



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.261 OF 2015

(Before D. K. N. Marete)

LAWRENCE RONO.....CLAIMANT

VERSUS

KAISUGU LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 11th November, 2015. The issue in dispute is therein cited as;

“Unlawful, wrongful and unfair dismissal of Lawrence Rono”

The respondent in a Response to Memorandum of Claim dated 26th January, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times to this suit he was an employee of the respondent. This was from 15th March, 2010 to 24th July, 2014 when he was summarily dismissed.

It is the claimant's further case was on 15th March, 2010 he was employed by the respondent as a Technical Assistant at her Outreach Farms. On 8th July, 2014 he was issued with a letter of dismissal with no offer of a hearing as per S. 41 (2) of the Employment Act, 2007. Then, he earned a basic salary of Kshs. 18, 214.00.

On 4th June, 2014 and 12th June, 2014, the respondent sent the claimant two show cause letters as to why disciplinary action should not be taken against him.

These, he avers, were unnecessary and drastic. He submits that the delay complained of by the respondent was caused by those assigned the duty of transporting tea leaf. Therefore, his dismissal was unprocedural, unlawful and unfair in the circumstances. This is as follows;

- a. *Not paying the claimant one month's salary in lieu of notice, allowances and benefits.*
- b. *Failing to recognize the claimant's previous conduct and capability and reward him accordingly.*
- c. *Failing to accord the claimant an opportunity to be heard.*

The particulars of damages cited are;

- a. *One month's salary in lieu of notice..... Kshs. 18,214/=*
- b. *Twelve months wages for unfair dismissal..... Kshs. 218,568/=*
- c. *All terminal benefits due.*

He prays for;

1. *A declaration that summary dismissal of the Claimant is unprocedural, unlawful and unfair in the circumstances.*
2. (i) *An order compelling the respondent to reinstate the claimant without loss of benefits.*

(ii) *An order compelling the respondent to pay the claimant monthly salary for the entire time he has been out of service.*

Alternatively;

3. *In the alternative an order directing the respondent to pay the claimant as follows:-*

- a. *One month wage in lieu of notice..... Kshs. 18,214/=*
- b. *Compensation equivalent to twelve (12) months' salary for unfair termination.....Kshs. 218,568/=*
- c. *Terminal benefits.*
- d. *Costs and interests.*
- e. *Costs of the cause.*

4. *Interest on 2 (ii) or 3 hereinabove at court rates.*

5. *Any other relief this Honourable Court may deem fit and just to grant.*

The respondent case is that the claimant was summarily dismissed for gross misconduct on his part. It is the respondent's further case that contrary to the claim, the provisions of the Employment Act were observed and the claimant afforded a fair hearing in the circumstances. He (claimant) admitted to negligently performing his duties thus contravening his obligations to the respondent and the provisions of the Employment Act. In addition, the respondent states that the Claimant did not show cause why he absconded duty.

He was therefore dismissed for in compliance with the provisions of the law and also for refusing to report to his new work station on transfer. The case was therefore good material for dismissal.

The matter came to court variously until the 11th April, 2016 when the parties agreed on a determination of the dispute by way of written submissions.

The issues in dispute 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 bears the costs of this cause?

The claimant in his written submissions reiterates his case as presented in the claim. He seeks to rely on S. 43 of the Employment Act, 2007 which burdens the employer to prove the grounds of termination failure of which the termination shall be deemed to be unfair. This is as follows;

S. 43

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.*

This is coupled by S. 45 (2) as follows;

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 employees conduct, capacity or compatibility; or*
 - ii. *Based on the operational requirements of the employer and That;*
 - c. *That the employment was terminated in accordance with fair procedure*

Again, S. 41 of the Employment Act, 2007 goes out to buttress the claimant's

case as follows;

41. (1) *Subject to section 42 (1) an employer shall, before termination 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 the explanation.*
2. *Notwithstanding any other provision of this Part, an employer shall before termination 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.*

The claimant denies and submits a case of no prove of his transfer and that he was only subjected to a show cause on the issue of green leaf collection. He also denies absconding duty and submits that he was not called upon to answer this charge.

The respondent does not file any written submissions but in defence annexes the following;

1. *A show cause letter dated 12th June, 2014 and referenced "absconding duty."*
2. *A show cause letter dated 4th June, 2014 from the respondent to the claimant referenced "plucking organization."*

3. *Letter dated 4th June, 2014 by the claimant to the respondent referenced “delays in green leaf collection.”*
4. *A letter dated 18th June, 2014 by the claimant to the respondent referenced “green leaf refund” where the claimant admits liability for his default.*
5. *A letter of dismissal dated 8th July, 2014 by the respondent’s Outreach Manager to the claimant.*

This is coupled by the witness statements of Henry Cheruiyot, Harrison Kirui and Franklin Kirui the respondent’s witnesses which also reiterate the respondent’s case.

This appears to be a case of your word against mine. It is a case of a determination on the test of a balance of probability. The question is, which is the likely scenario of this case on a balance of probabilities? It is my finding that this matter tilts in favour of the case of the respondent. The respondent has ably demonstrated a case of lawful termination of employment whereas the claimant falls short of demonstrating the reverse of this. There is evidence of admission of liability over the burnt leaf as claimed by the respondent against the claimant. I therefore find a case of lawful termination of employment and hold as such. This answers the 1st issue for determination.

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. Langat instructed by M/s Gordon Ogolla Kipkoech & Company Advocates for the claimant.
2. Miss Ndungu instructed by Kiplenge Kurgat Advocates for the respondent.