



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 331 OF 2013

CALEB ADEMBESA ISIJI.....CLAIMANT

v

RAI PLYWOOD (K) LTD.....RESPONDENT

JUDGMENT

1. Caleb Adembesa Isiji (Claimant) was dismissed by Rai Plywood (K) Ltd (Respondent) through a letter dated 31 October 2011 and the reason(s) given were that he failed to report to work for the 2nd shift in the dryer section (instead he reported for the 3rd shift contrary to the Respondent's regulations).
2. On 17 October 2013, the Claimant commenced legal action against the Respondent alleging unfair termination of employment. The Respondent filed a Response on 18 November 2013 which prompted the Claimant to file a Reply to Response. Documents in support of the pleadings were also filed and the Cause was heard on 27 October 2015 and 20 January 2016.
3. After close of hearing, the Claimant filed written submissions on 3 February 2016, while the Respondent filed its submissions on 3 March 2016.
4. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the dismissal was unfair, and if so, appropriate remedies.*

Whether dismissal was unfair

Procedural fairness

5. The Claimant admitted that he was issued with a show cause notice dated 28 October 2011 prior to dismissal and that he responded to it on 29 October 2011.
6. Despite the show cause and response, the Claimant contended that he was not afforded an opportunity to be heard before dismissal.
7. One of the Respondent's witnesses produced the show cause notice and the Claimant's response. He also testified without being challenged that a hearing was held and the Claimant was accompanied by a colleague called Patrick Owino.
8. The Court has looked at the show cause. It outlined the allegations against the Claimant. He responded to the allegations and the Court also finds that an oral hearing was held in the presence of the Claimant's colleague.
9. In the view of the Court, the process adopted by the Respondent was in compliance with the statutory requirements as envisaged under section 41 of the Employment Act, 2007.
10. The Court finds the dismissal was procedurally fair.

Substantive fairness

11. However, procedural fairness is not the only consideration in finding unfairness in dismissal disputes.
12. By dint of sections 43 and 45 of the Employment Act, 2007, the employer must prove the reasons for the dismissal and that the reasons were valid and fair.
13. It is common that the Claimant worked the *wrong shift* for about 2 months without the necessary approvals. The same was as a result of a local arrangement with another employee.
14. The question the Court needs to examine is whether working the *wrong shift* in circumstances as obtain here would constitute valid and fair reason(s) for dismissal.
15. In so far as, the approval of the Respondent's supervisor was expressly not sought, the reason was valid.
16. However, considering that the Claimant offered services for over 2 months and must have been assigned duties on a daily basis by the Respondent's staff in charge over him, the Court is of the considered view that the reason for dismissal, and the dismissal itself was not fair nor in accord with justice and equity.
17. The Respondent inevitably benefitted from the Claimant's sweat and labour and in working the *wrong shift* he was not in breach of a fundamental obligation arising out of the contract of service to warrant a dismissal.
18. The dismissal was an overreaction. It was punishment/penalty which did not fit the offence.
19. The Court finds the dismissal was substantively unfair.

Pendency of parallel proceedings

20. The Respondent had contended that the Claimant had filed Cause No. 341 of 2013 but no evidence was presented to Court to demonstrate the allegation or that the issues in that case were similar to the ones presented herein.

Appropriate remedies

Pay in lieu of notice

21. The Claimant sought the equivalent of 3 months wages (Kshs 29,235/-) on account of pay in lieu of notice.
22. In terms of clause 19 (ii) of the collective bargaining agreement, the Claimant qualifies for the equivalent of 2 months wages in lieu of notice.

Compensation

23. Considering the length of service (Claimant was engaged in 1998 and was dismissed in 2007 and re-engaged in 2008), the Court is of the view that the equivalent of 5 months gross wages would be fair.

Gratuity

24. The Claimant sought Kshs 63,375/- as gratuity and the Respondent did not challenge the computation.
25. In terms of clause 18 of the collective bargaining agreement, the Court finds for the Claimant.

Certificate of Service

26. A Certificate of Service is a statutory right and the Respondent should issue one to the Claimant within 7 days.

Conclusion and Orders

27. The Court finds and holds that although the dismissal of the Claimant was procedurally fair, the Respondent has failed to prove as fair the dismissal, and the Court awards the Claimant

i. 2 months wages in lieu of notice	Kshs 19,490/-
ii. Compensation	Kshs 48,725/-
iii. Gratuity	Kshs 63,375/-
TOTAL	Kshs 131,590/-

28. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 3rd day of May 2016.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Orina instructed by Manyoni Orina & Co. Advocates

For Respondent Ms. Adisa instructed by Kalya & Co. Advocates

Court Assistant Nixon