



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.106 OF 2015

(Before D. K. N. Marete)

GILBERT KIPKORIR.....CLAIMANT

VERSUS

SUPER EXPO LIMITED.....RESPONDENT

JUDGEMENT

This matter was brought to court by way of a Memorandum of Claim dated 16th March, 2016. It does not disclose the issue in dispute on its face.

The respondent, in a Statement of Reply dated 8th April, 2015 denies the claim and prays that it be dismissed with costs.

The claimant's case is that on or about 1st October, 1999 the claimant was employed by the respondent as a driver. He served on various ranks and was ultimately promoted to a Manager. He served in this position from 2007 to 2014 when he was unlawfully terminated from employment.

3. The claimant served the respondent as a manager between the years 2007 to the year 2014 when he was unlawfully terminated from employment. The claimant served the respondent with loyalty, diligence and with full dedication and commitment until 9th September, 2014 when the respondent wrongfully, unprocedurally and unlawfully summarily dismissed his services and refused to pay his salary for the month of September, 2014 and his terminal benefits and allowances. (Annexed herewith and marked "APPENDIX. 1 is a payslip of the claimant from the respondent certifying that the claimant was employed by the respondent.")

The claimant's further case is he was unlawfully and unprocedurally summarily dismissed by the respondent on grounds that a lorry, registration number KBQ 566B caught fire at midnight in Turbo along Eldoret – Webuye road around Mwamba area. The claimant avers that he was not the driver, conductor and that he was not with the lorry at the time. He has not been issued with a certificate of service and neither was he paid his terminal benefits including;

1. One month pay in lieu of notice

Basic + House allowance 64,991 + 9748

Kshs. 747,39.65/-

2. Severance pay

15 days x years worked x basic/30 days

15 days x 4 yrs x 64991/30 days Kshs. 487432.48/-

3. Unpaid leave dues

21 days x yrs worked x basic + house allo/26 days

21 days x 7 yrs x 74739.65/26 days Kshs. 422566.48/-

4. Overtime dues

45 hrs per month

11 hrs x 6 days = 66hrs – 45 hrs = 21 hrs

21 hrs x 4wks = 84 hrs p.m

84 hrs x 1.5 x 64991/195 = 41994

41994 x 180 months Kshs. 7558920/-

5. Pending salary

6 days x 74739.65/30 days Kshs. 14947.93/-

6. Unpaid house allowance for 7 yrs

15 of basic x yrs worked

9748.65 x 7 yrs

9748.65 x 7 yrs Kshs. 81888.6/-

7. Unpaid public holiday

11 days per yr x yrs worked x 2 x basic/30 days Kshs. 333620.46/-

8. Compensation for unfair termination

Gross pay x 12 months Kshs. 896,875.8/-

It is the claimant's further case that;

1. The claimant submits that the respondent terminated his services summarily without following the right procedure laid down in the Employment Act, 2007.

2. The respondent violated Sections 41 (1) of the Employment Act 2007 which provides that when an employer intends to dismiss or terminate the employment of an employee for among other reasons misconduct, it must explain to the employee in a language the employee understands the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. The claimant contends that the respondent violated his provision and never explained to him the reasons for the intended termination.

3. Section 44 (4) of Employment Act lists matters which amount to gross misconduct and which would entitle an employer to summarily dismiss an employee; however the same provides that an employee should be given an opportunity to dispute the truthfulness of the accusation. The claimant submits that the respondent did not give him a chance to dispute the correctness of the accusation before dismissing him.

