



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.1842 OF 2013**

**BENSON MURAGURI MAINA.....CLAIMANT**

**VERSUS**

**KASSAM & BROS CO. LTD.....RESPONDENT**

**JUDGEMENT**

1. In September 2009 the Claimant was employed by the Respondent as a casual, electronics trainee and later trained and got a certificate in 2011. His last position was Electrician and Machine work. On 5<sup>th</sup> August 2013 the respondent, without reason, notice or hearing terminated the Claimant from his employment. This was in breach of his contract of employment, contrary to the collective bargaining agreement (CBA) and the applicable law. The termination was contrary to natural justice and unfair.
2. The Claimant is seeking 5 months' pay for his incomplete contract; unpaid leave for 3 years; service for 3 years; and compensation for unfair termination of employment.
3. The Claimant also testified in support of his claim that in 2010 he was employed as a casual by the Respondent and as an Electrician Trainee. He was then issued with a contract dated 1<sup>st</sup> September 2010 as an electrician and machine work. He did Grade III exam with the Ministry of Labour but he was not promoted and was told to wait. He submitted his certificate with the Respondent as he was still at work in 2011.
4. The Claimant also testified that his contract was renewed but problems started when he asked that his salary be increased. The Respondent said that the Claimant was absent most of the time or drunk. However, the Claimant contest that if he had been drunk or absent from work, the Respondent did not act and such is not true.
5. That the Claimant had not gone on leave but took emergency leave of one week. He got 15 days of leave which started on 18<sup>th</sup> June 2013 to 4<sup>th</sup> July 2013. This was the only leave he got.
6. After taking his leave, the Claimant resumed duty but the Respondent officer told him that he had no work. He was not given a reason for the termination or given notice. The Claimant without knowing why he had been dismissed from work.
7. In defence, the Respondent allege that the Claimant was drunk, would be absent from work. There was a time he was made to write a letter that he had been drunk but this was not true. The termination was unfair and has put the Claimant into great hardship and seek his terminal dues.
8. In cross-examination, the Claimant testified that he had a contract that set out reasons of summary

dismissal as being absence from work and being drunk while at work. That he was forced to take several emergency leave due to situations at home but would call his supervisor. In 2012 he wrote an apology on the reason that he was not at work for 2 to 3 times without permission. He got a warning letter on 15th October 2012. On 14<sup>th</sup> June 2013 another warning was issued due to absence from work.

## **Defence**

9. In defence, the Respondent admit they employed the Claimant but deny that the Claimant was sacked without a reason. That upon employment the Claimant was issued with a contract which set out the grounds upon which he would be summarily dismissed for being drunk or absent from work without due cause. The Claimant breached his contract of employment leading to his dismissal.

10. The Claimant reported to work several being drunk and remained absent for up to 2 days without notice or permission. The Claimant was issued with several warning letters but failed to abide. The Claimant also wrote an apology due to his absenteeism and accepting responsibility. Due to repeated gross misconduct, the Respondent terminated the claimant.

11. In evidence, the Respondent called Wilson Maina Mbothe in supported their case. He testified that he is the head of Electronic department at the Respondent since 1995. He worked closely with the Claimant who was under his supervisor since 2009 to his last day of dismissal.

12. That he went for a job in Kiambu road to install a panel for a client. The work took long forcing them to work late and he drove the Claimant to his house. While at work, the workers on site asked him why the Claimant was shaking while working. The client they were serving got concerned due to the claimant's conduct. That the work the Respondent employee do is sensitive as it relates to electricity and any careless act can lead to serious repercussions but they worked with the Claimant while he closely monitored him until the end of the day. They used the same vehicle home. That previously he had to counsel the Claimant for being at work drunk but he never heeded.

13. That when the Respondent employees were paid their salary at 15<sup>th</sup> and month end, the Claimant would go drinking to a stupor. He was resident near the office and fellow employees would have to go fetch him from home. This caused the Claimant to be constantly absent from duty. He was issued with various verbal warnings but did not change leading to dismissal.

