



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1856 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 13th June, 2016)

ALLAN OKUKU CLAIMANT

VERSUS

NYAYO TEA ZONE

DEVELOPMENT CORPORATION.....RESPONDENT

JUDGMENT OF THE COURT

1. The Statement of Claim herein was filed on 20th of November 2013, via the firm of Ochieng, Ogutu & Company Advocates where the Claimant pray for judgment against the Respondent for:
 - a. *Compensation for unfair dismissal with interest from the date of this suit until payment in full, in terms of:*
 - i. *Salary for months of April, May, June July, August & 9 days in September, 2013, @ Kshs. 24,060/= per month Kshs. 127,518/=*
 - ii. *12 months' salary compensation for unfair dismissal Kshs. 288,720/=*
 - iii. *Compensation for discrimination in employment*

@ 10 years' salary (24,060 /= x120)

Kshs 2,887,200/=

TOTAL Kshs 3,303,438/=

- b. *Costs of the suit and interest therein.*

Facts of the Case:

2. The Claimant was employed by the Respondent on 4th of June 2004 as Field Supervisor and worked in Kiambu, Kapcherop and Kakamega Zones, where he worked faithfully and diligently and was issued with certificate of Merit and Appreciation Letters for his diligence and good work.
3. On the 13th February 2013, the Claimant proceeded on annual leave with effect from 14th

- February, 2013 to resume duties on 15th March 2013. By a letter dated 25th February, 2013, the Respondent transferred the Claimant to Kericho Station where he was supposed to report on the 12th March 2013. The letter was received at his Station in Kakamega on 1st of March, 2013 while he was away on leave.
4. The Claimant reported back to work on the 15th March 2013 as required when he was given his transfer letter and asked to report to Kericho immediately.
 5. The Claimant states that he reported back to work on the 15th of March 2013 as required but did not find the Zone Manager who was to allocate him duties in a block.
 6. The Claimant states that he appealed against his transfer on the 18th of March but did not receive a reply until 24th April 2013. Further, he states that he discovered that the reply had been sent from Nairobi on 25th March, 2013 and received in Kericho on the 2nd March, 2013 but was never forwarded to him by the Kericho Zone Manager as required.
 7. He waited for his appeal against his transfer and he went to Kericho twice on 25th of March 2013, and 2nd April 2013 to report to the Zone Manager but found the Manager had not come back from leave and no one was around to allocate him a block.
 8. He states that the response to his appeal came in on the 24th of April 2013, where he was advised to report to Kericho as soon as possible while his appeal was being looked into.
 9. The Claimant states that he was later summarily dismissed from the service on the 9th of September 2013 for gross misconduct in terms of Section 44(4) of the Employment Act for allegedly being absent from duty without permission between the 18th of March 2013 until the 23rd of April 2013.
 10. The Claimant submits that he was transferred and instructed to report to his new station while he was on leave, was not informed of the transfer early and was not given time to prepare to relocate to his new station. He has a family and children who were going to school in Kakamega and was not given money for transfer allowance to cover his travelling and related expenses, and being the middle of the month he did not have funds to support his transfer or organize his family.
 11. He submits that his transfer was malicious and in bad faith done with ulterior motive.

Response

12. The Respondent filed a Statement of Response dated 13th December 2013 via the firm of Musyoki Mogaka & Co Advocates.
13. In it they admit that the Claimant was an employee of the Respondent as from the 26th of June 2004 to the 9th of September 2013 when he was summarily dismissed from service.
14. They state that the Claimant was officially cleared to proceed on his annual leave on the 4th of February 2013 and was expected back on the 5th of March 2013, but the date was altered to be 15th of March 2013 by his direct supervisor.
15. On the 15th of January 2013 the Respondents Area Manager _ West recommended to the Managing Director at Nairobi 15 names of employees based in the West Area for transfer and the Claimant's name was one of those on the list proposed for transfer to Kericho.
16. While the Claimant did report to work on the 14th of March 2015, the Respondent states that he

