



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAKURU
CAUSE NO. 314 OF 2013

ABRAHAM MUKUNYA.....CLAIMANT

v

MEGA SPIN LIMITED.....RESPONDENT

JUDGMENT

1. Abraham Mukunya (Claimant) was employed by Mega Spin Ltd (Respondent) with effect from 18 February 1999 as a general worker. On 1 March 2006, the Respondent offered him permanent employment as a machine attendant. The letter of offer did not disclose the remuneration.
2. On 5 December 2012, the Respondent issued a show cause notice to the Claimant on the ground that he had left the workplace on 3 December 2012 at 1.00pm and failed to return to work. The letter asked the Claimant to show cause within 24 hours why he should not be dismissed immediately.
3. The next day, 6 December 2012, the Respondent wrote to the Claimant informing him that he was being dismissed for gross misconduct for being absent on 3 December 2012 between 2.00pm to 5.00pm.
4. The Claimant was dissatisfied and sought legal advice culminating in his filing a Memorandum of Claim against the Respondent on 17 December 2013, complaining of unfair termination and seeking a declaration that the termination was contrary to law, compensation and damages.
5. The Respondent was served and it filed a Memorandum of Reply through Federation of Kenya Employers on 30 October 2013.
6. On 13 March 2014, both parties appeared before Ongaya J. and agreed by consent to the Cause being heard on 6 October 2014. On the hearing day, the Respondent was not present and being satisfied that the hearing date was taken by consent, the Court allowed the hearing to proceed.

Claimant's case

7. The Claimant's pleaded case is that his dismissal on 6 December 2012 was unfair and unlawful because he was not accorded an opportunity to be heard, was not given notice of the allegations against him, there were no valid reasons for the dismissal nor was he informed of the reasons for dismissal.
8. The Claimant testified and stated that he was not given an employment contract but a job identity card.
9. On the reasons for the dismissal, the Claimant stated that on 6 December 2012, he left work to go to

Family Bank Ltd to get his wages and reported back to work late and was sent away and directed to come back the next day. On reporting back the next day, the Claimant stated that he sought permission to go to hospital because he was feeling sick and was granted 2 days off.

10. The Claimant also stated that he gave a colleague his medical card to take to the Respondent and that when he reported to work after the 2 days sick off, he was given the dismissal letter at the Respondent's gate.

11. The Claimant ended his testimony by stating that he was seeking compensation, house allowances and costs.

12. The Claimant annexed pay slips, job identity card, dismissal letter and receipts issued by FITC Dispensary to buttress his case.

Respondent's case

13. In respect to the grounds and reasons for dismissal, the Respondent pleaded that the Claimant was dismissed for gross misconduct and the reason given was that on 3 December 2012, after lunch, the Claimant went to collect his wages from the bank with other colleagues but never reported back to work, without permission.

14. The Respondent admitted in the Response that the Claimant presented a medical card on 5 December 2012 through a co worker Joseph Mireri and further pleaded that the Claimant should have picked a sick sheet from the Respondent's Human Resources office in accordance with the Respondent's standing orders.

15. Regarding the process followed before dismissing the Claimant, the Respondent pleaded that the Claimant was given a show cause letter dated 5 December 2012 but declined to accept the same thus leading to the dismissal.

16. After the dismissal, the Union of which the Claimant was a member met with the Respondent and sought that the Claimant be paid *ex gratia* 4 months wages.

17. The Respondent annexed to its Memorandum of Reply the Claimant's initial employment letter for 1999, employment contract dated 1 March 2006, dismissal letter, biometric attendance records, Claimant's medical report, standing orders, show cause letter, previous warning letters and apology letter from Claimant dated 12 March 2009.

Issues for determination

18. The present Cause is presented as one of unfair termination and therefore the questions arising for resolution are whether the dismissal was unfair and if so, appropriate remedies. An ancillary but material issue, which the Court needs to discuss before hand is the legal effect of the Respondent's failure to participate in the hearing

Legal effect of Respondent's failure to appear at the hearing

19. By failing to appear during the hearing, the Respondent has failed to bring forth any evidence to anchor its pleaded case as required by sections 41, 43, 45 and 47 of the Employment Act, 2007.

