



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 742 of 2011

JAPHETH MUDOGO.....CLAIMANT

VS

MASTER FABRICATORS LIMITED.....RESPONDENT

AWARD

By a Memorandum of Claim dated 10th May 2011 and filed in Court on 16th May 2011, the Claimant sued the Respondent for unlawful/unfair termination of employment and failure to pay terminal dues. At the trial Mr. Makokha instructed by Namada & Co Advocates appeared for the Claimant while Mr. Masese instructed by the Federation of Kenya Employers (FKE) appeared for the Respondent. The Claimant and the Respondent's Human Resource Manager gave sworn evidence.

According to the Claimant's Memorandum of Claim, the Claimant was employed by the Respondent between June 2009 and July 2010 in the position of Cleaner. On 2nd July 2010, the Claimant was summarily dismissed on allegations that he had ferried some materials from the Respondent's workshop to the dumping site with intention to steal the said materials. The Claimant averred that the allegations made against him were false, that he knew nothing about the materials in question and that no evidence implicating him was ever produced. The Claimant further stated that he was not afforded any opportunity to defend himself against the allegations.

The Claimant's claim was particularized as follows:

- a) 1 month's salary in lieu of notice.....Kshs. 7,753
- b) Pay in lieu of leave for 1 year.....Kshs. 7,753
- c) Service pay @ 18 days for every completed year of service.....Kshs. 4,652
- d) Compensation for unfair termination $7,753 \times 12$Kshs. 93,036
- e) Certificate of Service
- e) Costs of the case and interest

The Respondent filed its Statement of Response on 8th September 2011. The Respondent while admitting that the Claimant had indeed been its employee stated that the Claimant's employment was on a one year fixed contract running from 1st April 2010 to 1st April 2011 (the contract is marked Appendix 1 in the Respondent's documents).

The Respondent further stated that on 2nd July 2010, it came to the Respondent's knowledge that the Claimant was colluding with other workers to ferry the Respondent's materials from the workshop to the dumping site where paints, hardeners and other materials had been found covered with litter. On the same day, the Human Resource Manager demanded an explanation from the Claimant and his colleagues as to how the materials had ended up at the dumping site. Failing to offer any explanation, the Claimant was issued with a summary dismissal letter (letter marked Appendix 2 in the Respondent's documents.)

The Claimant told the Court that he had been a temporary employee for 10 months before being issued with a one year contract on 1st April 2010. He stated that on 2nd July 2010, he was summoned to go to the dumping site. When he got there, he found the Workshop Manager, Mr. Amitpal Singh and other employees. He also found some paints and hardeners. The Workshop Manager asked the Claimant whether he knew anything about these materials and the Claimant stated that he did not. The Claimant was then told by the Managing Director, Mr. Bobi to change and wait for a letter. The Claimant handed over his uniform and tools of work to his supervisor. On instructions from his supervisor and the Managing Director, the Claimant went to see the Human Resource Manager, Charity Mutugi who gave him a letter of summary dismissal at around 12.00 Noon (letter marked Annex B in the Claimant's documents).

The Claimant averred that he was not given an opportunity to defend himself and that when he got to the office of the Human Resource Manager, he found the dismissal letter already written. He added that the dumping site was accessible to many employees and that in his line of work, he was not concerned with the materials found at the dumping site.

On 3rd July 2010 the Claimant went back to the Office of the Human Resource Manager who attempted to give the Claimant Kshs. 500 which the Claimant declined. As at the time of leaving employment, the Claimant earned a monthly salary of Kshs. 7,753 (the Claimant's payslip for the month of May 2010 is marked Appendix A in the Claimant's documents). The Claimant further told the Court that for the entire period he worked for the Respondent, he never went on leave.

On cross examination by Counsel for the Respondent, the Claimant admitted that he did not have a document to show his employment from June 2009 to 1st April 2010 when he was issued with a one year contract. He however stated on re-examination that he had before the contract for 1st April 2010 -1st April 2011, been issued with a previous contract for 2009 whose copy the Respondent had not given him and that he had not been given the contract for 2010/2011 either. The Claimant also confirmed his monthly salary as Kshs. 6,130 plus a house allowance of Kshs. 920 as at the time of employment and that the same had been raised to Kshs. 6,743 plus 1,011 house allowance as at the time of his leaving employment. He added that he was dismissed alongside 3 of his colleagues.

