



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 231 OF 2013

HENRY C. LANGAT

CLAIMANT

v

NAIVAS COMPANY LTD

RESPONDENT

JUDGMENT

1. Henry C. Langat (Claimant) sued Naivas Company Ltd (Respondent) on 22 July 2013 alleging unfair termination of employment. He sought a total of Kshs 4,368,000/- being pay in lieu of notice, unpaid wages, compensation and service pay.
2. The Respondent filed a Memorandum of Reply on 14 October 2013. Parties also filed documents in support of their respective cases and the Cause was heard on 10 February 2016.
3. The Claimant filed his submissions on 7 March 2016, while the Respondent's submissions were not on file by the agreed timeline of 10 April 2016.
4. The Court has considered the pleadings, evidence and submissions and identified two principal issues for determination, to wit, *whether the summary dismissal of the Claimant was unfair* and if so, *appropriate remedies*.

Claimant's case

5. The Claimant's pleaded case challenges primarily the procedural fairness (not validity or fairness) of the termination of his employment.
6. In oral testimony as well, the Claimant in his brief narration adduced evidence on the procedural and not substantive fairness of the dismissal.
7. The Claimant contended that while on leave and more specifically around 21 January 2013, he learnt that the Police was looking for him through a daily newspaper (informed by a friend), and that he presented himself before Eldoret CID where a director of the Respondent (Simon Mukuha) came and informed him verbally of the termination of his employment.
8. In the same breath, the Claimant denied being served with a dismissal letter produced in Court by the Respondent and asserted that the dismissal was not procedural/lawful, because he was not given notice.
9. He also contended he was arrested and charged with stealing by servant on 26 January 2012 and that he was convicted of the offence of stealing on 19 December 2014 against which an appeal is still pending.
10. The Claimant also confirmed that he did not return to the workplace after the arrest and release on bond.

Respondent's case

11. The Respondent called its Loss Control Manager to testify. The witness testified at length on the

- reasons for the separation and contended that he received a tip about the Respondent's goods (wheat and maize flour) being diverted and carried out investigations.
12. The investigations which involved system audit and physical stock take established a variance of about Kshs 36,000,000/-.
 13. The witness also narrated how his investigations and interviews with drivers and loaders led him to Sunrise Wholesalers where they alleged the Claimant had directed them to deliver the diverted products and that the driver and loader had been given an envelope which was delivered to the Claimant.
 14. On the process followed prior to the dismissal of the Claimant, the witness was rather brief and he stated that after a tip off (after placing a notice in a newspaper on 1 February 2012), they got the Claimant's mobile phone number and that they called the Claimant to the Police Station where he was arrested on 2 February 2012 and he was charged in Court (copies of charge sheet were produced).
 15. The witness denied that the Claimant was dismissed verbally on 2 February 2012. According to him, the Claimant was dismissed through a letter dated 20 February 2012, though effective date of dismissal was 1 February 2012.
 16. On whether the Claimant was notified of the dismissal or taken through a disciplinary process, the witness stated that the Respondent did not have the Claimant's contacts (unreachable), while he was on leave so he was not taken through a disciplinary process.
 17. Before evaluating the parties' respective cases, the Court wishes to note that the both witnesses' testimonies were riddled with inconsistencies (including dates) which in the Court's view are not decisive on the determination of the identified issues.

