Ongere v New Wide Garmets Kenya EPZ Limited & another (Cause 1565 of 2017) [2024] KEELRC 13308 (KLR) (26 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13308 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1565 OF 2017

K OCHARO, J

NOVEMBER 26, 2024

BETWEEN

DUNCAN OGWENO ONGERE ..... CLAIMANT

AND

NEW WIDE GARMETS KENYA EPZ LIMITED ..... 1ST RESPONDENT

MAHALAKSHMI GARMENTS EPZ LIMITED ..... 2ND RESPONDENT

(Before Hon. Justice Ocharo Kebira on 28th November, 2024)

JUDGMENT

Introduction

1. Through his Statement of Claim dated 3rd August 2017, the Claimant sued the Respondents jointly and severally seeking as against them, a declaration that his dismissal from employment was unlawful, wrongful. And unfair, notice pay, service pay, salary underpayments, compensation for unfair dismissal, certificate of service, interest and costs. The Claimant charged that at all material times, he was an employee of the Respondents, and that they summarily dismissed him from employment unfairly and wrongfully.

2. The Respondents resisted the Claimant's claim through a Response to Memorandum of Claim dated 28th August 2017, denying that the Claimant was, employed as a tailor as he asserted but a Mass Production Machinist, an employee of the 1st Respondent at the material time, wrongfully and or unfairly dismissed from employment, and entitled to the reliefs sought.

3. At the hearing, the Claimant testified as a sole witness in support of his case, whilst the Respondents presented two witnesses to testify in support of their defence against the Claimant's case. At the close of the parties' cases, this Court directed them to file written submissions. They obliged the direction. Their submissions are on record.

The Claimant's Case.

4. The Claimant stated that he was employed by the 1st Respondent in February 2014 as a tailor. However, he was erroneously given the designation of a machine operator. The engagement by the 1st Respondent was under a written contract of employment, however, a copy thereof was not released to him by the 1st Respondent who retained all the copies. The agreed starting salary was set at Kshs.12,500.0 which salary is below the minimum wage prevailing at the time for tailors.

5. He further stated that in June 2015 he was transferred to Mahalakshmi Garments Kenya EPZ Limited [the 2nd Respondent] in the position of a tailor. The 2nd Respondent engaged him under fixed term contracts at various times. He was a member of the Tailors and Textiles Workers Union, which had a Collective Bargaining Agreement with the 2nd Respondent.

6. He asserted that at all material times, he worked with the well with the Respondents well, diligently, and without blemish until the unlawful, wrongful and unfair dismissal.

7. On 03/07/2017 at around 5.00pm, he was taken ill. As a result, he was attended at Athi River Shalom Community hospital where he was treated and allowed to go home. He was instructed to take two days off work to enable me recuperate. He called one of the 2nd Respondent's supervisor's, Mr. Alan and explained to him that he had been taken ill and requested for sick leave as advised by the doctor. The supervisor allowed me two days leave to enable him recover. The witness undertook to inform his superiors regarding the Claimant's health condition.

8. On 05/07/2017 he reported to work as usual and even though he was still in pain, he persevered and carried on with his normal duties until close of business. On 06/07/2017 he reported to work as usual and explained to his supervisor, Mr. Daniel that he was unwell, and sought for permission to leave. The supervisor acceded to his request, signed a gate pass for him and directed that he takes it to the line manager, Mr. Dennis who also signed on the pass. The manager directed him to take the gate pass to the factory manager, Mr. Nishadha and when he did, the manager declined to authorize the sick leave stating that he did not have a replacement for him.

9. As he couldn't persevere any more, he was prompted to pleaded with the Human Resource Manager, Mrs. Magdalene who only promised that she would talk to the factory manager. He worked until lunch break whereupon he left for hospital hoping to come back after lunch break even though he was unwell. At Athi River Shalom Community Hospital he was reviewed and advised to take further two days' rest. He called Mr. Allan and informed him about his condition and the doctor's advice. The supervisor informed him that he would inform his superiors about his situation.

10. The Claimant stated further that on 10/07/2017 he reported to work as usual and proceeded to the Human Resource Manager's office where he handed the sick off sheet issued to him at Athi River Shalom Community Hospital on 06/07/2017 to the manager. The manager informed him that the 2nd Respondent had already dismissed him with effect from 08/07/2017. She advised him to address the issue further with the factory manager.