The Respondent's witness, Charity Mutugi (RW1) told the Court that the Claimant had been employed as a cleaner on an annual contract which was to run from 1st April 2010 to 1st April 2011. She added that the Claimant and 3 other cleaners used to take litter to the dumping site.

The witness confirmed that she terminated the Claimant's employment on 2nd July 2010 following discovery of company materials being paints, hardeners and thinners hidden at the dumping site. According to RW1, at the time of dismissal the Claimant was on probation. She stated she had, before issuing dismissal letters to the Claimant and the other cleaners, asked them to explain how the materials had ended up at the dumping site and that they had failed to offer any explanation. She pointed out to the Court that the cleaners, their supervisor and the garbage collectors had exclusive access to the dumping site.

After the dismissal, RW1 asked the Claimant to collect his dues, being salary for 1.5 days but he declined. The witness added that the Claimant had been paid his leave alongside his monthly salary and the Respondent was remitting National Social Security Fund (NSSF) dues for the Claimant's benefit. She further stated that the Claimant was not given notice of termination of his employment because his was a case of summary dismissal and that the Claimant was still on probation as at the time of dismissal.

On cross examination by Counsel for the Claimant, RW1 admitted that at the time of the Claimant's dismissal, 3 months had lapsed. She also admitted that the remuneration figures on the contract and on the payslip were different, clarifying that the correct figures were those on the payslip.

In reference to the question as to whether or not the Claimant was given an opportunity to defend himself prior to his dismissal, RW1 stated on cross examination that the Claimant and his colleagues were in her office for 15 minutes. She admitted that she did not explain to the Claimant the right to have a fellow employee present and that she notified the Claimant's Union after the dismissal. She further admitted that the Workshop Manager had custody of the key to the dumping site.

The first question for determination is whether the Claimant was on probation at the time he was summarily dismissed. According to the contract of service, the Claimant was to be on probation for 3 months effective 1st April 2010. His probation period would have ended on 30th June 2010. There was no evidence of confirmation or non confirmation of the Claimant. In the circumstances, the Court has concluded that the Claimant was confirmed either in fact or by default upon expiry of the 3 months probation period set out in the contract of service. The Claimant was therefore not on probation by the time he was dismissed from employment.

Section 43(1) of the Employment Act, 2007 provides that:

43(1) In any claim arising out of termination of a contract , the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45

Section 45 (2) (c) provides that:

(2) ***A termination of employment by an employer is unfair if the employer fails to prove-***

(a).....

(b).....

(c) That the employment was terminated in accordance with fair procedure

Section 41 of the Act sets out the procedure for handling of cases of misconduct, poor performance and physical incapacity as follows:

(1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make

In the case of **Isaac Matongo Mogoi Vs. Municipal Council of Nakuru and Another (HC Misc Case No. 810 of 2005)** Koome J (as she then was) held that an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them.

The Claimant told the Court and RW 1 confirmed that the Claimant was questioned about the materials found at the dumping site alongside his colleagues. RW1 went on to state that since none of the cleaners owned up or gave a lead, then they were all summarily dismissed. The question then is whether the session the Claimant and his colleagues had with the Respondent's management constituted a hearing of

the Claimant within the meaning of Section 41 of the Employment Act, 2007. Hearing of an employee facing disciplinary action must be real and authentic. A hurried guillotine type process will not do. RW1 told the Court that her session with the Claimant and his colleagues took 15 minutes and within that short time she made a very serious decision affecting the livelihoods of several employees and their families.

I have therefore come to the conclusion that the Claimant was not afforded an opportunity to be heard prior to termination of his employment. Additionally, the omnibus fashion in which the Respondent treated the Claimant and his colleagues was inherently unfair. *Mensrea* cannot be shared unless there is clear evidence of joint liability., which the Respondent failed to prove.

I therefore award the Claimant 3 months salary as compensation for unfair termination of employment. I also award him 1 month's salary in lieu of notice. The Claimant is also entitled to a Certificate of Service. The claims for leave and service pay were not proved and therefore fail.

The Respondent will pay the costs of this case.

DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF DECEMBER 2012

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JUDGE

In the Presence of:

.....**Claimant**

.....**Respondent**