



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 251 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 26th July 2016)

PETER KANYEKI KARUGA.....CLAIMANT

VERSUS

HORIZON CONTACT CENTERS LIMITED....RESPONDENT

JUDGMENT OF THE COURT

1. Before Court is a Claim for unfair and wrongful termination where the Claimant herein seeks relief from the Court in terms of:

- a) A declaration that the Respondent has, through its conduct unfairly/wrongfully terminated the Claimant's employment contract contrary to Section 45 of the Act;*
- b) A declaration that the Respondent has, through its conduct breached Section 31 of the Act;*
- c) An order directing the Respondent to issue the Claimant a certificate of Service in accordance with the provisionS of Section 51 of the Act;*
- d) An order directing the Respondent to pay the Claimant:*
 - (i) Kshs.204,000.00 being twelve months' gross remuneration as damages for unfair/wrongful termination of the Claimant's employment contract.*
 - (ii) Kshs.17,000.00 being salary for the month of May 2014;*
 - (iii) Kshs 17,000.00 being one months' pay in lieu of Notice;*
 - (iv) Kshs. 12,750.00 being overtime on account of 15 unpaid public holidays;*
 - (v) Kshs. 23,800.00 on account of 28 accrued leave days;*
 - (vi) Kshs 4,500.00 being illegal deductions from salary for the months of January, February and April 2014;*
 - (vii) Kshs.175,000.00 being a reasonable house allowance at the rate of Kshs 7,000.00 per*

month for the 25 months of employment.

e) The costs of and incidental to these proceedings; and

f) Such other, alternative, further, additional or incidental reliefs as the Honourable Court may deem just and expedient.

Facts of the Claim

2. The Respondent employed the Claimant on a contract basis, as a Customer Service Agent from 2nd November 2011, to 31st March 2012. He was confirmed and engaged on permanent terms on the 10th of April 2012, until 20th May 2014 when he was summarily dismissed by the Respondent.

3. Throughout his service, the Claimant served the Respondent diligently and exemplarily as evidenced by his appraisal until dismissal.

4. On the 2nd of May 2014, the Claimant reported to work at around 2.00 pm for the afternoon shift, at around 10.00 pm one of his colleagues Branice Mukasa accidentally stepped on the power cable as a result of which three computers including the Claimant's shut down making it impossible to receive the Customers incoming calls.

5. The team leader came in to find out what was happening but did not believe the explanation alleging that they did not want to speak to customers. There was a slight altercation where the two exchanged some words.

6. The Claimant was off duty from the 3rd to the 6th of May 2014 and when he was due to report back he received a call from the Team Leader who informed him that his shift had been changed and that he was due to report to work at 6.30 in the morning on the 7th of May 2014 and not 2.00 pm as earlier arranged.

7. The Claimant reported to work, at the said time and was called to the boardroom to attend a meeting at around 11.30 am. The meeting was with Human Resource Manager, Service Delivery Manager and two Team Leaders, where he was asked to discuss what had transpired on the 2nd May 2014.

8. After deliberations, he was asked to go home and report to the HR Manager the following day. He reported as asked where he was informed that the meeting held the previous day was a disciplinary one and that a decision to summarily dismiss him had been reached.

9. He was asked to go home and report the following week for further directions. He visited the offices severally and when he was finally able to get the Human Resource Manager on the 20th May 2014, he was handed his dismissal letter dated 9th May 2014.

10. The Claim is undefended.

The Claimant Submissions

11. The Claimant filed written submissions. In them they submit that before an employee is terminated, the employer has to have valid reasons to terminate as envisioned in Section 41(1), 43, and 45 (2) of the Employment Act 2007, and that in this instant, no valid reason has been preferred by the Respondent for its termination of the Claimant.

12. They submit that the reasons advanced in the dismissal letter are frivolous as the Claimant successfully completed a rigorous three month probation program before being employed on permanent terms.

13. The Claimant had prior to taking up permanent employment, satisfactorily served the Respondent on contract basis for a period of two years.