11. He proceeded to the factory Manager's office and explained his predicament to the Manager, also handing him [the manager] the sick off sheet of 06/07/2017. Surprisingly, the Manager took it and tore it into pieces arguing that it was a forgery that was aimed at defrauding the 2nd Respondent. He directed Claimant to leave the premises immediately and issued security guards with stern orders to escort me out of the compound.

12. After leaving the premises, he called one of the employee representatives in the 2nd Respondent's employment, Mr. Kelvin and raised the issue with him. The shop steward promised that he would take up the issue with the 1 st Respondent and revert to him. Later in the day the shop steward called and informed him to go for his dismissal letter on 11/07/2017.

13. The Claimant stated that on 11/07/2017 he proceeded to the Human Resource Manager's office [2nd Respondent's]. Without a word, the manager handed him a summary dismissal letter dated 08.07.2017 for allegedly absenting myself from duty from 05/07/2017 without permission, a position not true.

14. The dismissal was unlawful, wrongful and unfair for failure to adhere to the law. It was, without any valid reason, and procedural fairness as he was not accorded a hearing. At the time of dismissal, his salary had been increased to Kshs.15,264.41 which amount was still against the minimum wage set by the law for tailors. Upon dismissal he was not paid any money.

15. He further asserted that throughout his employment the Respondent was deducting NSSF dues from his emoluments but was not remitting consistently as provided by law.

16. He was not issued with a certificate of service as provided by law or at all.

17. Cross examined by Counsel for the Respondent, the Claimant testified that Claimant testified that as regards the tasks carried out by a tailor and a Mass Machinist, there isn't a difference.

18. He testified that he consented to be transferred from the employment of the 1st Respondent to the 2nd Respondent's by executing a consent dated 13th October 2017. According to this document he executed, the transfer took effect in August 2017.

19. The 1st Respondent didn't pay him any terminal benefits at transfer. His contracts of employment were each of six months, renewable. The last one that he was rendering services under before he was dismissed was that which was running from 24th February 2017 to 23rd August 2017.

20. On 3rd July 2017, he was unwell. He attended Hospital as a result. On 4th July 2017, he didn't report to work because of his illness, but on 5th he did. He had sick off sheets which he handed over to the Human Resource Manager. The letter dated 12th July 2017, that he presented as exhibit 2 was sourced and so presented to demonstrate that indeed on the dates mentioned above, he was unwell.

21. The allegation by the Respondent that he was seen at the Bank on 3rd July 2017 isn't true.

22. Testifying on his remuneration, the stated that his salary was KSHS. 15, 306 plus a house allowance of KSHS. 2,296.

23. He asserted that throughout his employment, he was not issued with any warning letter. He signed none. The signature obtaining on the warning letters tendered by the Respondents aren't his.

The Respondent's Case.

24. Florence Mwajuma, the 1st Respondent's Human Resource Manager testified as the Respondents' first witness. She adopted her witness statement dated 25th March 2022 as her evidence in chief. She tendered in evidence, the Respondents' documents filed herein as their documentary evidence [exhibit 1-12, in the order they appear on the list of exhibits].

25. The witness stated that the 1st and 2nd Respondents are companies with close ties. Prior to August 2015, the Claimant worked for the 1st Respondent as a Mass Production Machinist. On 18th August 2015, the Claimant agreed to transfer from the 1st Respondent to the 2nd Respondent in the same capacity.

He was subsequently issued with a three months contract of employment by the 2nd Respondent. The contract was renewed from time to time. The last renewal was done on 20th February 2017 running for the period 23rd February 2017 to 23rd August 2017.

26. The Claimant's tasks as a Mass Production mechanist was to sew specific operations on a garment. He was not a tailor as the responsibility of the latter is to measure, cut, and sew full garments.

27. The 2nd Respondent dismissed the Claimant from employment on 10th of July 2017, after absconding from duty from 5th July 2017. The dismissal letter was dated 8th July 2017, but was served on the Claimant on 10th July 2017, when he reported back to work.

28. The Claimant's tenure with the 2nd Respondent was marked with cases of indiscipline and absenteeism. He was warned from time to time.

