



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 315 OF 2014

DOUGLAS MACHARIA WAWERUCLAIMANT

v

CRESTED ACRES INVESTMENTS LTDRESPONDENT

JUDGMENT

1. Douglas Macharia Waweru (Claimant) was employed by Crested Acres Investments Ltd (Respondent) as Operations Manager on 1 March 2013.
2. Barely one year later, specifically through a letter dated 5 May 2014, the Respondent wrote to the Claimant informing him that his services had been terminated due to wilful neglect neglect of duty. The letter set out the particulars.
3. Being aggrieved, the Claimant commenced legal action against the Respondent on 17 July 2014 and he stated the issues in dispute as
 - i) Unfair termination
 - ii) Overtime
 - iii) Unpaid leave.
4. The Respondent filed its Response on 28 August 2014 and the Cause was heard on 12 May 2015 and 2 July 2015. The Claimant testified while the Respondent called 3 witnesses.
5. The Claimant filed his written submissions on 27 July 2015 while the Respondent filed its submissions on 21 August 2015.
6. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the dismissal of the Claimant was unfair and appropriate remedies/orders.*

Whether dismissal was unfair

Procedural fairness

7. The Claimant's case was that on 4 May 2014 he reported to work as usual and worked until evening when the Managing Director of the Respondent called him and informed him verbally of his dismissal.

8. The Managing Director gave the reasons as the bouncing of some cheques which had been issued in favour of East African Breweries Ltd.
9. After the meeting, the Claimant left and reported the next morning, because according to him he did not have written communication of the dismissal. The Managing Director then confronted him and asked to know what he was doing at the workplace and assured him he would get the letter when it was ready. After about a week, he received an email with a copy of the dismissal letter.
10. According to the Claimant, the dismissal was unfair because he was not given notice of termination/show cause notice or afforded an opportunity to be heard before the dismissal and there were no valid reasons for the dismissal.
11. Under cross examination, the Claimant admitted that he gave explanations to the Respondent's Managing Director on the bounced cheques.
12. The Respondent's first witness, a stock supervisor stated that the Claimant was chased away on 5 May 2014 when he reported for work in the morning. He was not aware of what transpired the previous evening or whether a hearing was conducted.
13. The second witness, a Sales and Business Development Manager stated that he was aware that the Claimant had been given verbal warnings and that on the evening of 4 May 2014, he saw the Managing Director talking with the Claimant but he did not know what they discussed.
14. He stated he was not aware whether a hearing was held before the Claimant was dismissed.
15. The Respondent's third and last witness was the Managing Director. He stated that initially the performance of the Claimant was good, but the same deteriorated with time.
16. According to this witness, meetings were held with the Claimant over the performance and minutes were kept. During the meetings, he realized the Claimant had family problems which affected his performance.
17. Despite the meetings, the Claimant's performance did not improve and an email was written to him (Respondent's exh. 16).
18. On the circumstances immediately surrounding the dismissal, the witness stated that he returned to Nakuru around 5 May 2014 and asked the Claimant to explain about several shortcomings but he refused to respond and therefore he told him that he (witness) had no option but to terminate his (Claimant's) contract. This was in the evening and when the Claimant asked for a dismissal letter, he advised him it would be sent through email.
19. According to the witness, by refusing to respond, the Claimant's action amounted to insubordination and the Respondent agreed to pay the Claimant pay in lieu of notice and that the dismissal was in compliance with the terms of the contract.
20. During cross examination, the witness disclosed that he did not summon the Claimant to appear before him in the presence of the other directors but he informed them of the decision he had taken.
21. He admitted that there was no show cause notice.
22. The Claimant was being paid by the month. Pursuant to section 35(1)(c) of the Employment Act, 2007 as read with clause 9 of the appointment letter, the Respondent ought to have given the Claimant 1 month written notice of termination of employment. This was not done.
23. The Court is therefore satisfied that the Claimant has discharged the burden in section 47(5) of the Act to show there was unfair termination of employment. The burden therefore shifts to the Respondent.