Evaluation

18. The Court has already adverted to the case advanced by the Claimant as one rotating on procedural fairness, and not substantive fairness, and therefore the Court will not unduly dwell on the validity and fairness of the dismissal (reasons).
19. The reason given for the dismissal of the Claimant was theft. Theft belongs to the category of *misconduct*.
20. Pursuant to section 41 of the Employment Act, 2007, the Respondent ought to have complied with certain statutory requirements before dismissing the Claimant.
21. The Respondent's witness admitted that the statutory requirements were not complied with, and gave the reason for the failure as lack of details about the Claimant's contacts.
22. The question therefore revolves around whether an employer can be excused for the failure to comply with the peremptory statutory requirements because it does not have its employee's contact details.
23. The Claimant was a senior person within the Respondent's establishment. He was a Manager.
24. To the Court, it is inconceivable that in this age and times, an employer such as the Respondent which runs a chain of supermarkets would fail to have the contact details of a senior employee.
25. It is granted that the Respondent may not have known of the Claimant's physical (residential) contact details but the evidence on record suggests that it had some contact details.
26. The Respondent's witness stated that attempts to reach the Claimant were not successful, and I presume that would be mobile phone contact.
27. The same witness stated that the Respondent was tipped off and was given a phone number which was used to contact the Claimant before his arrest and this was well before the dismissal.
28. It is noteworthy that the Respondent did not call its officer responsible for personnel issues such as Human Resources Manager under whom employment records would ordinarily be kept and who would be in charge of the disciplinary docket.
29. Such a witness would have competently addressed the question of the disciplinary process and attempts to get the Claimant to appear for a hearing.
30. In my considered view, the reason advanced by the Respondent that it could not conduct a hearing because it could not reach the Claimant is more of an excuse and should be taken with a pinch of salt.
31. The Respondent got the phone contact of the Claimant before his arrest, as a meeting took place at the CID offices, and was well aware of his arrest and arraignment in Court.

32. Further, the Respondent did not demonstrate any attempts to contact the Claimant through his declared postal address in the employment form (Claimant's exhibit 1).
33. The Court therefore finds that the Respondent had opportunity to hold a hearing prior to the dismissal but that it did not make reasonable attempts to reach the Claimant to accord him the section 41 requirement.
34. The Court finds the dismissal procedurally unfair.
35. As already stated, the Claimant did not contest the validity and fairness of the reasons for the dismissal and it is not necessary for the Court to address the same despite the Respondent's witness dwelling at length on the substantive fairness of the dismissal.

Appropriate remedies

1 month pay in lieu of notice

36. By dint of section 35(1)(c) of the Employment Act, 2007, the Claimant being paid by the month ought to have been given at least 28 days written notice of termination of employment.
37. Because none was given and the Respondent has failed to satisfy the section 41 test, the Court would find that the Claimant is entitled to 1 month pay in lieu of notice.

Wages for January 2012

38. The Claimant's dismissal was stated to be effective 1 February 2012. He is entitled as of right to wages (basic wage and house allowance and not bonus and annual leave allowance which are one off benefits) up to that date.

Compensation

39. The Claimant was employed in 2005 and was dismissed in 2012. He served for about 7 years.
40. Considering the length of service and circumstances of dismissal, despite Court not delving into the reasons for separation, the Court is of the view that the equivalent of 6 months gross wages as compensation would be fair.

Service pay

41. The Claimant's pay slip for December 2011 which was produced show he was a contributor to the National Social Security Fund, and in terms of section 35(5) and (6) of the Employment Act, 2007 he is not entitled to service pay.
42. There was no demonstration that service pay had a contractual as opposed to the statutory basis.
43. Before concluding, the Court wishes to observe that the Respondent filed an application on 5 December 2013 seeking the stay of the Cause pending hearing and determination of Eldoret Criminal Case No. 401 of 2012, but took no active steps to have the application determined.
44. Filing and leaving applications pending without prosecution is antithetical to the principal objectives of the establishment of this Court and administration of justice in general.
45. The Court also notes that the criminal case was determined on 19 December 2014 though an appeal is pending.

Conclusion and Orders

46. The Court finds and holds that the summary dismissal of the Claimant was procedurally unfair and awards him and orders the Respondent to pay him

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|----------------------------------|----------------|
| i. 1 month pay in lieu of notice | Kshs 84,150/- |
| ii. Wages for January 2012 | Kshs 99,000/- |
| iii. Compensation | Kshs 594,000/- |

TOTAL

Kshs 777,150/-

47.Claimant to have costs.

Delivered, dated and signed in Nakuru on this 6th day of May 2016.

Radido Stephen

Judge

Appearances

For Claimant
Advocates

Mr. Mogambi instructed by Wambua Kigamwa & Co.

For Respondent
Advocates

Mr. Njenga/Mr. Kiiru instructed by Thuita Kiiru & Co.

Court Assistant

Nixon