29. The witness stated that the Claimant didn't report to work on 3rd and 4th July 2017. He reported back on 5th July 2017 and attended the Human Resource office but could not explain his absence on the two days. He indicated that he was so absent because of domestic issues.

30. He was allowed to resume work. He however worked until 12.30 pm when he broke for lunch but never reported back to his work station at 1.30 pm as was required. He neither reported to work nor called the 2nd Respondent's management to his absence or his whereabouts until 10th July 2017 when purported to get back to work.

31. Considering the Claimant's absenteeism record, his unexplained absence on 3rd and 4th July 2017 and from 1.30pm July 2017, the 2nd Respondent was left with no option but to terminate his contract of employment.

32. The witness stated further that the Claimant didn't report to work on 6th July 2017. His records show that he never punched in on the said date. His allegation that Mr. Nishadha refused to authorize his sick leave on the said date is therefore not true.

33. The Claimant was on 10th July 2017 served with the dismissal letter at the human resources office in the presence of the shop floor representative. He however, refused to receive the letter and worked away.

34. It was further stated that on 11th July 2017, he was prevailed upon by the Shop floor representative to pick the letter, thing which he did.

35. The 2nd Respondent complies with Government's minimum wages. The minimum wage for a mass production machinist within Mavuko and its environs, including Athi River where the Respondent's factory is situated was at the material, KSHS. 13,633. The Claimant's gross pay at this time of his dismissal was KSHS. 17, 602, an amount higher than the then set minimum wage.

36. Further, the 2nd Respondent remitted statutory deductions, including NSSF contributions to the relevant government agencies. In view of the contributions to NSSF, the relief, service pay cannot be availed to the Claimant.

37. The Claimant went on leave from time to time but in a number of occasions he preferred to be paid in lieu of leave, which payment was made every month.

38. Cross examined by Counsel for the Claimant, the witness testified that she was the Human Resources Manager for the 1st and 2nd Respondents. Pressed further, she stated that Dennis Otieno was the Human Resource Manager for the 1st Respondent while she was the overall Manager.

39. The witness stated that the Claimant was dismissed on 10th July 2017 vide a letter dated 8th July 2017. The 2nd Respondent didn't issue him with any show cause letter. However, a disciplinary hearing was held on 5th July 2017, immediately he reported back to work. Before the hearing, he was informed of the accusation against him, being absent from work on 3rd and 4th July 2017. The Respondent doesn't have minutes for the disciplinary hearing.

40. Before he was issued with the various warning letters, he was subjected to disciplinary hearing at various dates.

41. The Claimant was a member of the Tailors and Textile workers union. There was a collective bargaining agreement between the union and the 2nd Respondent. Upon dismissal, he was paid his dues. The Respondent pleaded that the Claimant was deducted a month's pay [notice pay], yet it is the 2nd Respondent who terminated his employment.

42. The 2nd witness to testify was Dennis Oriangi [RW2]. He testified that he was an employee of the 2nd Respondent as a sewing production manager. He stated that the Claimant didn't work on 3rd and 4th July 2017. He alleged that he was admitted at Athi River Shalom Hospital. However, he was spotted on the same day at Co-operative Bank, Kitengela by a colleague, Isiah Mayieka.

43. The Claimant reported back to work on 5th July 2017, went to the Human Resources office which cleared him for assignment of work by the witness. At around 1.30, the witness was informed by the line manager that the Claimant didn't report back after the lunch break. The witness reported the absence to the Human Resources Manager, the Shop Floor representative and the factory Manager.

44. In his evidence under cross examination, the witness asserted that the Claimant didn't call him on 3rd or 4th July 2017 about his illness. His assertion that the Claimant was seen in a Bank was information that he [the witness] received from another employee.

The Claimant's Submissions

45. The Claimant identified two issues for determination, thus; whether the Claimant's dismissal is lawful and fair; and whether the Claimant merits the reliefs sought for?