- was received by the Accountant for the Kericho Zone Mr. Wilfred K. Korir who testified that he sought two days off to settle and thereafter report to work on the 18th of March 2013. The Accountant had taken up the responsibilities of the Zone Manager who was away on leave and would have assigned him his new duties.
17. The Respondent submits that the Claimant did not report back to work on the 18th of March as agreed neither did he contact the offices of the Respondent to inform them that he was still in the Kakamega offices.
 18. The Respondent further submits that the Claimant's appeal against his transfer to Kericho did not relieve, stop and or exclude him from reporting to his new station at Kericho, moreover, the response was received in Kericho on the 2nd of April 2013 but the Claimant was unavailable to collect his letter and only showed up on the 24th of April 2013 and having found that the Zone Manager had resumed duty, did not request that he be assigned to a block.
 19. The Respondent submits that this was not the first time the Claimant had been transferred from one zone to another, and he was aware of the Respondents processes of transferring its employees. They stated that it was the duty of the transferred employee to ask for a vehicle to facilitate a transfer, as for refund of money expended during the transfer and seek more time to enable him settle at the new zone.
 20. The Respondent further submits that they were bound by the Section 44 of the Employment Act 2007 which provides instances where an employer may effect summary dismissal. They therefore submit that the Claimant failed to report to his designated place of work and left the Respondent with no other alternative but to dismiss the Claimant.
 21. The Respondent states that the Claimant was issued with a show cause letter as to why disciplinary action should not be issued against him for absenteeism on the 4th of June 2013 and having not been satisfied with the Response, he was invited for a Disciplinary hearing scheduled for the 19th of July 2013.
 22. At the hearing, the Claimant was charged with neglect of work and absenteeism from duty and was unable to give reasonable and justifiable explanation that would exonerate him from the charges and on 9th September he was lawfully and fairly dismissed from his employment.
 23. The Respondent claims that he complied with the requirements of Section 41 of the Employment Act which requires an employer to explain to an employee the reasons as to why the former is considering terminating the employees services and the employee is in return entitled to give their explanation as to why the employer should not terminate them.
 24. The Respondent states that they lawfully and fairly dismissed the Claimant and he is not entitled to salary claimed for the months of April up until 9th September 2013 as he did not work for that period. As to discrimination, the Respondent restates that the allegation is baseless and unfounded in law as at no time was the Claimant discriminated against and the cause he has presented is malicious and seeks to unjustly enrich himself.
 25. For those reasons the Respondent prays for:
 - a. ***The Court to find that the dismissal for the Claimant was justified, fair and lawful and the Claimant's suit be dismissed.***
 - b. ***That the Claimant was not entitled to the salary for time not worked.***
 - c. ***That the Claimant's allegation of discrimination at the work place are not meritorious and therefore baseless and be dismissed.***

d. That the suit be dismissed in its entirety and costs be awarded to the Respondent.

26. Having considered evidence of both parties, issues for consideration are:

1. **Whether there were valid reasons to warrant dismissal of the Claimant.**
2. **Whether due process was followed before Claimant was dismissed.**
3. **What remedies to award in the circumstances.**

27. From the Claimants' termination letter the Claimant was dismissed for gross misconduct in line with Section 44(4) of Employment Act 2007. The particular limb of the gross misconduct is however not mentioned.

28. However from Document No. 12 in Claimant's list is a letter to Claimant which is a Notice to Show Cause and it indicates that the Claimant was absent from duty from 18/3/2013 to 24/4/2013. From that letter the Claimant appealed against his transfer on 18/3/2013 and the appeal was denied vide a letter of 25/3/2013.

29. This letter was received by the Claimant on 24.4.2013 though received earlier and not forwarded to him by the Kericho Zone Manager as required. In that letter declining his appeal on transfer, the Claimant was told to report to work immediately but his position is that when he reported back on 24.4.2013 his supervisor declined to allocate him duties stating that he had overstayed away from duty.

30. The argument by the Claimant is that when he got information that the transfer appeal had been declined, he was ready and willing to resume his work but the Respondent's Zonal Manager is the one who declined to assign him work. This letter, the Claimant claims he was only given by the Zonal Manager after he resumed duty as the officer deputing him could not have allocated him any work.

31. He also avers that his April 2013 salary was stopped without notice and before any disciplinary action was taken against him and when a decision on his appeal against the transfer had not been communicated to him.

32. The question then is whether this absenteeism from duty was justified or was such that it constitutes a gross misconduct?.

33. The Claimant received the letter denying him an appeal on transfer on 24.4.2013. However, the Notice to Show Cause letter refers to the transfer letter of 25/2/2013 and indicates that when he reported on 24.4.2013 he was not given duties by Zone Manager due to long absence from duty.

34. The Respondents however didn't take into consideration the fact that the rejection of his appeal for transfer was received on 24.4.2013 and by then the Zone Manager refused to allocate him duties.

35. There is no indication that after the Claimant received communication that his transfer appeal had been rejected, he refused to work. In fact it is his boss who refused to allocate him duties. In this Court's finding, there is no wrong doing on part of Claimant after 24.4.2013.

36. Previously any wrong doing on absenteeism is vindicated because the Respondent was still considering his appeal and he had still not been allocated any duties. In this respect, I find that there were no valid reasons to dismiss the Claimant or even take him through the disciplinary processes for events before 24.4.2013.

37. On issue of due process the Claimant was taken through the process.

38. However 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*

39. The law is clear that there must be valid reasons before a termination is declared valid. Section 43 of Employment Act:

"(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".

40. Having found that there were no valid reasons which caused Respondent to terminate employment of Claimant, I find the termination unfair and unjustified. I therefore find for Claimant and enter judgment for Claimant as follows:

1. *Unpaid salary for the months of April, May, June, July, August and 9 days in September 2013 @ 24,060/= per month = 127,518/=*
2. *1 months salary in lieu of notice = 24,060/=.*
3. *12 months salary as compensation for unlawful and unfair termination = 12 x 24,060/=288,720/=*

TOTAL = 440,298/=

4. *Claimant to be issued with a Certificate of Service.*
5. *Respondent to pay costs of this suit.*

Read in open Court this 13th day of June, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Ochieng holding brief for Omari for Respondent – Present

Mutua holding brief Ogutu for Claimant – Present