



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 179 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 5th May 2016)

FRED ODHIAMBO OBURACLAIMANT

VERSUS

SGS KENYA LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claim was instituted via a Statement of Claim dated 12th February, 2015, filed through the firm of Jaleny and Company Advocates. The Claimant claims for damages for wrongful and unlawful termination. He states that vide a letter dated 12.2.2014 he was employed by the Respondent as a Hardware Technician and Supervisor at an agreed monthly salary of Shs. 60,000/=.
2. He further states that by a letter dated 10.12.2014, the Respondent suspended him from employment citing specific acts of breach of the terms and conditions of employment by intimidating the Respondent but the said intimidation was not particularized therein.
3. On receipt of the said letter the Claimant sought to be supplied with each and every recorded copy of the complaint of intimidation but none was supplied. At the hearing the Respondent presented employees who claimed that they had been intimidated by the Claimant, which claims were uncorroborated or supported by any documentary evidence.
4. It is also the Claimant's contention that due process was not followed neither in the disciplinary hearing nor at the hearing of the appeal which he had sought on 16.12.2014 in breach of the Labour Laws and the terms and conditions of employment.
5. The Claimant prays for judgment against the Respondent for the sum of Shs. 171,000/=, loss of earnings, costs of the suit, interest and any other relief that the Court may deem fit to grant.
6. The Respondent did not enter appearance and the matter proceeded by way of formal proof.
7. In submissions the Claimant states that Section 41 of the Employment Act is mandatory and must be adhered to in cases where an employer intends to terminate an employee for reasons of misconduct or non-performance. He relies on the case of **Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited (2014) eKLRn** to buttress this position.

8. He prays for the suit to be allowed as prayed.
9. From the evidence of the Claimant there is no proof that the Claimant was accorded a hearing as envisaged under Section 41 of employment Act which states as follows:

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

10. The Respondent also failed to file their Response to rebut the Claimant’s case under Section 45(2) of Employment Act:

2. A termination of employment by an employer is unfair if the employer fails to prove:

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason:-

- i. related to the employee’s conduct, capacity or compatibility; or**
- ii. based on the operational requirements of the employer; and**

c. that the employment was terminated in accordance with fair procedure”.

11. In this regard, there is no proof that there were valid reasons to warrant dismissal of Claimant nor was he taken through a hearing. I therefore find the dismissal unfair and unjustified.

12. I find for Claimant and award him as follows:

1. 1 month salary in lieu of notice = 60,000/=

2. Unpaid leave 17 days = 34,000/=

3. December salary (16 days) = 32,000/=

TOTAL = 126,000/=

4. The Respondent will pay costs of this suit.

Read in open Court this 5th day of May, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Jaleny for Claimant- Present

No appearance for Respondent