



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 312 OF 2013

JOHN KIPCHIRCHIR MARITIM

CLAIMANT

v

KEN KNIT KENYA LIMITED

RESPONDENT

JUDGMENT

1. John Kipchirchir Maritim (Claimant) was employed by Ken Knit Kenya Ltd (Respondent) as a machine operator in 1993. On 16 September 2013, he commenced legal proceedings against the Respondent alleging unfair termination of employment.
2. The Respondent filed a Response on 3 October 2013 and the Cause was heard on 12 February 2015, 28 April 2015 and 20 May 2015.
3. The Claimant filed his submissions on 29 May 2015, while the Respondent filed its submissions on 24 June 2015.
4. The Court has considered the pleadings, evidence and submissions filed on 29 May 2015 and identified the issues for determination as *whether the dismissal of the Claimant was unfair and appropriate remedies*.

Whether dismissal was unfair

Procedural fairness

5. Procedural fairness is now an integral part of the employment contract in Kenya due to statutory intervention. By dint of section 41 of the Employment Act, 2007, an employer is under an obligation to inform an employee of the contemplated reasons for dismissal, afford the employee an opportunity to make representations and consider such representations if it is a case of summary dismissal. The employee is further entitled to be accompanied by a colleague or union representative if an oral hearing is conducted.
6. The Claimant testified and stated that he was issued with a dismissal letter dated 19 December 2011 on 21 December 2011. He also stated that prior to the dismissal he had written an apology letter on 16 December 2011 over allegations that he had presented forged medical documents to get a sick off.
7. He further stated that he was not given notice prior to dismissal.
8. The Respondent's Human Resources Manager stated that the Claimant was summarily dismissed and that before the dismissal, he was issued with a show cause notice and was also called and informed of the intended dismissal by Joachim Kimoja (Respondent's Human Resources Manager at the material time).
9. In cross examination, the witness stated that though notice of termination was not given to the

- Claimant, he was issued with a notice to show cause and a hearing was conducted. The witness however stated that he could not tell who were present at the disciplinary hearing.
10. The Claimant gave very scanty information in his oral testimony. He had also filed a witness statement in which he admitted that a clerk informed him of the allegations against him, and that he wrote an apology letter and also sought that 3 days sick off be deducted from his wages.
 11. From the contents of the witness statement, the Court is satisfied that the Claimant was informed of allegations against him and he made representations including in writing and therefore the Respondent was in substantial compliance with the statutory requirements as outlined in section 41 of the Employment Act, 2007.

Substantive fairness

12. In complaints of unfair termination of employment, the employer must prove the reasons for dismissal (section 43 of the Act) and that the reasons are valid and fair (section 45 of the Act).
13. The reason given for the dismissal of the Claimant was forgery of a sick sheet in order to obtain sick off and wages during the sick off.
14. The Respondent produced a copy of the sick sheet in contention. At the back was a writing *N. G.* which was explained in Court to mean *not genuine*. There was a stamp by the Medical Officer of Health Huruma Sub District Hospital.
15. The Respondent also produced a copy of a letter dated 27 July 2009 written and stamped by the Medical Superintendent, Huruma District Hospital (Respondent's exhibit 2). The letter confirmed that the Claimant had attended the hospital on the indicated dates. Another copy of the same letter was produced and it had writing in a different type of pen and handwriting indicating that the Claimant had been given 3 days off.
16. The Respondent's own document show and confirm that the Claimant attended the hospital on 27 July 2009. The contention therefore is whether the Claimant was given sick off or not.
17. The hospital disowned the sick sheet form which the Claimant presented to the Respondent. The Respondent confronted the Claimant and he appeared to admit the same. He sought that wages equivalent to 3 days he took as sick off be deducted from his wages.
18. The Respondent nonetheless went ahead to summarily dismiss him.
19. The Respondent had secured an apology letter from the Claimant but it did not explain why despite securing the apology on 16 December 2011, it still went ahead to summarily dismiss the Claimant on 21 December 2011. Of note is that a hearing was held on 19 December 2009 after the apology.
20. Similarly no explanation was offered as to why the Respondent disregarded the suggestion by the Claimant that it had been agreed he be deducted 3 days wages.
21. Again no explanation was offered why it took nearly 2 years before taking action against the Claimant. It was not suggested investigations took 2 years.
22. In the view of the Court, the action of the Respondent was not in accord with equity and justice and therefore the dismissal was unfair.

Appropriate remedies

Notice pay

23. The Claimant sought Kshs 27,300/- being the equivalent of 3 months wages.
24. The appointment letter produced provided for one month notice or pay in lieu of notice.
25. The Claimant would therefore be entitled to 1 month pay in lieu of notice. The Claimant's basic wage at time of dismissal was Kshs 8,000/-.

Compensation

26. Compensation pursuant to section 49(1) (c) of the Employment Act, 2007 is a discretionary remedy. The Claimant served the Respondent for over 18 years.
27. Considering the length of service, the Court would award him the maximum compensation equivalent to 12 months gross wages.

Gratuity

28.No contractual or statutory basis for this head of claim was placed before Court and therefore it is untenable.

Certificate of Service

29.This is a statutory right. The Claimant should collect his Certificate of Service which was prepared on 22 December 2011 if he has not picked it up.

Conclusion and Orders

30.The Court finds and holds that the summary dismissal of the Claimant did not accord with justice and equity and hence unfair and awards him and orders the Respondent to pay him

- a. 1 month wage in lieu of Notice Kshs 8,000/-
- b. 12 months wages as compensation Kshs 109,200/-

TOTAL **Kshs 117,200/-**

31.Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 24th day of July 2015.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Orina instructed by Manyoni Orina & Co. Advocates

For Respondent Ms. Lusweti instructed by Kitiwa & Co. Advocates

Court Assistant Nixon