He cites the following as grounds of unlawful termination;

- a) *The respondent did not give the claimant termination notice as provided by Section 35 (1) (b) (c) & 36 of the Employment Act;*
- b) *The respondent denied to give the claimant his lawful leave days contrary to Section 28 (1) of the Employment Act.*
- c) *The respondent terminated claimant's employment without following the procedure laid down in the Employment Act, especially the procedures laid out in Section 45 and 41 of the Employment Act.*
- d) *The respondent terminated claimant's employment without proving that the reason for the termination was valid as provided under section 43 of the Employment Act.*
- e) *The respondent did not act in accordance with justice and equity as provided by section 45 (2) and 4 (b) of the Employment Act.*
- f) *The respondent did not regulate the working hours of the claimant. The claimant worked overtime with no pay both as a driver and in charge of transport operations in the lorry he was assigned to operate contrary to Section 27 (1) of the Employment Act.*
- g) *The respondent did not give the claimant his lawful rest days and that the claimant worked during holidays without pay contrary to Section 27 (2) of the Employment Act.*
- h) *The respondent failed to pay the claimant his house/lodge allowances contrary to the Employment Act.*
- i) *The respondent failed to pay the claimant his 12 months wages for loss of employment as provided under Section 15 (c) of the Labour Institutions Act.*
- j) *The respondent failed or neglected to give the claimant a Certificate of Service contrary to Section 51 of the Employment Act.*

He prays as follows;

- (a) *Declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated;*
- (b) *Kshs. 10,607,989.00/-*
- (c) *Certificate of Service;*
- (d) *Cost of this suit and Interest at court rates from the time of filing the suit until payment in full and*
- (e) *Any other further and better relief the Honourable Court may deem just and fit to grant.*

The respondent in reply contends that the claimant was not terminated by the respondent as alleged. He instead willingly tendered his resignation from employment vide a letter dated 22nd September, 2014

which letter was acknowledged by the respondent through a letter dated 22nd September, 2014. She further denies notice or demand to sue.

The respondent further denies the claim for overtime

6. The claim in paragraph 6 (4) (5) and (6) for overtime dues, pending salary and unpaid holiday dues respectively, are unfounded and total fabrications of figures meant to extort the respondent herein.

7. The content of paragraph 6 (6) claiming for unpaid house allowance for seven (7) years is unjustified since the claimant earned a salary that was all inclusive. Reference should be made to his exhibit at page 7 being Appendix II and an all inclusive approach is to salary payment is legal.

8. Further to the above and in response to the content of paragraph 6; how come the claimant has waited for seven (7) years to claim his alleged outstanding dues? He has not adduced a grain of evidence to show that he ever asked or these amounts were outstanding. His entire claim is an afterthought meant to extort the respondent in the guise of a legal claim.

Further;

10. The content of paragraph 13 of the Memorandum of Claim is refuted in its totality and further counter claims that;

a) The respondent did not violate the provisions of Section 35 (1) (b) (c) and Section 36 of the Employment Act since it did not terminate the claimant's employment. In any case, it is the claimant that violated the said sections of the Employment Act because when he tendered in his resignation letter, he did not give the respondent the required legal termination notice.

“Section 35 (2), Subsection (1) shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.”

b) The one (1) month notice salary in lieu of notice to the benefit of the respondent.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who should pay costs of the suit?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unprocedural. The claimant's case is to this extent. He submits a case of unlawful termination and seeks to rely on the authority of S. 45, of the Employment Act, 2007 as follows;

‘No employer shall terminate the employment of an employee unfairly.

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;

(c) That the employment was terminated in accordance with fair procedure”

Again, in the authority of **Walter Ogal Anuro Vs Teachers Service Commission [2013] eKLR** where it was held;

“that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

Section 45 (4) (b) of the Employment Act, 2007 provides:-

.....that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee.

He therefore submits that;

... is evident that there was no valid reason given at all over the termination of the claimant from his employment. The Respondent failed to establish a valid reason for the termination of the Claimant's employment as required under Section 45(2) of the Employment Act, 2007. Put another way, there was no substantive justification for the termination of the Claimant's employment.