46. Submitting on the first issue, the Claimant submitted that there is no doubt that the Claimant was dismissed on 10th July 2017 pursuant to a dismissal letter dated 8th August 2017. There is also no doubt that the Claimant was not at work between 07/07/2017 and 09/07/2017, both days inclusive

47. It was submitted that the testimony of the Respondent's second witness, that the Claimant was spotted at Co-operative Bank, Kitengela Branch, amounted to hearsay evidence as he was relying on information by a third party, whom the Respondent didn't call to testify. The evidence should be rejected. To support this submission, reliance was placed on the case of Prime Bank Limited Vs. Esige [2005] eKLR where it was held as follows: -

> The courts have, therefore, developed certain rules to decide when evidence should be rejected as inadmissible for being hearsay. One of the key tests is to consider the purpose for which the evidence is tendered.
>
> Is the evidence tendered to establish the truth or falsity of a fact or only for some other purpose? If the evidence is tendered to establish the truth or falsity of a certain fact and it is not direct, then it is hearsay and inadmissible. However, evidence may be "hearsay" that is to say, not direct but admissible if it is tendered for some other purpose quiet apart from

establishing the truth or falsity of any fact. The position was summarized in the following words in Subramanian vs Public Prosecutor (1956) I WLR 965 (P C) at p. 969.

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

48. It was further submitted that Section 45(1) of the *Employment Act* provides that no employer shall terminate the employment of the employee unfairly. Section 45(2) of the Act provides that a termination of employment by an employer is unfair if the employer fails to prove: -

    (a) That the reason for termination is valid;

    (b) That the reasons for termination is a fair reason-

        (i) related to the employees conduct, capacity or compatibility: or (ii) based on the operational requirements of the employer

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

49. Section 43 of the *Employment Act* provides that: -

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

50. It was argued that from the Claimant's evidence as well as the Respondent's evidence i.e. that of RW2 and generally the Memorandum of Response, the Claimant was ill on 03/07/2017 and resumed duty on 05/07/2017. There is probability that he did not recover fully therefore seeking leave on 06/07/2017 to enable him seek further medical attention.

51. Notwithstanding the fact that the Claimant had informed the Claimant about his illness, it proceeded to dismiss him from employment on alleged grounds that he had absented himself from duty despite denying him leave.

52. It is instructive that the Respondent did not take any steps to reach the Claimant after he failed to resume duty on 05/07/2017 as it alleges. It proceeded to draw a dismissal letter on 08/07/2017. No effort was made whatsoever to establish contact with the Claimant.

53. Upon the foregoing premises this Court was urged to find that the respondent didn't have a valid and fair reason to dismiss the Claimant from his employment. Further, to be persuaded by the holding in the case of Nicholas Muasya Kyula V. Farm Chem Limited [2012] eKLR, that: -

> It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.

54. Submitting on procedural fairness, the Claimant's Counsel stated that whereas in his Memorandum of Claim and witness statement the Claimant complained that he was not afforded an opportunity to be heard, the Respondent did not broach this aspect at all. It did not controvert his evidence on this aspect.

55. It was common ground that the Claimant was not at work from 07/07/2017 to 10/07/2017 (i.e. the parties offer different accounts on whether the Claimant left on 05/07/2017 or 06/07/2017) when he was issued with a dismissal letter authored on 08/07/2017. Clearly, the Claimant was not granted an opportunity to be heard on the allegations of absenteeism from duty as alleged or at all.

56. The Claimant was neither issued with show cause nor invited for disciplinary hearing. The Respondent did not even make effort to trace his whereabouts before issuing him with the dismissal letter.

57. It was further submitted that it is now settled law that before an employer dismisses an employee on account of absconding duty, the employer must make effort to trace the employee with a view of subjecting such employee to disciplinary process.

58. In the case of Richard Maingi v Wells Fargo Limited [2017] eKLR Court held that: -

> " Dismissal on account of desertion requires that the Respondent produces evidence showing reasonable steps were taken to contact the employee accused of desertion."

59. Further reliance was placed on the case of Chrispine Onguso Okinyi v. Devki Steel Mills Limited [2018 eKLR where the Court held that: -

> " The respondent should have gone out to demonstrate what steps she took in the event of the claimant's desertion of duty. Evidence of desertion and disciplinary action taken in view of such desertion should have been fronted by the respondent in evidence."

60. The Claimant's counsel further submitted that where the Court has found that the termination of an employee's employment was procedurally unfair, there shan't be reason for it to move further to consider whether the termination was substantively justified or not. To buttress this point, he placed reliance on the case of Patrick Abuya v. Institute of Certified Public Accountants of Kenya (ICPAK) & another [2015] eKLR where the Court stated that: -

> Because of the conclusion, and considering the mandatory nature of the requirements of section 41 of the *Employment Act*, 2007, it is not necessary, in the view of the Court to consider whether the Respondents have discharged the burden placed on employers by sections 43 and 45 of the *Employment Act*, 2007.