14. No warning and/or disciplinary action was ever taken on the alleged insubordination.

15. They submit that the dismissal was also not procedurally fair as contained in the Act. The requirements were disregarded by the Respondent and no explanation was given to the Claimant in the presence of another employee as to the reasons why he is being dismissed.

16. They rely on the case of **Aphonse Maghanga Mchwanyanya vs. Operation 680 Limited [2013] eKLR** where Justice Radido held that:

“....in the context of Section 41 of the Employment Act, it is not enough for an employer to simply set out the reasons for termination or dismissal in the termination or dismissal letter. The letter of termination/dismissal’s primary purpose when the whole parameters of Sections 10, 12, and 41 of the Employment Act is considered is to convey the decision reached by an employer after holding a disciplinary hearing..”

17. In this case it was held that the Respondents’ failure to comply with Section 41 of the Act amounted to procedural unfairness which had the effect of rendering the dismissal unlawful.

18. They further submit that failure to comply with requirement of procedural fairness/due process automatically renders termination unfair. They refer to **Deakin & Morris (1998) Labour Law 2nd edition Butterworths** at page 48:

“...failure to comply with these minimum procedural requirements is more likely not to lead to a finding of unfair dismissal. The employer cannot argue that notwithstanding a breach of procedure, the dismissal was fair on substantive grounds, either because of facts which emerged later or because viewed objectively, the failure to operate the procedure would have no difference to the outcome...”

19. The remedies sought by the Claimant are all within the provision of Section 49 of the Act as read with Section 50.

20. They submit that it is only fair and just that the Court grants the Claimant the prayers sought and rely on the case of **Aphonse Maghanga Mchawanya vs. Operation 680 Limited** where the Honorable Court when awarding 12 months for gross salary as remedy for unfair termination to the Claimant who had served only two years of employment held that:

“...in determining whether to make this award the court is required to consider some thirteen factors which have been set out in Section 49(4) of the Act. The Claimant had served the Respondent for only about two years by the time of termination. An employment contract is one of mutual trust and confidence which dissipates when one party terminates the contract. Having regard to this, the factors set out in the quoted section and that the Claimant did not express any intention or wish to be reinstated, it is in my view that he is entitled to an award of 12 months compensation for the unfair termination, he still had nearly two more years to end the contract...”

21. They conclude stating that they are entitled to all the reliefs sought, that in addition, they are entitled to the sum of Kshs. 4,635.00 being refund for the deductions illegally deducted from salary for the months of January, February and April 2014. They pray the claim be awarded as claimed.

22. Having considered the evidence of the Claimant, the issues for determination are as follows:

1. Whether there were valid reasons to warrant dismissal of Claimant.

2. Whether due process was followed.

23. From the dismissal letter the Claimant was dismissed summarily for insubordination. The details of the insubordination are not enumerated. The Claimant explained what happened and it is not clear whether he was insubordinate or the Respondents failed to understand him.

24. In any case, this was not a case that would have warranted summary dismissal without any formal disciplinary hearing, there is no proof of what really happened. Coupled with failure to have a formal disciplinary hearing as envisaged under Section 41 of Employment Act, I find that there were no valid reasons to dismiss the Claimant and due process was not followed.

25. I find the Claimant has proved his case accordingly and I find the dismissal was unfair and unjustified as provided under Section 45(2) of Employment Act which states:

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.

26. I award the Claimant as follows:

1. 1 months salary in lieu of notice = 17,000/=.

2. Claimant's salary for May 2014 = 17,000/=

3. 12 months salary as compensation for unlawful termination = $12 \times 17,000 = 204,000/=$.

4. 28 days accrued leave = 23,800/= unpaid.

5. House allowance being 15% of 17,000 x 25 months = 63,750/=

TOTAL = 325,550/=

6. Issuance of a Certificate of Service.

7. Costs of this suit.

Read in open Court this 26th day of July, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Karanja for Claimant – Present

No appearance for Respondent