



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 464 OF 2014

HENRY ISAIAH ONJELO CLAIMANT

V

MARIDADI FLOWERS LIMITED.....RESPONDENT

JUDGMENT

1. Henry Isaiah Onjelo (Claimant) commenced legal proceedings against Maridadi Flowers Ltd (Respondent) on 3 October 2014 alleging unfair termination of employment.
2. The Respondent filed a Response on 28 November 2014 and the Claimant filed a rejoinder on 16 December 2014.
3. The Cause was heard on 24 June 2015 and 25 June 2015. The Claimant did not file submissions while the Respondent filed its submissions on 18 August 2015.
4. 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

5. The Claimant was dismissed through a letter dated 24 May 2014. Prior to the dismissal, the Respondent had on the same day issued to the Claimant a show cause letter alleging that on 23 May 2014 the Claimant had incited other employees to participate in an unprotected strike.
6. The show cause letter requested the Claimant to show cause in writing within 24 hours why disciplinary action should not be taken against him.
7. Minutes produced by the Respondent indicate that a disciplinary hearing was conducted on the same day (24 May 2014) and that the Claimant was present and he was afforded an opportunity to make representations.
8. According to the minutes, the hearing on 24 May 2014 was anchored on the allegation that the Claimant had declined to receive/acknowledge the earlier show cause letter.
9. Witnesses attended the disciplinary hearing.
10. In testimony, the Claimant admitted that he declined to sign the show cause letter after which the Human Resources Manager called an urgent disciplinary hearing to which he (Claimant) was requested to bring along a colleague but his colleague of choice (Kosgey) did not attend. A Justus Amimo accompanied him instead.
11. He also stated that he was informed of the purpose of the hearing and that those present at the hearing urged him to acknowledge receipt of the show cause letter.
12. In the view of the Claimant, the hearing was rushed and he was not given sufficient time to make representations.

13. Asked by his counsel, he admitted that the colleague who accompanied him to the hearing had written a statement implicating him in inciting the workers.
14. Section 41 of the Employment Act, 2007 provides for procedural fairness before a decision to terminate the employment of an employee is made.
15. The basics of the statutory requirement are that an employee should be informed of the allegations to confront. In the case at hand, the Claimant admitted he was informed of the allegations.
16. The requirement also includes affording the employee an opportunity to make representations. The minutes indicate the Claimant was given time to respond to the allegations.
17. Further the Claimant was accompanied by a colleague. It is not exactly clear why the first choice of the Claimant was not present at the hearing, but the Claimant did not suggest he complained at the time.
18. He has also not demonstrated any prejudice he suffered.
19. The Claimant contended that he was not granted sufficient time to prepare for the hearing. Sufficiency of time to prepare depends on the circumstances of each case.
20. In the instant case, the allegations against the Claimant had mutated from incitement to one of refusing to acknowledge receipt of a show cause letter. He admitted as much. This was a straightforward matter and if he needed more time, he should have at the first instance brought that request to the panel he appeared before.
21. The Claimant did not demonstrate he sought for more time before the panel or what injustice/procedural prejudice he suffered because of the hearing being held on the same day.
22. In the view of the Court and based on the material before Court, the Respondent was in substantial compliance with the statutory requirements of section 41 of the Employment Act, 2007.

Substantive fairness

23. The reason for dismissal was set out in the minutes and the dismissal letter. According to the Respondent, it was gross misconduct (minutes) for the Claimant to refuse to cooperate with it by accepting and signing the show cause letter.
24. In so far as the notice envisaged by section 35 of the Employment Act, 2007 was not given, this was a case of summary dismissal and it merits assessing to see if the refusal is the type of grounds contemplated for summary dismissal.
25. Section 44 of the Employment Act, 2007 provides the circumstances under which an employer may summarily dismiss an employee. The gravamen of the circumstances is that an employee has by his conduct fundamentally breached an obligation arising under the contract of service.
26. The section also sets out some of the matters which may amount to fundamental breach of obligations under a contract of service. These include *absence without permission or lawful cause, intoxication at workplace rendering employee unable to perform his work, negligence/carelessness, use of abusive language and others.*
27. All the matters listed, though not exhaustive suggest that the conduct of the employee goes to the root of contract/performance of the duties expected of the employee.
28. In the present case, it is alleged that the Claimant declined or refused to sign a show cause letter.
29. In the view of the Court, failure to sign a show cause letter does not go to the root of a contract of service. It does not belong to the same genre as the matters set out in section 44(4) of the Employment Act, 2007. In other words, such conduct does not amount to a fundamental breach of an obligation arising from a contract of service.
30. Of course the Court is aware that there is a universally acknowledged term in every contract of employment that employees will cooperate with employers including in disciplinary proceedings.
31. But in the view of the Court, failure to cooperate should not attract summary dismissal but rather termination in compliance with section 35 of the Employment Act, 2007.
32. The Court therefore finds that the dismissal of the Claimant was substantively unfair and also not in accord with justice and equity in terms of sections 45(2) and (4)(b) of the Employment Act, 2007.
33. Despite the finding, the Court deplores the conduct of the Claimant.
34. Before concluding, the Court wishes to observe that it did not understand why the Respondent would make use of employee welfare committee/association to deal with issues to do with terms and conditions of employment in a scenario where there is a recognition agreement with union.