61. The Claimant dismissed from employment unlawfully, wrongfully and unfairly. His dismissal is substantively and procedurally unfair.

62. On the reliefs sought, it was submitted that having demonstrated that he was dismissed from employment and that the dismissal was unlawful, wrongful and unfair, he merits payment in lieu of notice. The Claimant stated that he was neither issued with termination notice nor paid in lieu thereof.

63. The Claimant stated that he neither took leave nor was he paid in lieu thereof in respect of the last year of employment. His claim for leave against the Respondent under this head of claim is the amount of Kshs.8,531.77. Whereas the Respondent alleged that it paid the Claimant in lieu of leave and produced pay slips in attempt to demonstrate so, no material was placed before the Court to demonstrate that the amounts alluded to were indeed paid to the Claimant. A pay slip in itself is not evidence of payment. This relief should be availed to the Claimant.

64. Counsel submitted that the Claimant is entitled to service pay. He was a member of the Tailors and Textiles Workers Union which had concluded a Collective Agreement with the Respondent. The pay

slips filed by both the Claimant and the Respondent demonstrate that deductions were made from his emoluments to cater for union dues.

65. Clause 31 of the Collective Agreement provided for gratuity at the rate of 18 days for each completed year of service after an employee works with the Respondent for a period of two years. In this case, the Claimant had worked with the Respondent for three and half years. His last salary should have been the amount of Kshs.20,166.00 per month. He is entitled to Kshs.38,362.50 under this head of claim.

66. It was further submitted that he was engaged as a Mass Production Machinist but was soon thereafter assigned duties of a tailor, and earned a basic salary of Kshs.15,264.41 instead of Kshs.20,166.00 as prescribed by law. The Respondent purported that the Claimant was not a tailor and that the work of a tailor is to measure, cut and sew full garments. RW1 purported that this definition was prescribed by law. However, she could not point the specific provision of law that provides as such as none exists.

67. Section 10 (2) of the *Employment Act* bound the Respondent to set out a job description for the Claimant in his contract of employment. The contract of employment produced by the Respondent did not indicate the job description assigned to the Claimant. No material was placed before this by the Respondent to demonstrate the roles the Claimant was to perform.

68. *Legal Notice No.117 of 2015* i.e. Regulations of Wages (General) (Amendment) Order, 2015 provides for the minimum monthly salary of a tailor exclusive of housing allowance at Kshs.17,090.00. *Legal Notice No.112 of 2017* i.e. Regulations of Wages (General) (Amendment) Order, 2017 provides for the minimum monthly salary of a tailor exclusive of house allowance at Kshs.20,166.00. Despite the clear Wage Orders, the Respondent went on to underpay the Claimant in flagrant violation of the law. The Claimant should be paid the cumulative under paid salary of Kshs.187,194.90.

69. Having demonstrated that he was dismissed unlawfully, wrongfully and unfairly for want of valid and fair reason and failure by the Respondent to adhere to peremptory provisions of the law with regard to fairness of procedure for dismissal, the Claimant merits compensation under Section 49[1][c] of the *Employment Act*, to the extent of the maximum compensation (equivalent of 12 month's salary), Kshs.241,992.00

70. Under section 51 (1) of the *Employment Act*, an employer is obligated to issue a certificate of service upon an employee if and when employment terminates. This is not depended on the lawfulness or otherwise of the termination which in any event the Respondent has demonstrated to be unfair and unlawful. The Respondent didn't discount the Claimant's position that it issued the certificate. The Court should avail the relief to him.

Respondent's Submissions

71. The Respondent identified the following issues for determination: -

    a. Which respondent had employed the claimant at the time of the termination?

    b. Whether the claimant's employment was wrongfully and unfairly terminated?

    c. Whether the claimant is entitled to the prayers sought, and

    d. Who meets the costs of the suit?