24. On that score, the dismissal was unfair. But sections 36 and 44 of the Act envisage an employer terminating the services of an employee with no notice or on shorter notice for fundamental breach of an obligation arising out of the contract of service.

25. However, dismissal without notice or on short notice is subject to the procedural fairness safeguards outlined in section 41 of the Employment Act, 2007.

26. Because this is a case of summary dismissal, section 41(2) of the Act is more pertinent.

27. It is incumbent upon an employer to demonstrate compliance with the procedural fairness safeguards.

28. In *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* (2013) eKLR, I attempted to outline the basics of the safeguards as follows (paras 60-66)

Section 41 of the Employment Act, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the Act, the right to a hearing was not part of the employment contract unless it was expressly incorporated into the contract by agreement/staff manuals or policies of the parties or through regulations for public entities.

An employer was free generally to dismiss for a bad reason or a good reason but on notice or payment in lieu of notice. The employer could even dismiss for no reason at all. There was no obligation to notify or listen to any representations by the employee.

The law was very harsh on employees. I believe this could have been one of the factors which led to incorporating what has long been referred to in administrative law as the rules of natural justice and embodied in the Latin maxim *audi alteram partem rule* into the employment contract. Whatever the reasons, the Employment Act, 2007 has fundamentally changed the employment relationship in Kenya.

And what does section 41 of the Act require. The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness.

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.

29. The Respondent contended that several meetings were held with the Claimant over his performance.

30. In my view, such meetings were to discuss general performance and operations of the business but were not geared towards and do not satisfy the statutory requirements of a hearing as part of the disciplinary process.

31. There was no suggestion at all that the Claimant was informed that his dismissal was contemplated during those meetings.

32. The Respondent's witnesses went to great lengths to demonstrate that the Claimant had

underperformed.

33. That may be so, but the statutory scheme in place currently obligates an employer not only to prove the reasons for dismissal (section 43 of the Act) and that those reasons are valid and fair (section 45 of the Act) but to also follow due process before taking the decision to dismiss. The statute has now intervened in the employment relationship and an employer cannot solely rely on a contractual provision to dismiss an employee.

34. Compliance with both procedural fairness and proof of the substantive reasons are mandatory and where an employer fails in one, there is unfair termination of employment, despite and inspite of contractual provision for termination on notice without cause.

35. The Court finds that the Respondent did not comply with the requirements of section 41 of the Employment Act, 2007 and thus the dismissal of the Claimant was unfair.

36. With the conclusion reached, it is not necessary to consider whether the Respondent has proved the reasons for the dismissal or that the reasons were valid and fair.

Appropriate remedies/orders

Unpaid leave

37. Annual leave is a statutory right which accrues as a result of service and is due and payable when not forfeited on completion of the requisite tenure of service.

38. The contract provided that leave could not be carried forward without permission. The Claimant did not demonstrate that he had permission to carry forward his leave and this head of relief is declined.

Compensation

39. The Court has reached a conclusion the dismissal was unfair. An award of compensation is a primary though discretionary remedy.

40. The Claimant's unchallenged testimony was that his gross pay at time of dismissal was Kshs 63,500/-

41. Considering the Claimant's length of service, the Court is of the view that 3 months gross wages would be fair as compensation.

Unpaid overtime

42. By practice, managers do not get paid overtime in this country. The Claimant did not lay any contractual or statutory basis why he was entitled to overtime which he never sought during the currency of employment.

43. The relief is declined.

Conclusion and Orders

44. The Court finds and holds that the dismissal of the Claimant was procedurally unfair and awards him and orders the Respondent to pay him

(a) 3 months gross wages as compensation Kshs 190,500/-

45. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 11th day of December 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ndubi instructed by Robert Ndubi & Co. Advocates

For Respondent Mrs. Kirui/Mr. Kipkoech instructed by Gordon Ogola, Kipkoech & Co. Advocates

Court Assistant Kosgei/Nixon