20. Although several documents were annexed to the Memorandum of Reply, they just remain so. The Court cannot *suo moto* treat them as evidence as they were not formally introduced as exhibits.

21. The Court is aware that under the Rules of the Court, parties may agree that the Court determines a Cause on the basis of pleadings, affidavits, documents filed and submissions. There was no such agreement in the instant case.

22. A further consequence of the failure is that the Claimant's case as evidenced through the testimony tendered in Court remains uncontroverted.

Whether the dismissal was unfair

Procedural fairness

23. Section 41 of the Employment Act, 2007 obligates an employer to inform an employee of the reasons for contemplated dismissal and to hear the employee. If it is a case of summary dismissal like herein, an employer is under a statutory obligation to consider the representations made by the employee.

24. The statutory burden to show that procedural fairness was complied with is placed upon the shoulders of the employer.

25. The Respondent did not participate in the hearing. Therefore the plea that the Claimant was given a show cause letter but failed to accept the same or respond thereto remains just that.

26. The only logical conclusion the Court can reach on the basis of the material placed before it, is that the dismissal of the Claimant was procedurally unfair.

Substantive fairness

27. Similarly, sections 43, 45 and 47 of the Employment Act, 2007 have placed a duty upon an employer to prove the reasons for a dismissal, that the reasons are fair and valid reasons, and to justify the grounds for dismissal. The Respondent did not discharge this burden because it did not attend the hearing, and the Court finds the dismissal substantively unfair.

Appropriate remedies

Three months salary in lieu of Notice

28. The Claimant did not lay any contractual or statutory basis for seeking 3 months' salary in lieu of notice.

29. According to the pay slips annexed to the Memorandum of Claim, the Claimant was on a monthly salary of Kshs 10,601/-. Pursuant to section 35(1)(c) of the Employment Act, 2007, the Claimant would be entitled to one month's salary in lieu of notice in the sum of Kshs 10,601/-

One month pay for each of the 13 years worked

30. The Claimant sought Kshs 109,811/- pleaded as *one month pay for each of the 13 years worked*. The Claimant did not clarify in testimony what this claim was and whether it was grounded on a contractual or statutory footing. The Court declines to give this award.

Compensation

31. Under this head, the Claimant sought Kshs 106,164/-. Section 49(1)(c) of the Employment Act, 2007 has given an award equivalent to not more than 12 months gross wages as one of the primary remedies where there is a finding of unfair termination.

32. The award is discretionary and section 49(4) of the Employment Act, 2007 enjoins the Court to consider any, some or all of the 13 factors set out therein. In this regard, a party desiring compensation should place material before Court as to which of the factors the Court ought to consider, otherwise the Court may exercise the discretion arbitrarily and capriciously, a situation which is frowned upon both in equity and in law. The Claimant did not disclose which of the factors were relevant in his case.

33. But it is not disputed that the Claimant joined the Respondent in 1999 and was dismissed in 2012. He served for some 13 years. The Claimant also stated he is currently operating a *boda boda*. Based on the length of service and that the Claimant is currently productively engaged, the Court would award the Claimant the equivalent of 6 months gross wages assessed in the sum of Kshs 63,606/- as compensation for unfair termination.

Conclusion and Orders

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

- | | |
|---------------------------------------|---------------|
| a. One month salary in lieu of Notice | Kshs 10,601/- |
| b. 6 months wages as compensation | Kshs 63,606/- |

TOTAL	Kshs 74,207/-
-------	----------------------

35. The relief framed as one month pay for each of the 13 years worked is dismissed.

36. Claimant to have costs of the Cause.

Delivered, dated and signed in open Court in Nakuru on this 10th day of October 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ngamate instructed by Geoffrey Otieno & Co. Advocates

For Respondent Federation of Kenya Employers (absent at hearing)