72. On the 1st issue, the Respondent's Counsel submitted that though the claimant sued the two Respondents, in paragraph 4 of the Memorandum of Claim, he avers that he was transferred from the 1 st Respondent company to the 2nd Respondent's company in June 2015. This evidence agrees with that of the Respondent's 1st witness, and the consent that he executed dated 24th August 2015.

73. On the 2nd issue Counsel submitted the Claimant's was that his employment was terminated unlawfully, wrongfully and unfairly. He stated that he was sick at the time that he was away from work but the 2nd Respondent could hear none of it. It therefore follows that the burden of proof solely rested on him to show that his termination was unlawful, wrongful and unfair. He failed to discharge the said burden.

74. Section 107 (1) of the *Evidence Act* is explicit that;

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

75. Section 47 (5) of the *Employment Act* (hereinafter the Act) is also clear that in a claim of unfair termination or wrongful dismissal, the burden of proving the ingredients of unfairness and wrongfulness lies with the employee. To buttress this point reliance was paced on the case of Omar Ndaro Zuma v Modern Coast Express [20191 eKLR, where the court held;

> " The import of Section 47(5) of the *Employment Act* is that an employee alleging unfair 'termination or wrongful dismissal must lay before the Court the actual circumstances leading to his exit from employment. It is not enough for an employee to simply say "my employment was unfairly terminated'. They must prove ingredients of the unfair termination or wrongful dismissal."

76. The letter of termination dated 08/07/2017 states the reasons for termination. The Claimant was summarily dismissed for being absent from work without permission. The circumstances surrounding the claimant's dismissal are further explained by RW. The evidence of DW 1 was corroborated by the evidence of RW 2. at paragraphs 3 to 6 of his statement. The Respondent sufficiently established that the Claimant's dismissal was justified for the reasons enumerated in the dismissal letter.

77. Section 44 (4) (a) of the *Employment Act* permits an employer to dismiss an employee who without leave or other cause absents himself from work. To support this submission, reliance was placed on the case of Consolata Kemunto Aming'a -vs- Milimani High School [2019] eKLR, where the court held as follows;

> " Absence from work without good cause and without the permission of the employer is a matter categorized as gross misconduct under section 44 (4) of the *Employment Act*, 2007."

78. As regards the reliefs sough, Counsel submitted that the 2nd Respondent led evidence to show that the Claimant's terminal dues as contained in the dismissal letter were calculated and paid in full in the month of July 2017. His pay slip for the month of July 2017 is a testament to this.

79. The 2nd respondent had good reasons to terminate the claimant's contract of employment. The contract permitted the 2nd respondent to terminate the contract by issuing a seven (7) days' notice the contract of employment provided for seven days' notice or payment of salary in lieu of notice. The relief, notice pay, cannot be availed to the Claimant as a result.

80. Even if the court was to find that the Claimant ought to have been paid salary in lieu of notice, the claimant would be entitled to Kshs.4,107/- being the salary for seven (7) days as provided under clause 11 of his contract of employment. The claimant was earning a salary of Kshs. 17,602/- per month at the time of his dismissal

81. The Claimant seeks payment of Kshs.8,531.77 in lieu of leave. He claims that he neither took leave nor was paid for the same during the last year of his employment. On its part, the 2nd Respondent stated that the Claimant took leave from time to time but preferred to be paid in lieu. RW 1 told the court that leave payments were made on a monthly basis. The court should note from his pay slips for the months of May and June 2017 that he received a monthly payment of Kshs. 1,444.27 on account of leave. His claim for payment in lieu of leaves, ought to fail.

82. On the Claimant's claim for service pay of Kshs.38,362.50, Counsel submitted that the Claimant did not adduce any evidence in support of the same. Surprisingly, he in his submissions, took an about turn and submitted that he is entitled to gratuity as provided for under the CBA. Parties are bound by their pleadings and therefore the Claimant is o not entitled to gratuity having failed to plead the same in his Memorandum of Claim.

83. A claim for service pay is premised on Section 35 of the Act. Under section 35 (5) of the Act, an employee whose contract of service has been terminated is entitled to service pay for every year worked. However, under section 35 (6) (d) of the Act, an employee is not entitled to service pay where he/she was/is a member of the National Social Security Fund (NSSF).