Further, in the case of **ALPHONCE MACHANGA MWACHANYA VS OPERATION 680 LIMITED [2013] EKLK**, the court summarized the legal fairness requirements set out in Section 41 of the Employment Act as follows;

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;*
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;*
- c) That the employer has heard and considered any explanations by the employee or their representative;*
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.*

Again, in the case of **NICHOLUS MUASYA KYULA V FARMCHEM LIMITED INDUSTRIAL CAUSE NUMBER 1992 OF 2011; [2012] LLR 235 (ICK)** the court held that:-

“It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.”

Further, in the case of **KABENGI MUGO V SYNGENTA EAST AFRICA LIMITED INDUSTRIAL CAUSE NUMBER 1476 OF 2011** where the court held that:-

“The Kenyan employment law no longer accepts the ‘at will doctrine’ whereby an employer can fire employees at will, for any reason or no reason.”

And lastly in the case of **DONALD ODEKE V FIDELITY SECURITY LIMITED INDUSTRIAL CAUSE NUMBER 1998 OF 2011; [2011] LLR 277** the honourble court held that:

“It does not matter what offence the employee is accused of. If the employee is not heard, the termination is ipso facto unfair.”

He finally submits that;

..... in view of the a foregoing, there is no evidence that the Claimant was subjected to either the procedure above, the disciplinary procedure set out in Section 41 of the Employment Act, 2007 or the Respondent's internal disciplinary procedural rules if any at all. The claimant submits that he was not issued with any notices to show cause and neither was he heard prior to termination from employment. Our prayer therefore is that you find the procedure adopted by the Respondent by summarily terminating the Claimant irregular. That the termination of the Claimant's employment was unfair for want of both substantive justification and procedural fairness.

The respondent as aforesaid denies the claim and submits there was no termination of the employment of the claimant. She enlists and annexes the following documents in support of the defence case;

- a) Resignation letter dated 22nd September 2014;*
- b) Resignation letter dated 11th November 2006;*
- c) Letter acknowledging the receipt of the resignation letter dated 22nd September 2014;*
- d) Labour Inspection reports dated, 19th June, 2009, 14th October 2010, and 30th April 2013;*
- e) Master roll;*
- f) Payslips; and*
- g) Respondent's witness statements.*

It is the respondent's submission that the claimant voluntarily resigned from employment vide a letter dated 22nd November, 2014 which the claimant acknowledges in his witness statements but chooses to deny at a convenient hour. It is the claimant's further case that this is not the first resignation by the claimant he having made another one on 26th November, 2006. In the instance case, the claimant had incited other employees to resign enmasse as evidenced in the witness statement of Rimal P. Shal and Francis Odhiambo Membo.

The respondent further seeks to rely on the provisions of S. 36 of the Employment Act, 2007 which enables a party to an employment contract to terminate the contract upon payment to the other party of remuneration payable for the period of notice at termination. She further relies on the authority of **Owaga versus Transcom (u) Ltd HCC No.44 of 1982** where Bosire, J, (as he then was), clarified the distinction between resignation and dismissal as follows;

Resignation

relates to the conduct on the part of the employee in which he voluntarily decides to terminate his employment with his employer either with or without notice. It is an act by servant.

Dismissal

it is by an employer or master terminating the services or employment of his employee or servant without notice.

The claimant has not in any way demonstrated a case of termination of employment. He only alleges termination. He has not in any way refuted or rebutted the evidence of the respondent that indeed he

acted as an inciter to his colleagues to cause massively resignations and hurt the performance of the respondent. On a preponderance of evidence and balance of probability this matter tilts in favour of the respondent. It is lost on the claimant. I therefore find a case of lawful termination of employment of the claimant and hold as such.

On a finding of a lawful termination of the employment of the claimant, he becomes disentitled to the relief sought. This answers the 2nd issue for determination.

I am therefore inclined to dismiss the claim with an order that each party bears its own cost of the claim. And this clears all the issues for determination.

Delivered, dated and signed this 3rd day of June 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Biketi instructed by Wamalwa, Abdi & Company Advocates for the Respondent.
2. Mr. Kirwa instructed by Mwakio, Kirwa & Company Advocates for the Claimant.