



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 353 OF 2013

KENNEDY ESADIA LUVISI

CLAIMANT

v

RAI PLY WOOD (KENYA) LTD

RESPONDENT

JUDGMENT

1. Kennedy Esadia Luvisi (Claimant) was employed by Rai Ply Wood (Kenya) Ltd (Respondent) on 1 February 2001 as a mechanical fitter. The Respondent through a letter dated 22 August 2013 purportedly dismissed him from employment.
2. On 17 October 2013, the Claimant commenced legal proceedings against the Respondent alleging unfair/unlawful termination of employment and seeking a total of Kshs 520,530/- (as terminal dues/compensation).
3. The Respondent filed a Response on 11 November 2013 and this prompted the Claimant to file a rejoinder on 5 December 2013 and the Cause was heard on 8 June 2015.
4. After considering the pleadings, evidence and submissions, the Court has identified the issues for determination as, *whether the dismissal of the Claimant was unfair and appropriate remedies/orders.*

Whether dismissal was unfair

Procedural fairness

5. The Claimant testified and stated that he was found with petrol in the workplace on 19 August 2013 and that he was issued with a show cause notice on 20 August 2013. He also stated that the show cause notice set out the allegations against him and that he responded to the show cause notice on 21 August 2013. The dismissal came on 22 August 2013.
6. The Respondent's fifth witness confirmed a show cause was issued and that an oral hearing was held on 21 August 2013.
7. Section 41 of the Employment Act, 2007 provides for procedural fairness before an employer takes a decision to terminate the employment of its employee.
8. In my view the essential ingredients of the statutory procedural fairness envisaged under the cited section are that the employee should be informed of the allegations to confront and he should be afforded an opportunity to respond to the allegations. He may be accompanied by a colleague or union shop floor representative.
9. Depending on the circumstances of the particular case, the process contemplated by the section could be conducted through correspondence, face to face hearing or a combination of both (see *Kenya Revenue Authority v Menginya Salim Murgani* (2010) eKLR. But where a hearing is

- conducted, the employer is not expected to hold a mini-court.
10. In the present case, the Claimant was informed of the charges in a show cause and he responded in writing. He was also called to and appeared at an oral hearing. It is only thereafter that the Respondent took the decision to dismiss him.
 11. In my view, the Respondent was substantially in compliance with the statutory requirements as to procedural fairness.

Substantive fairness

12. An employer is expected to prove the reasons for dismissal (section 43 of the Employment Act, 2007) and that the reasons for dismissal are valid and fair (section 45 of the Act). The employer should also act in accordance with justice and equity (section 45(4) of the Act).
13. The reason given in the show cause letter and the dismissal letter was that the Claimant was found with 2 litres of super petrol in a plastic container hidden in a jacket. This is the reason the Respondent had to prove.
14. In his testimony, the Claimant stated that the petrol was his personal property (for his motorbike) and that employees were not restricted from entering the Respondent's premises with personal property.
15. The Respondent called 5 witnesses. The first witness was a security guard who searched employees. He testified that a search was mandatory on entry and exit. He also stated that he called the Claimant but he ran away. When the Claimant was caught up with he was taken to the security office and found with the petrol. The Claimant was asked to record a statement which he did.
16. The second witness corroborated the testimony of the first witness. He also stated that there was a notice at the gate requiring all employees to declare personal property and that because the Respondent operated a timber factory, employees were not allowed to bring in petrol.
17. The other witnesses also gave a similar narration as the two witnesses.
18. The Court has considered the testimonies and documents. In his statement of 19 August 2013, the Claimant wrote

I was found with 2 lts petrol (super) at 23.00 hrs on my way when I was being searched at gate B without gate pass by K.K. Shift Supervisor. I apologise for what I have done.

19. This statement by the Claimant is a corroboration of the testimony by the Respondent's witnesses that employees were required to declare personal property.
20. Now, if the Claimant had come in with the petrol, the entry search would have established the same and he would have been issued with a gate pass. It is more probable that the Claimant got the petrol from within the Respondent's premises and it must have been the property of the Respondent.
21. The Court finds that the Claimant had the Respondent's property and could not account for it and that the Respondent has proved as much. The Respondent had sufficient grounds for suspecting the Claimant of having committed a criminal offence and which has been proved. This is one of the grounds given for summary dismissal in section 44(4)(g) of the Employment Act, 2007.
22. The dismissal of the Claimant was substantively fair.
23. The Court wishes to thank counsels involved in this Cause for their industry and research and even though the numerous authorities cited have not been expressly referred to, they have been considered.

Conclusion and Orders

24. Arising from the above, the Court finds and holds that the dismissal of the Claimant was fair.
25. The Court orders the Memorandum of Claim filed in Court on 17 October 2013 to be dismissed with costs to the Respondent.

Delivered, dated and signed in Nakuru on this 13th day of November 2015.

Radido Stephen

Judge

Appearances

For Claimant Ms. Gacanja Instructed by Manyoni Orina & Co. Advocates

For Respondent Ms. Adisa Instructed by Kalya & Co. Advocates

Court Assistant Nixon