84. The Claimant produced in court a statement from NSSF showing that he is member number 264522931. The statement further shows that the 2nd Respondent is the employer and made remittance to NSSF. The pay slips produced in court confirm the said deductions. The claimant is therefore not entitled to service pay. To bolster this point, Counsel cited the case of Julius Mwangi — vs- Meridian Hotel Limited [2021] eKLR, where the court stated as follows;

> "...in light of the provisions of section 35 (6) (d) of the *Employment Act*, employees who are entitled to payment of National Social Security Fund (NSSF), are not eligible for service pay. In the instant case, the claimant's pay slip indicates that he was a member of the NSSF, thus bringing him within the ambit of the exclusions under section 35 (6) of the *Employment Act*. In the circumstances, I find that he is note entitled to service pay hence the claim fails. To this end, he may follow up for his dues from the NSSF."

85. On the Claimant's claim for salary, Counsel submitted that the Parties were clear in the employment contract that was entered into by them as regards what the claimant's position under the contract was to be, a mass production mechanist.

86. It is trite law that parties are bound by the terms of their employment contract. The said terms ought to be upheld by the court. The Claimant's employment contract and all the subsequent renewals clearly describe the Claimant's job description as a mass production machinist. The contract of employment, without doubt, meets the requirements of section 10 (2) of the *Employment Act*.

87. Counsel urged this court to be persuaded by ruling in the case of Samuel Chacha Mwita v Kenya Medical Research Institute [20141 eKLR where the court made the following observation;

> "Once there is a written contract, the Court will seek to give meaning to such a written contract based on its terms in determining any issue that may arise especially any dispute. The Court as guided by the provisions of section 10 of the *Employment Act* will give the ordinary meaning to any written agreement between parties unless there is proof that there is ambiguity on the face of the contract."

88. The 2nd respondent operates at Athi River's Export Processing Zone within Mavoko Municipality. The applicable minimum wage for a mass production machinist working within Mavoko Municipality is Kshs.13,633.60 per month per the Regulation of Wages (General) (Amendment) Order 2017).

89. The Regulation of Wages (General) (Amendment) Order 2017 issued vides *Legal Notice No. 117 of 2017* came into operation on 1st May 2017. The Claimant's salary was Kshs.17,602/- per month, which salary was 12.3% higher than the prevailing minimum wage of a mass production machinist of Kshs. 13,633.60 per month.

90. The Court is invited to further note that the prevailing minimum wage for a mass production machinist under the CBA was Kshs.13,259.30 per month per clause 19 of the CBA.

91. Prior to *Legal Notice No. 117 of 2017*, *Legal Notice No. 117 of 2015* that came into operation on 1st May 2015, set the minimum wage of a mass production machinist working within Mavoko Municipality at Kshs.11,553.90. The Claimant's basic salary at the commencement of his employment on 24th August 2015 was Kshs. 12,023/-, which amount was above the prevailing minimum wage.

92. As such, it is clear that the Claimant's basic salary was always set above the applicable minimum wage. His claim for payment of the alleged underpaid wages ought to be declined.

93. It was submitted that the compensatory relief sought by the Claimant under Section 49[1][c] of the *Employment Act*, should be declined as he failed to demonstrate that the termination of his employment was unfair. However, should the Court find that he is entitled to the relief, then it should note that he was on a fixed term contract that was running for the period 09/07/2017 to 23/08/2017. Therefor, at the time of termination he had 45 days remaining of the life of the contract, and grant him salary for these days.

94. On the certificate of service, it was submitted that the evidence of RW1 was clear that the 2nd Respondent has not declined to issue the Claimant with a certificate of service. The dismissal letter dated 8th July 2017 clearly indicated that a certificate of service shall be issued to him. The claimant is therefore at liberty to pick his certificate of service from the 2nd Respondent's offices.

95. Costs of the claim are ordinarily at the discretion of the court. The 1st Respondent is entitled to an award of costs as against the Claimant because it was dragged into this suit yet it was no longer his employer.

Analysis and Determination.

96. I have carefully considered the pleadings, the evidence, and the submissions by the parties and the following issues emerge for determination:

    I. Whose employee was the Claimant at the material times.

    II. Was the Claimant’s employment unfairly terminated?

    III. Is the Claimant entitled to the reliefs sought?

Whose employee was the Claimant at the time of separation?