14. Mr Mbothe also testified that the Respondent issued a circular to all employees to take their leave days. Each employee had to use the appropriate forms and apply. Such leave lapsed in a year without a carry over. The Claimant would be absent from work each time he was paid. His salary midmonth and month end. He admitted in his letter of apology for being absent. He is not entitled to the claim for leave or compensation.

## **Submissions**

15. The Claimant submit that the Claimant was dismissed without a valid reason. Section 41 and 44 of the Employment Act require that an employee be given a hearing before summary dismissal. The fact that the Claimant came to work intoxicated and apologised was denied in evidence. Mr Mbothe testified that the Claimant was an experienced worker without any issue being raised. There was therefore no immediate cause for the dismissal as held in **Linus Barasa Odhiambo versus Wells Fargo Limited [2012] eKLR**.

16. The Respondent did not follow fair procedure in accordance with section 41(2) of the Employment Act. Such requires the employee be given a hearing before dismissal as held in **Walter Ogal Anuro versus TSC [2013] eKLR**. that the provisions of section 41 of the Employment Act are mandatory as held in **Kenya union of Commercial Food and Allied Workers versus Meru North Farmers Sacco limited, Cause No.74 of 2013**. The Claimant was not given a hearing and thus entitled to the remedies sought.

17. The Respondent submit that section 44 of the Employment Act allow an employer to dismiss an

employee for gross misconduct and cite instances of being intoxicated while at work and being absent without due cause or permission. The Claimant was absent from work on various instances and was verbally warned. Further warning letters dated 15<sup>th</sup> October 2012 and 13<sup>th</sup> June 2013 were issued and the Claimant admitted and wrote an apology. He did not take heed and this resulted in dismissal. There were valid reasons for the same and in accordance with the law.

18. That section 45 of the Employment Act states that a termination based on operational requirements of the employer is a fair reason. The Claimant had a contract that clearly stated the reasons that can lead to dismissal. In **Dunsmuir versus Brunswick [2008] 1 S.C.R** the Supreme Court of Canada held that the employer governing general principles bind an employee. That the procedure provided under section 41 of the Employment Act were followed with regard to the Claimant and before his dismissal. Several warnings verbal and written were done.

19. On the remedies sought, the Respondent submit that notice pay is not due in summary dismissal. Statutory dues were paid for the Claimant and service pay is not due. The reasons for dismissal were valid and no compensation is due.

### **Determination**

20. The claim is that the Claimant was dismissed by the Respondent on 5<sup>th</sup> August 2013. That the Claimant was not issued with a letter of dismissal or given any reasons.

21. Section 44 of the Employment Act allow an employer to summarily dismiss an employee without notice or with less notice. However, the provisions of section 44(3) and (4) of the Employment Act are subject to the provisions of section 41(2) of the Employment Act. Section 41 of the Act requires that the employer give an employee a hearing before dismissal from employment. Noting the requirements under section 44(4), where an employer must summarily dismiss an employee for reasons of being absent or being intoxicated while at work, effort must be given to give the employee a hearing. Where the employer cannot be able to give the employee a hearing, the circumstances leading to the same must be demonstrated. See **Joseph Sohelo Mariko & Another versus Pandya Mukesh t/a Relish Restaurant, Cause No.1237 of 2013** that;

*Hearing before termination is mandatory pursuant to the provisions of section 41 of the employment act. The duty is upon the employer to hear the employee whatever misconduct has taken place. Even on the case of gross misconduct, an employee must be given a hearing unless such is not possible in the circumstances but such exceptional circumstances must be demonstrated by the employer. At the hearing, there are set safeguards that the employer must comply with.*

22. In this case the Claimant is said to have been at work on several occasions while intoxicated. He also would be absent form work on several occasions. He was issued with a warning letter dated 15<sup>th</sup> October 2012 and 14<sup>th</sup> June 2013. The Claimant also wrote an apology letter stating that

*I, Benson Maina, an employee of Kassam and Bros Co Ltd apologize for not turning up after the receipt of advance salary on the 16<sup>th</sup> August 2012 and also was the same done by me previously.*

...

