



Tailors and Textiles Workers Union v Bosky Industries Limited (Cause 633 of 2019) [2024] KEELRC 345 (KLR) (21 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 345 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 633 OF 2019
DKN MARETE, J
FEBRUARY 21, 2024**

**BETWEEN
TAILORS AND TEXTILES WORKERS UNION CLAIMANT
AND
BOSKY INDUSTRIES LIMITED RESPONDENT**

JUDGMENT

1. This matter was originated by way of a memorandum of claim dated 7th June, 2019. The issue in dispute is herein cited as;

“Wrongful summary dismissal of Collins Kusimba and refusal by the employer to pay his terminal due/benefits”
2. The Respondent in a Memorandum of Response dated 23rd February, 2023 denies the claim and pray that it be dismissed for want of merit.
3. The claimant’s case is that the parties have a Recognition Agreement and Collective Bargaining Agreement *inter partes* and these regulate their relationship.
4. The claimant’s background case comes out as follows;
 7. That, the grievant herein Collins Kusimba was employed by the respondent on 15th January 2016 as a machine attendant.
 8. That at the time of his dismissal the grievant was earning a basic salary of Kshs.13,311 per month and a house allowance of Kshs.2,100.
 9. That, on 15th June 2018 his services were unfairly dismissed without notice as he was given an off so that the Respondents can reorganize with a promise that he will be recalled but that was not the case and the Respondents refused to pay his terminal dues.



10. That, efforts by the Branch Secretary to have the matter resolved at the shop floor level failed prompting the dispute to be forwarded to the General Secretary.
 11. That, the General Secretary reported the dispute to the cabinet secretary in the Ministry of Labour and a conciliator, was appointed.
 12. That, the conciliator convened a meeting but the parties failed to agree on the best way to handle the dispute.
 13. That, the conciliator gave his recommendations and findings but the Respondents did not comply and the grievant decided to come to this court for determination.
5. She submits that the dismissal of the grievant was wrongful, unfair and unjustified on the following grounds;-
- i) That, in Section 43 and 45 of Employment Act 2007 has been violated as no proof for reasons to dismiss the grievant has been adduced by the Respondent up to date as there are no valid reasons in terms of the grievant misconduct, or operations requirement by the employer.
 - ii) That, the procedure followed in dismissing the grievant was inhumane, not fair as the laws cited above were not followed.
6. She prays as follows;
15. That, the grievant be reinstated back to work without loss of terms and conditions of employment or in the alternative, be paid as follows:-

<i>(i)</i>	<i>Notice pay (1 months) (Kshs.13,311)</i>	<i>Kshs.13,311</i>
<i>(ii)</i>	<i>Gratuity (15 days per each complete year) for 2 ½ years</i>	<i>Kshs.19,198</i>
<i>(iii)</i>	<i>12 months salary compensation for wrongful loss of employment.</i>	<i>Kshs.159,732</i>
<i>(iv)</i>	<i>Cost and interest until the judgment is fully complied with.</i>	
<i>(v)</i>	<i>Certificate of service (to issue)</i>	
<i>(vi)</i>	<i>Total</i>	<i>Kshs.192,241</i>

7. The Respondent's case is that;
6. The Respondent admits the contents of paragraph 8 to the extent that the Grievant was earning a salary of Kshs.13,311/- per month and a house allowance of Ksh.2,100/-. The Respondent however denies that the Grievant was dismissed.



7. The Respondent in further response to Paragraph 8 of the Statement of Claim states that the Grievant's last contract expired in June 2018.
8. The Respondent states further that the Grievant could not be taken on a new contract due to lack of work.
9. The allegations of dismissal or unfair dismissal are therefore denied as the Grievant had no contract in force. The Claimant is invited to prove otherwise.
10. The Respondent denied averments made in paragraph 9 and states that the alleged termination was not contrary to fair labour practices enshrined in the Constitution, Employment Act, and the general principles of natural justice reasons wherefore:
 - a. There was no more work for the Grievant at the company, and was duly released per his employment contract.
 - b. The Grievant's last contract expired in June 2018 and given he was employed on the availability of work, he had to wait to be called again. However, there was no indication of an opening in the Company.
 - c. The Grievant requested through the shop steward to be paid his terminal dues sometime in July 2018 upon which the Respondent calculated his dues amounting to Ksh.16,946/- less deductions of Ksh.16,422/-. The Grievant refused to take his dues.
 - d. There was no promise made to the Grievant as alleged in Paragraph 9. The Claimant is put to strict proof.
8. The matter came to court variously until the 26th April, 2023 when they agreed a determination by of written submission.
9. The issues for determination therefore are;
 1. Whether there was a termination of employment of the grievance by the Respondent.
 2. Whether the termination of employment of the grievant was wrongful, unfair and unlawful.
 3. Whether the Claimant is entitled to the relief sought.
 4. Who bears the costs of this cause.
10. The 1st issue for determination is whether there was a termination of employment of the grievant by the Respondent. The claimant in his written submission dated 15th May, 2023 brings out a case of his unlawful termination of employment by the Respondent. He seeks to rely on clause 11c of the CBA which provides thus;

