



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 229 OF 2013

PAUL THUKU GACHORA

CLAIMANT

v

NAIVAS COMPANY LTD

RESPONDENT

JUDGMENT

1. Paul Thuku Gachora (Claimant) sued Naivas Company Ltd (Respondent) on 22 July 2013 alleging unfair termination of employment.
2. The Respondent filed a Memorandum of Reply on 14 October 2013, and on 5 December 2013 it filed a motion seeking the staying of the Cause pending hearing and determination of Criminal Case No. 401 of 2012.
3. Ongaya J in a ruling delivered on 12 February 2014 allowed the stay application. The criminal case was concluded and the Claimant convicted but he appealed (appeal is still pending before the High Court).
4. The Cause was heard on 28 January 2016, after an adjournment sought by the Respondent was declined. The Claimant testified while the Respondent did not call any witnesses.
5. The Claimant filed his submissions on 7 March 2016, while the Respondent's submissions were not on file by the agreed timeline of 29 March 2016.
6. The Court has considered the pleadings, evidence and submissions and adopts the issues as framed in the Claimant's submissions, to wit, *whether the dismissal of the Claimant was unfair and if so appropriate remedies.*
7. First, why the adjournment sought by the Respondent was declined.
8. The pendency of a criminal appeal by itself should not be a ground for seeking an adjournment in an employment dispute.
9. According to documents filed by the Claimant in Court on 11 November 2015, the criminal trial before the subordinate Court was concluded on 10 October 2014, slightly more than a year ago.
10. Secondly, the Respondent had failed to attend Court without explanation on 4 occasions before the hearing date was fixed. The advocate on record had a responsibility as an officer to attend Court and he ought to have raised the objection to the hearing. The criminal trial before the Subordinate Court had been concluded earlier.
11. Lastly, the thresholds for proving unfair termination of employment is different from the standard expected to be demonstrated in a criminal trial, and the conviction or nor conviction in a criminal trial without more may not be decisive in a dispute of unfair termination of employment.
12. In any event, section 43 of the Employment Act, 2007 is clear that the reasons to be proved in Court are those which the employer genuinely believed to exist at time of dismissal on a balance of probabilities and not beyond reasonable doubt.

Procedural fairness

13. The Claimant's testimony that he was dismissed on 21 January 2012 without notice or being afforded an opportunity to make representations was not challenged or controverted.
14. Section 35 of the Employment Act, 2007 envisage written notice of termination of employment, whilst section 41 of the Act makes a hearing mandatory if the termination is any of the listed grounds, *misconduct, poor performance or physical incapacity*.
15. The allegations leading to the dismissal of the Claimant form the broad category of *misconduct* the Respondent therefore ought to have complied with the statutory requirements as to procedural fairness.
16. With no written notice and demonstration that a hearing was held either through correspondence or face to face interactions, the Court is satisfied that the dismissal of the Claimant was tainted with procedural unfairness.
17. The Court is further satisfied that the Claimant has demonstrated that there was unfair termination by dint of section 47(5) of the Act in so far as no notice was given.

Substantive fairness

18. The Court is of the view that with the conclusion on procedural fairness, it is therefore not necessary to examine whether the Respondent has proved the reasons for the dismissal (section 43 of the Act) or that the reasons for dismissal were valid and fair (section 45 of the Act).

Appropriate remedies

Pay in lieu of notice

19. The Claimant sought Kshs 38,000/- being the equivalent of 1 month's wages in lieu of notice.
20. With the conclusion reached and in terms of section 35(1)(c) of the Employment Act, 2007 as read with clause 8 of the employment contract, the Court finds the Claimant is entitled to 1 month wage in lieu of notice but in the sum of Kshs 32,300/- which was the last proved basic wage.

Wages for January 2012

21. The Claimant's testimony that he was not paid wages for January 2012 remained unchallenged. He is entitled to the earned wages as of right.

Compensation

22. The Claimant served the Respondent for about 4 years and considering the length of service, the Court finds that the equivalent of 5 months gross wages would be fair and appropriate.
23. The Claimant's proved gross wage according to November 2011 pay slip was Kshs 38,000/-.

Service pay

24. The Claimant's pay slip for November 2011 shows he was a contributor to the National Social Security Fund.
25. In terms of section 35(5) and (6) of the Employment Act, he is not entitled to service pay.

Conclusion and Orders

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

- i. 1 month pay in lieu of notice Kshs 32,300/-
- ii. January 2012 wages Kshs 38,000/-
- iii. 5 months wages compensation Kshs 190,000/-

TOTAL

Kshs 260,300/-

27.Claimant to have costs.

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

Radido Stephen

Judge

Appearances

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

For Respondent Mr. Ombati instructed by Thuita Kiiru & Co. Advocates

Court Assistant Nixon