



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 504 OF 2014

DENNIS MAKORI

CLAIMANT

v

MARIDADI FLOWERS LIMITED

RESPONDENT

JUDGMENT

1. The Claimant commenced legal action against the Respondent on 13 October 2014 alleging unfair termination of employment. The Respondent filed a Response on 27 November 2014 and the Claimant filed a rejoinder on 19 December 2014. The Cause was heard on 20 July 2015.
2. The Court has considered the pleadings, evidence and submissions and identified the pertinent issues as, *whether the dismissal of the Claimant was unfair and appropriate remedies/orders.*

Whether dismissal was unfair

Procedural fairness

3. The Claimant was dismissed through a letter dated 25 May 2014. The dismissal was preceded by a show cause letter dated 24 May 2014. The show cause notice outlined the allegations against the Claimant (participating in an unprotected strike despite being in an essential service).
4. The show cause asked the Claimant to show cause within 24 hours and also invited him to an oral hearing on 25 May 2014.
5. According to the minutes produced by the Respondent, the Claimant appeared at the hearing, and a workers representative and a colleague (Duncan Ngala) chosen by him were present.
6. In his testimony, the Claimant stated that he responded in writing to the show cause notice, was not given an opportunity to make representations during the hearing and that the dismissal letter was prepared even before the hearing and that the hearing was rushed.
7. Section 41 of the Employment Act, 2007 provides for procedural fairness before a decision to terminate the services of an employee is taken.
8. I alluded to the essential ingredients of procedural fairness in the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* (2013) eKLR as

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed

of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

9. The Claimant herein was notified of the allegations to confront through the show cause notice. He was requested to respond in writing which he did. He was also invited to a hearing which he attended. Although he contended that he was not allowed to make representations during the oral hearing, the minutes suggest otherwise.
10. Further, the Claimant was accompanied by a colleague of his own choice. There was also a union representative.
11. On the basis of the documents produced and testimony, the Court is satisfied that the Respondent complied with the essentials of procedural fairness.

Substantive fairness

12. Although the Claimant vehemently denied that there was an illegal strike, his testimony points to the fact that there was work disruption at the work place.
13. He stated that he was holed up in a meeting with the Respondent's management the whole day on 23 May 2014. He also stated that the local Labour Officer had come and held meetings with the parties to help find a solution to grievances raised by the employees. He further stated that the Police came and dispersed the employees.
14. The mere presence of the Labour officer and Police indicate there was a problem. The Respondent considered the problem an *unprotected strike*. It accused the Claimant of participating in the strike and dismissed him on that ground.
15. The crucial question is therefore whether the Respondent has proved that the Claimant participated in the *strike*.
16. The Respondent's Human Resources Manager stated that there was a strike by some employees on 23 May 2014 concerning unionisation and that a meeting was held from about 11.00am to the evening.
17. According to her, the next day, some 37 employees (including Claimant) who were employed in essential services were issued with show cause letters. She also stated that the Claimant was not in his work place by 7.30am and did not inform the Respondent of the strike. After a hearing, the employees, including the Claimant were dismissed and requested to apply for their jobs afresh. The Claimant did not.
18. The Claimant's testimony was that he participated in a meeting with the Respondent's management the whole of 24 May 2014. He was participating in his capacity as a member of the employees' welfare group.
19. He confirmed a hearing was held after which he was issued with a dismissal letter.
20. From the material placed before Court, the Court finds that there was work disruption on 23 May 2014 and that the Claimant as a member of the welfare group participated in meetings attended by the Labour Officer to help find a solution. The meeting started about 11.00am.
21. Now, if the Claimant participated in the strike, it must have been before 11.00am. But considering that the Claimant was a member of the welfare group (exact duties and purpose of the group were not disclosed but it appears it included fire fighting like during the work disruption as herein), he could not have been expected to be in his work station working. In all fairness, he would have been expected to be up and about to establish exactly what the grievances were and engage with the Respondent to find a solution.
22. Based on the Claimant's position as a member of the welfare group, it was not in accord with justice and equity for the Respondent to dismiss him allegedly for participating in a strike.
23. The Court has also been bothered by the fact that the Claimant's dismissal letter was not signed by the Managing Director. Although the Court asked the parties to address the non-signing of the dismissal letter, they did not. The Court is of the opinion that the dismissal did not have the

imprimatur of the controlling mind of the Respondent.
24. The Court therefore concludes the dismissal was not in accord with justice and equity and finds it substantively unfair.

Appropriate remedies

One month pay in lieu of notice

25. With the conclusion reached and pursuant to section 35(1)(c) of the Employment Act, clause 10 of the appointment letter and clause 18 of the Collective Bargaining Agreement, the Court finds for the Claimant (the proved basic wage was Kshs 7,376/-).

Severance pay

26. The Claimant was not declared redundant and this remedy is not available.

Compensation

27. The Claimant served the Respondent for about 6 years. Considering the length of service, the Court would award him the equivalent of 6 months gross wages as compensation (proved gross wages was Kshs 10,577/-).

Conclusion and Orders

28. The Court finds and holds that the dismissal of the Claimant was not in accord with justice and equity and therefore substantively unfair and awards him and orders the Respondent to pay him

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| a. 1 month pay in lieu of Notice | Kshs 7,376/- |
| b. 6 months wages compensation | Kshs 63,462/- |

TOTAL **Kshs 70,838/-**

29. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 20th day of November 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muthanwa instructed by Muthanwa & Co. Advocates

For Respondent Mr. Kinyanjui, Legal Officer, Agricultural Employers Association

Court Assistant Nixon