



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1072 OF 2013

JOSHUA KISILU..... CLAIMANT

VERSUS

ASHUT ENGINEERS LIMITED.....RESPONDENT

JUDGMENT

1. That the claimant in this suit claims he was wrongly and unfairly terminated from employment by the respondent. He therefore seeks an order for compensation from the Court which he has quantified at Kshs.289,429/=.
2. The respondent on its part averred that on several occasions the claimant's work was found unsatisfactory and several notices to that effect were issued. The respondent further stated that the claimant had previously been issued with termination notice but this was rescinded upon the intervention of his Union.
3. The respondent further averred that despite his union's interventions, the claimant was on 9th November, 2012 found wasting time on his mobile phone. The incident according to the respondent was deliberated upon and the claimant afforded an opportunity to explain his part of the case but was found unsatisfactory. He was consequently terminated.
4. In his evidence before the Court, the claimant admitted that his services had previously been terminated but he was reinstated on the intervention of his Union.
5. On the material day, it was his evidence that his colleague at work had a problem and wanted him to lend him money through Mpesa but when his supervisor found him he took away his phone and consequently terminated his services.
6. In cross examination he denied ever being issued with any warning letter and upon being shown one allegedly signed by him, he denied that the signature on the letter was his. He however admitted that in 2011 he was terminated because he failed to meet the targets but was reinstated upon the intervention of his union on condition that he met the targets set and not repeat similar mistakes. He denied there was a designated place for leaving phones during working hours. He further admitted that the shop steward was called by a Mr. Rupesh, his supervisor and told he was found with a phone. He also admitted that they used to take leave every December.
7. The respondent on its part through DW 1 stated that the claimant had been issued previously with three warning letters. These warning letters were produced in Court as Dex 1-3. He was

reinstated on the intervention of the Union and cautioned not to repeat his mistakes. On 9th November, 2012 however, he was found playing with his phone during working hours and the phone confiscated by his supervisor Mr. Rupesh. According to his evidence, the company does not allow workers to carry phones during working hours.

8. Counsel for the claimant in his closing submissions submitted that the claimant was not offered any proper chance to defend himself as required by section 41 of the Employment Act. According to Counsel he was only summoned and required to sign for a dismissal letter which he refused to do because he could not own up to mistakes he did not commit.

9. Counsel for the respondent on the other hand submitted that the act of the claimant using mobile phone while at work was a serious ground for gross misconduct since it reduced productivity, interfered with the company's work and distracted concentration and attention. Counsel further urged the Court to note that the claimant had a previous dismissal where he had been forgiven and warned not to involve in gross misconduct.

10. Employment contract just like any other contract has obligations binding on parties to it. On the part of the employer, there is an obligation to provide work and a conducive environment to perform such work among other obligations.

11. Further, the employer has an obligation to compensate an employee for services rendered and in accordance with Labour Laws and regulations applicable.

12. The employee on the other hand has an obligation among others, to dedicate his working hours to the service of his employer and never to engage in activities to the detriment of the employer's interest.

13. A contract of employment may further just like any other contract, be terminated either by breach or in accordance with the terms of the contract itself and or as provided by the relevant legislation.

14. In our case, the Employment Act, 2007 provides for reasons and processes for terminating an employment relationship. These provisions are not exclusive and conclusive in themselves but provide the minimum below which parties cannot contract.

15. In terminating the services of an employee an employer is expected by the Act to observe the provisions of the Act as minimum both in terms of reason for termination and the process. In doing so however, it was never the intention of the Act that the reasons and procedure for termination should take the rigour and circumspection of a Court trial. What the law expects of an employer in terminating the services of an employee is that the reason or reasons for termination must be valid and fair and further that in carrying out the termination a fair procedure was followed. The fair procedure contemplated here is that the employee concerned is made aware of the reasons why his termination is being considered and afforded an opportunity to react to those reasons either alone or through a colleague or representative of his or her choice. The best test in reaching the decisions to terminate would be that:-

Would a reasonable employer confronted with such accusation against such an employee consider dismissal as the best option? This is where the fairness lies.

16. In this particular case before me, the claimant had a previous discipline record for which he was dismissed but was reinstated on the intervention of his union and on condition that he does not in future repeat the mistakes for which he was to be dismissed. He did not deny being found in possession and using a mobile phone during working hours. He sought to justify his action but barely denied that the company had a policy prohibiting use of mobile phones during working hours. As submitted by Counsel for the respondent, mobile phones can be distractive and can interfere with ones concentration at work. It was therefore more probable than not that the use of

mobile phones considering the nature of the claimants work as a welder, was not permitted during working hours.

17. In view of the fact that the claimant had a previous disciplinary issue for which he was dismissed but reinstated on the intervention of his union on condition that he does not engage in misconduct in future, his dismissal on the second misconduct was therefore justifiable and the Court so finds.

18. Considering the procedure adopted in course of his dismissal; the accusations against the claimant were made known to him in the presence of the shop steward. He was subsequently issued with a dismissal letter which he admits receiving but refusing to sign for as he did not agree with the reasons for terminating his services. This time round, neither his union nor himself reacted to his dismissal. The Court is therefore satisfied that in dismissing the claimant, the respondent did not engage in any process that could be described as unfair.

19. In conclusion, this claim fails and is hereby dismissed with costs.

Dated at Nairobi this 20th day of March 2015

Abuodha J. N.

Judge

Delivered this 20th day of March 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge