



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1669 OF 2013

JOHN NDEGWA KAMINJACLAIMANT

VERSUS

NAIVAS LIMITEDRESPONDENT

JUDGEMENT

1. The claimant, John Ndegwa Kaminja on 18th October 2013 filed his claim for unlawful termination by the respondent, Naivas Limited. On 14th April 2014 the respondent filed their defence and denied the entire claimant noting that the claimant was terminated due to insubordination and therefore not owed anything. In evidence the claimant gave his sworn statement while the respondent called Peter Kiboi Ndungu as their witness. Both parties filed their written submissions on 9th May 2014 and 3rd June 2014 for the claimant and respondent respectively.

The claimant's case

2. On 28th March 2013 the claimant was employed by the respondent as a Shop Attendant on a salary of Kshs.13, 000.00 which was inclusive of house allowance. The claimant joined a trade Union and on 10th July 2013 he was summoned by his supervisor where he found the Managing Director who asked the claimant to explain why he was recruiting fellow employees to the union and why he was planning for a strike. That when the claimant joined the union, the respondent management was not happy and used abusive language on him and as a result the claimant was ordered to remove the respondent uniform and leave their premises immediately and report back on 11th July 2013 to the supervisor. When the claimant reported back he was served with a dismissal letter without prior warning, hearing or being given reasons for the same. On 12th July 2013 the claimant wrote an appeal to the respondent but the same was ignored. That this dismissal was unfair and contrary to the law thus null and void and has cause the claimant grave harm, damage and loss for which he holds he respondent liable.

3. The claimant is therefore seeking to be reinstated to his position with the respondent without any loss of benefits and position; in the alternative to get compensation of the unfair termination, payment of his leave, notice pay and general damages and due benefits and costs of the case. The claimant is also seeking to have a Certificate of Service provided to him by the respondent.

4. In evidence, the claimant reiterated his claim and also stated that he was at work on 10th July 2013

when he was called by his supervisor to his office and at the office, he found the managing director of the respondent. Without any introductions, the managing director asked questions stating that the claimant wanted to cause violence within the respondent business and used abusive language. That the claimant wanted to organise a strike and was thus chased out. Since the claimant was wearing company dust coat, he was made to remove it and it revealed the shirt he was wearing that had the respondent logo and he was also ordered to remove it but on his way out he was directed to put on the shirt back. The next day the claimant was called by the human resource officer and when he arrived at the premises he was issued with a letter of dismissal and not given any time to read it and when he got out and read he was shocked. He wrote an appeal but this was never considered. He was accused of gross misconduct but was not allowed to give any defence.

5. In the defence the claimant was accused of using abusive language but there is not record of warning or disciplinary case to this effect. That the cause of these claims against the claimant was due to his joining the union which made the respondent unhappy yet the claimant had the right to join a trade union of his choice. He was not a shop steward or any official of the union so as to organise any strike and there is no evidence from any employee that was recruited or told to join a strike. The respondent did not give such information to the claimant so as to indicate he had recruited anybody to join the union. The claimant was thus victimised for joining the union.

6. In the claims, the claimant is seeking general damages but he could not explain the same as the memo was drafted for him, a claim for 11 days of leave, claim for compensation for unfair termination and costs of the suit.

Respondent's case

7. In defence the respondent stated that the claimant was their employee from 28th March 2011 until 11th July 2013 when he was dismissed for acting in a manner insulting of his employer that amounted to gross insubordination and a violation of his terms of employment. All dues were paid and there is no further claim and since this was a dismissal no notice is pay is due and the claim should be dismissed.

8. In evidence the respondent called Peter Kiboi Ndungu as their witness who stated that he was the respondent branch Manager in Machakos and was present when the claimant was called by the managing director and dismissed. On 10th July 2013 the claimant was called to the office and behaved in a disrespectful manner toward his superiors. The claimant was called to the office as there were rumours from staff that there was going to be a strike and already there was a go-slow. The previous day the respondent was late to close business by 15 minutes when the claimant came to the office and confronted the witness seeking to know why they were closing late which was supposed to have been at 9.00p.m. The Director came to the branch following the threat to industrial action and as was his periodic duty to visit various branches. He made enquiries from various staff and the claimant was called following information that he was behind the proposed strike. The claimant was not cooperative and became very rude and when asked about the strike he retorted back in a very disrespectful manner. Following this exchange, the claimant was sent to the human resource officer to get his letter of termination. All dues were paid.

9. On cross-examination the witness stated that he was the claimant's supervisor and when the exchange with the managing director took place the human resource officer was not present but this is the person who issued the letter of termination letter. The witness was not present to know if there was a hearing before the termination letter was issued to the claimant. He could also not recall the questions exchanged between the managing director and the claimant that amounted to abusive language or were insubordination but that the claimant had been hostile to him on several occasions.

Submissions

10. The claimant submitted that he did not voluntarily leave his employment as he was unfair dismissed by the respondent without notice or being granted a hearing. That in his case the provisions of section 41 and 43 of the Employment Act were never followed hence his termination was unfair and he

should be compensated.

11. The respondent submitted that the termination of the claimant followed the provisions of section 44 (4) of the Employment Act which outline the circumstances within which an employee can be summarily dismissed and under section 43(3) summary dismissal arise where an employee by their conduct is in a fundamental breach of their terms of service. There was a valid reason to terminate the claimant as the report had received information that the claimant was planning to engage in an illegal strike and based on ongoing events the respondent had to prevent such action which was within their legal mandate to avoid causing chaos and losses. When the claimant was called to the office to address his concerns he was rude and disrespectful hence the summary dismissal. The respondent relied on the case of **rev. Francis Muchee nthiga versus Bishop David Waweru, CA 161 of 2010** where the court held that in the absence of pleadings for damages the same cannot be awarded. That there are no due payments owed to the claimant.

Analysis

12. It is not in dispute that the claimant was summarily dismissed vide letter dated 11th July 2011 for what the Respondent referred to as 'insubordination'. Section 44 (4) of the Employment Act has laid out clearly the matters which if committed by an employee would attract summary dismissal. Of relevance to the issue at hand is Section 44(4) (d) and (e) which provides that an employee may be dismissed summarily if:

... An employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer.

... an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer

13. However, before invoking the provisions of Section 44(4) of the Employment Act, an employer is under a statutory obligation pursuant to Section 41(2) to give an audience to the employee who is subject to the dismissal so that the employee can make representations and which representations the employer should consider before making a decision to dismiss the employee.

14. This is what is universally referred to as procedural fairness within the industrial relations legal framework. Procedural fairness has its antecedents in the rules of natural justice. Basically it requires that before making a decision affecting another person's rights or interests, that other person should be given a hearing. This was as held by this Court in the case of **Jane Frances Ominde Munyakoh versus Imaging Solutions Limited, Cause No 1491 of 2011**.

15. Section 41(2) is set out in mandatory terms, before taking the decision to terminate or not to terminate there is The obligation to hear the employee even where the employer intends to make payment in lieu of notice or not. It is even applicable where the employee is accused of gross misconduct.

16. In the instant case, the Respondent did not plead that it gave the Claimant the opportunity to make any representations nor is there evidence that it extended to the Claimant the opportunity to make representations and therefore the procedural requirements were not followed. The dismissal of the claimant followed a flawed process can therefore not find any justification in law and in the practice of fair labour relations. The summary dismissal was therefore unfair.

The remedies

17. The claimant is seeking general damages amounting to kshs.344, 919.40 but failed to outline the basis of such a claim. The claimant went further to state that this claim was drafted for him and cannot explain why this was due. I equally agree with the respondent that when there is a claim that lack support in law or there is not evidence for the same, this must be declined. The claim for general damages is

therefore decline.

18. The claimant is seeking reinstatement. This court will only grant specific performance only in the clearest of cases that does not offer an effectively remedy otherwise. This did not stand out an exceptional case that would warrant the order for reinstatement. This will not be granted.

19. On the finding that there was unfair termination of the claimant, this Court will award compensation. The amount of 6 months' pay as compensation is found as an appropriate remedy. The claimant earned Kshs.13, 000.00 as gross pay; this will be granted all amounting to Kshs.78, 000.00.

20. Leave was claimed for 11 days. On the basis that the claimant earned kshs.13, 000.00 per month, for the 11 days accrued leave, the amount of Kshs. 4,800.00 is hereby granted. This will be awarded.

21. Notice pay is due in a case of unfair summary dismissal and the claimant is awarded one month's pay in lieu of notice at kshs.13, 000.00.

22. Upon termination and under the provision of section 51 of the Employment Act, each employee is entitled to receive a Certificate of Service. This should be granted without any further incontinence to the claimant.

23. There is no evidence by the claimant that he sent a demand notice for his terminal dues to the respondent before filing this claim. In the absence of such evidence, no costs will be granted.

Judgment is hereby entered for the claimant as against the respondent in the following terms;

- a. **The dismissal of the claimant was procedurally unfair**
- b. **The claimant is awarded kshs.78,000.00 as compensation;**
- c. **Notice pay awarded at Kshs.13,000.00;**
- d. **Accrued leave at kshs.4,800.00**
- e. **The claimant be issued with a Certificate of Service within 14 days.**
- f. **Each party to bear their own costs**

Delivered in open Court at Nairobi and dated this 11th Day of June 2014

Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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