Where an employee has worked as a casual for more than three months continuous service, his/her terms of contract shall automatically be converted to permanent terms and conditions of services.
11. This being the case the Respondents were in total violation of the CBA by not converting his employment into permanent terms as he had worked for more than three months continuously since 15th January, 2016 as admitted in paragraph 2 of the Respondents' witness statement.
12. The claimant's further submission is that the Respondent violated sections 43 and 45 of Employment Act, 2007 for failure to provide proof of reasons for dismissal as it is evident that the dismissal was



malicious as all the other employees who took an off were reinstated to work save for the grievant. The Respondents did not serve the grievant with any notice to inform him that there was not work and if that was the case the grievant was entitled to terminal benefits as would a permanent employee. On this the claimant seeks to rely on authority of *Ngatia v Chemoquip Limited* (Cause 1903 of 2016) [2023] KEELRC 874 where the court laid emphasis on application of section 43(1) and 45 of the *Employment Act*, 2007 in the event of termination of employment.

13. The Respondent on the other hand denies unfair termination of employment. She further denies termination of employment in the first place. It is her case that the claimant has in toto fails to prove a case of unfair termination of employment as provided by section 47(5) of the *Employment Act*, 2007. This provide as follows;

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

14. Again, the claimant has also failed to bring life to the provisions of section 107 and 108 of the *Evidence Act* Chapter 80, Laws of Kenya by failing to adduce evidence and substantiate his claim. These provides thus;

“107 whoever desires any court to give judgment as to legal right or liability
(1) dependent on the existence of facts which he asserts must prove that those facts exist.

‘108 the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

15. The Respondent dispute a case of unfair termination of employment and submit that the claimant on his own violation and through a Shopsteward, one, Andrew Muema requested that he be released from employment and paid his terminal dues. This was two weeks after expiry of last contract with Respondent. This is clearly document at page 8 of the Respondent’s list of documents filed in court. His case of dismissal on 15th June 2018 as alleged as paragraph 9 of memorandum of claim is false and misleading.
16. The Respondent in the penultimate seeks to rely on authority of *Protus Wanjala Mutike v Anglo Africa Properties t/a Jambo Mutara Lodge Laikipia* [2021], eKLR where this court in similar circumstances dismiss the claim for want of proof in compliance with section 47(5) of the *Employment Act*, 2007 above cited.
17. This again becomes a case of no termination of the employment of the claimant by the Respondent. The Respondent in toto denies termination of the employment of the grievance in totality. It is her case that the respondent left employment on his free will by instructing that his terminal dues be released to him. This was in writing and through a Shop steward as it were. The grievance has all together failed to establish a case of termination of employment or even unfair termination of employment as is require of him in all. The claim therefore becomes unsustainable on a preponderance of evidence. It cannot stand. I therefore find a case of no termination or even unlawful termination of employment of the grievance by the Respondent and hold as such. And this answers the 1st and 2nd issues of determination.
18. With a finding of no termination or even unfair termination of employment, all other issues for determination become bare and irrelevant.



19. I am therefore incline to dismiss the claim with orders that each party bears their costs of the same.

DELIVERED, DATED AND SIGNED THIS 21ST DAY OF FEBRUAY 2024.

D. K. NJAGI MARETE

JUDGE

Appearances:-

1. Mr. Omodi for the Claimant Union.
2. Mr. Odoyo instructed by Kipkenda & Company Advocates for the Respondent

