



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 588 OF 2014

**KENYA UNION OF PRINTING, PUBLISHING, PAPER MANUFACTURERS,
PULP & PACKAGING INDUSTRIES.....CLAIMANT**

v

HIGHLANDS PAPER MILLS LTD.....RESPONDENT

JUDGMENT

1. The Kenya Union of Printing, Publishing, Paper Manufacturers, Pulp & Packaging Industries (Union) commenced legal proceedings against Highlands Paper Mills Ltd (Respondent) on 14 November 2014 and the issue in dispute was stated as *wrongful dismissal from employment of Moses Watakila* (Grievant).
2. The Respondent filed a Memorandum of Appearance on 8 December 2014 and Memorandum of Response on 9 November 2015 and a List of Documents on 17 November 2015.
3. There is nothing on record to suggest that the Respondent sought leave to file a Response long after the lapse of the prescribed 14 days after service of summons and because the Union did not raise a challenge, the Court leaves it at that.
4. The Cause was heard on 19 November 2015 and 10 February 2016. The Union filed its submissions on 9 March 2016 while the Respondent's submissions were filed on 8 April 2016.
5. The Court has considered the pleadings, evidence and submissions, and identifies the issues for determination as, *whether the summary dismissal of the Grievant was unfair and if so, appropriate remedies*.

Whether dismissal was unfair

6. The Union contested the fairness of the summary dismissal of the Grievant on the ground that he was not afforded a hearing (*validity and fairness of the reasons was not set out in the pleadings nor raised in examination in chief*).
7. The Grievant in his testimony stated that after resuming from leave sometime in/after March 2013, the Respondent's Human Resources Manager extended the leave in order to consult with the General Manager.
8. After some time, he was called to the office and issued with a suspension letter dated 8 April 2013.

Thereafter, the General Manager called him to inform him that a letter had been posted and when he collected the letter, he found it was a summary dismissal letter dated 30 April 2013.

9. During cross examination, the Grievant confirmed that the contents of a show cause letter dated 7 April 2013 (Respondent's exh. 7) were brought to his attention and that he was required and indeed made representations in response to the allegations in the show cause notice (he did not disclose where, how and before whom).

10. He also confirmed that he appealed against the dismissal.

11. The show cause notice dated 7 April 2013 set out in clear terms the allegations against the Grievant and these were, altering approved leave days from 1 to 2 days and (leaving)/absence from work on 28 March 2013 to 3 April 2013, while the approval was for only 30 March 2013.

12. The Grievant was requested to make representations within 48 hours why disciplinary action ought not to be taken against him.

13. According to the Respondent's witness, the Grievant refused to accept the show cause notice and thus he was suspended through a letter dated 8 April 2013, after which the Respondent's Board met and resolved to dismiss the Grievant.

14. The witness also testified without being challenged that the Union's shop steward was present when the show cause was being issued and rejected by the Grievant.

15. With the above narrative, the Court is called upon to examine whether the process meet the requirements of section 41 of the Employment Act, 2007 and any contractual provisions governing disciplinary action between the Union and Respondent.

16. Section 41 of the Employment Act, 2007 is not explicit that an oral hearing be held where an employer is contemplating taking disciplinary action against an employee.

17. Jurisprudence from this Court and the Court of Appeal (see *Kenya Revenue Authority v Menginya Salim*) is now agreed that the process contemplated by section 41 of the Act could be oral, through correspondence or a combination of both.

18. In the instant case, the Grievant was informed of the allegations to confront and he was given 2 days to make representations. He confirmed he was made aware of the allegations, but he refused to accept the show cause notice.

19. Consequently, the Respondent suspended him pending determination of his fate by the Board.

20. In the Court's view, the Grievant was aware of the charges to confront and was given time within which to respond. Clause 17(c) of the collective bargaining agreement between the Union and Respondent provided for 48 hours to respond.

21. He refused to accept the show cause notice and also snubbed the opportunity accorded to him to make representations. Clause 17(e) of the collective bargaining agreement envisages summary dismissal where an employee refuses to accept a *warning*.

22. Although the clause refers to *warning*, in principle, the Court sees no difference where an employee refuses to accept a show cause, respond or cooperate with the employer in a disciplinary process.

23. An employee is under a common law obligation to cooperate with an employer even during disciplinary proceedings. The Grievant herein did not cooperate with the employer.

24. The Grievant, in the view of the Court cannot complain or contend that he was not afforded an

opportunity to be heard.

25. The Court reaches the conclusion that the Respondent was in substantial compliance with the procedural fairness essentials of section 41 of the Employment Act, 2007.

26. Because the Union did not contest the validity or fairness of the reasons for the dismissal, the Court will not examine the same.

27. Before examining remedies, a few observations on the submissions by the Respondent that section 41(1) and 43(1) & (2) of the Employment Act, 2007 do not apply in cases of summary dismissal.

28. In the considered view of the Court, the submission is misplaced and has no basis in law as section 41(2) of the Act makes summary dismissals on account of *misconduct, poor performance and physical incapacity* subject to statutory procedural fairness as envisaged by section 41(1) of the Employment Act, 2007.

Appropriate remedies

Pay in lieu of notice

29. This head of claim is legally unsustainable in light of the conclusion reached on fairness of dismissal.

Accrued leave/Overtime

30. No evidential foundation for this relief was laid, and it is declined.

31. In any case, the dismissal letter set out the accrued dues on account of leave and overtime and the same were paid.

Days worked

32. The Grievant was entitled as of right to earned wages up to 30 April 2013 when he was dismissed considering that he did not work during the period of suspension at the behest of the Respondent.

33. The Grievant's testimony that he was earning Kshs 12,338/- at time of dismissal was not contested.

Service pay

34. The Court was not addressed on the legal question whether *service pay* is available where the Court finds dismissal to have been fair, and the relief is therefore declined.

Compensation

35. Compensation does not lie as the Court has found the dismissal fair.

Conclusion and Orders

36. The Court finds and holds that the summary dismissal of the Grievant was fair and dismisses the cause of action founded on wrongful dismissal.

37. However, the Court finds and holds that the Grievant is entitled to and awards him

(a). April 2013 wages

Kshs 12,388/-

38. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 11th day of July 2016.

Radido Stephen

Judge

Appearances

For Union/ Grievant Ms. Njeri, Industrial Relations Officer

For Respondent Mr. Ochang' instructed by Ochang Ajigo & Co. Advocates

Court Assistant Nixon