23. Though this letter of apology is not dated, the Claimant admitted to having being the author. It confirms that he was absent from work on 16<sup>th</sup> of August 2012. Therefore, when the warning letter dated 15<sup>th</sup> October 2012 was issued to him, this was after his letter of apology following absence from work on two previous occasions.

24. The final warning letter dated 13<sup>th</sup> June 2013 was on the reason that;

*Despite several warnings you have made it a habit of failing to report on duty without valid reason. The management has decided to give you the final warning to reform yourself otherwise you will be summarily dismissed for gross misconduct.*

25. Mr Mbothe testified that on the material date on 5<sup>th</sup> August 2013, he was at work with the Claimant where a client observed that he was shaking. He had cautioned the Claimant on his conduct and being drunk while at work. When they were paid their salaries, the Claimant did not report to work as he was drunk.

26. These are circumstances specifically addressed under section 44(4) of the Employment Act as being gross misconduct. Being intoxicated while at work or being absent due to such intoxication is subject to summary dismissal.

27. However, even where the Claimant grossly misconducted himself; he was drunk while at work; he was absent severally and was issued with several warning, the resulting dismissal should have been in writing. The Respondent does not submit any written communication to the Claimant giving him the reasons for his summary dismissal. Such written notice is not optional as upon it, the Claimant has a right under section 47 of the Employment Act to challenge the same.

28. Without being issued with the written notice, the Claimant was left without any lawful reason for his dismissal. It is not sufficient for an employer such as the Respondent to give concrete evidence when in court justifying the summary dismissal. The Claimant should have been given a hearing at the shop floor and upon the decision of dismissal, a written notice should have been issued. The shop floor is the best place for an employer to give the employee a hearing before dismissal as held in **Joseph Asare versus Brookside Dairies Ltd, Cause No.1204 of 2014.**

29. Section 45 of the Employment Act requires the court to put into account the reasons for termination of employment and where such reasons are fair and justified, the termination is not unfair. Also the law requires the court to put into account the conduct and capability of the employee up to the date of termination and the existence of any pervious warning letters issued to the employee. Save for the failure to issue a written notice of termination, the Respondent complied with the requirements leading to the dismissal of the claimant. The lapse of not issuing notice I find not unreasonable as the Claimant knew at all times that he had been dismissed upon the breach of his contract of employment. No compensation is awarded.

## **Remedies**

30. The claim for 5 months due in the contract is claimed but the Claimant did not go into this claim. In any event, on the finding that the Claimant breached his employment contract, such remedy is not due.

31. Taking annual leave is a right due to an employee. Such leave is regulated under section 28 of the Employment Act;

*28. (1) an employee shall be entitled—*

*(a) After every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;*

32. Such leave should be taken and where not taken, the employee should be paid for it. The employer is responsible for ensuring that its employee take their annual leave, off days and day(s) of rest when due. The employer should keep the records of such lawful absence from work and when challenged, the employer should submit the same before court. It should not be left to the employee to submit such records. Upon the Claimant filing his claim, he clearly sets out that he is seeking leave due for 3 years. The Respondent witness testified that they got a circular to take all leave due. Where the Claimant took his leave days such records should have been submitted in court to confirm the same and or that he was paid for the same. Without these records, the claim for annual leave pay for 3 years is due and awarded at

Kshs. 39,951.00 based on the last pay slip.

33. The claim for service pay is not due. The Respondent submitted records and evidence of payments for NSSF, statutory dues for the claimant.

34. Notice pay is claimed. Such is not due in a case of breach of contract.

**In conclusion, save for annual leave pay due at Kshs.39, 317.00, the rest dues claimed are dismissed. Each party shall bear own costs.**

**ORDERS ACCORDINGLY.**

**Delivered in open Court at Nairobi this 14<sup>th</sup> day of September 2016.**

**M. MBARU**

**JUDGE**

In the presence of

.....

.....