nzwilli,

This letter serves to terminate your services with immediate effect. Yesterday night you left machine running and slept while on duty. As a result the machine was left unattended. This has resulted to enormous loss, damaged the machine and risked the life of other fellow staffs as it almost resulted in fire outbreak. This is unacceptable.

Your dues will be settled in due course and we ask you to leave with immediate effect.

Yours faithfully,

Agro irrigation & pump services ltd.

(signed)

Dinesh Halai”

17. The Respondent's Production Supervisor, John Gitau testified that on the night of 20th March 2014, while on patrol, he found the Claimant sleeping in a warehouse, while his machine was running unattended. The following day on 21st March 2014, Gitau told the Claimant to write an apology but he declined. Gitau then reported the matter to his Director, Dinesh who also also asked the Claimant to write an apology letter. The Claimant declined yet again and he was therefore dismissed. From Gitau's testimony, it would appear that the reason for the Claimant's dismissal was in fact his refusal to write a letter of apology.

18. An apology is essentially an admission of guilt and refusal to admit guilt cannot be a valid reason for terminating the employment of an employee. The Court therefore finds that the Respondent has failed to establish a valid reason for the Claimant's dismissal.

The Procedure

19. I will now examine the procedure adopted by the Respondent in effecting the dismissal. Section 41 of the Employment Act, 2007 establishes the following mandatory procedure for handling disciplinary cases at the work place:

- (a) The employer must explain to the employee in a language the employee understands the reasons why disciplinary action is being considered;
- b) The employee is entitled to have a representative of their choice, being either a fellow employee or a shop floor representative present during the explanation;
- c) The employer must hear and consider any explanations by the employee or their representative;

20. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

21. I have looked at the procedure adopted by the Respondent in this light and find that the Claimant was not afforded an opportunity to be heard as required under the foregoing provisions. The dismissal was therefore procedurally unfair.

Remedies

22. Having found the Claimant's dismissal unjustifiable and unfair, I award him six (6) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the dismissal process. I further award the Claimant one (1) month's salary in lieu of notice.

23. From the payslips produced by the Respondent, the Court observed that the Claimant was paid leave pay up to December 2013. I will therefore only allow prorata leave pay for two (2) completed months in 2014.

24. Ultimately I make an award in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation.....Kshs. 80,166
- b) 1 month's salary in lieu of notice.....13,361
- c) Prorata leave (13,361/30x1.75x2).....1,559
- Total.....95,086**

25. I further direct the Respondent to issue the Claimant with a certificate of service and to pay the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

26. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF MAY 2016

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JUDGE

Appearance:

Mr. Wathome for the Claimant

Mrs. Omondi for the Respondent