97. Unarguably, the Claimant has sued the two Respondents in this matter. Though the reliefs section of his Memorandum of Claim isn’t clear, a presumption flows that the reliefs sought are so sought against them jointly and severally, hence the necessity for an on-set interrogation and determination on this issue. When one keenly considers the pleadings by the Claimant, his witness statement, his evidence

under cross, examination, and the consent of transfer of services to the 2nd Respondent, there cannot be a difficulty in concluding they are all in agreement with the Respondents' position that at the material time, the Claimant was an employee of the 2nd Respondent. I am persuaded to, and I hereby, hold so.

98. The evidence and material placed before this court by the Respondent doesn't point out at all that liability should at against the 1st Respondent concerning any of those reliefs he has sought.

99. As a consequence of the foregoing, I have no challenge to find that the 1st Respondent was improperly, without any justification and casually enjoined in this claim. The Claimant's claim against him is hereby dismissed.

Was the Claimant's employment unfairly dismissed?

100. It is now trite law, and this Court has time and again stated, that termination of an employee's employment or summary dismissal from his or her employment can only be held to be fair where it is demonstrated that the two statutory aspects, procedural and statutory fairness, were present in the termination or summary dismissal. Procedural fairness concerns the process leading to the decision to terminate or dismiss, whilst substantive justification, the decision itself. Also see the Court of Appeal decision in Pius Machafu Isundu vs Lavington Security. [ ] eKLR .

101. Section 41 of the *Employment Act* provides for a mandatory procedure that must be adhered to by an employer who contemplates terminating an employee's employment on grounds of gross misconduct, incapacity or compatibility. The ingredients of this process contemplated under the provision are; notification-the employer must inform the employee of the grounds, the basis of the intention; the hearing- the employer must allow the employee affected adequate opportunity to prepare and make representation[s] on the ground[s]; the right of accompaniment- the employer shall inform the employee of his statutory right to be accompanied by a colleague or a Shop Steward [if the employee is a member of a trade union]; lastly the consideration-the employer must consider the representation[s] made by the employee and or the accompanying person, before taking a final decision. Absence of all or any of these ingredients shall render the termination or dismissal procedurally unfair within the meaning of Section 45 of the Act.

102. The Respondent contended and its Counsel submitted that the Claimant's contract of employment, and the CBA that was concluded between the Respondent and the Claimant's trade union allowed the Respondent to summarily dismiss the Claimant by issuing a 7 days' notice. The notice was issued. Therefore, the termination was procedurally fair. Further, Section 44 of the Act allows summary dismissal on account of desertion. This type of submission is surprising. It could only be proper and relevant in the pre-2007, labour legal regime of this Country. Certainly, it cannot be in the post-2007 era that came in with immense statutory protections and rights for employees, and ouster of the employer's at large authority to terminate an employee's right as and when they desired.

103. In the case of Gichuru v Package Insurance Brokers Limited [Petition 36 of 2019] [2021] KESC 12[KLR] [22 October, 2022], the Supreme Court of Kenya held;

> "75. However, the procedure followed to terminate the contract was in breach of Section 41 and 45 of the *Employment Act* .... for the reason that the appellant was not accorded a chance to defend himself or respond to the allegations against him. Although the letter of appointment provided for no prior notice when terminating the employment due to gross misconduct, the stipulation of the contract cannot be used to oust a mandatory and express statutory provision in section 41 of the said Act. Consequently, the failure to allow

fair procedure rendered the termination of the appellant's employment unfair within the meaning of Section 45 of the Act."

79. Moreover, Section 44[4] of the *Employment Act*..... does an not give an employer a blanket right to dismiss an employee at will. However, grave the circumstances of the employee's misconduct, he was entitled to be heard before he was dismissed."

104. The Respondent's witness who in her witness statement described herself as the 1st Respondent's Human Resources Manager asserted that a disciplinary hearing was conducted against the Claimant, however under cross examination, she wasn't able to demonstrate by material that the Claimant was invited to a meeting specifically for a disciplinary hearing and that there was such a hearing. This Court's view has always been that not every meeting should morph into, or be considered, a disciplinary hearing, otherwise, the importance and purpose of the insistence of presence of all the ingredients of procedural fairness mentioned hereinabove shall be rendered useless.

105. From the material placed before me, I am not persuaded that the Claimant was a accorded a hearing and that the process as was undertaken by the Respondent had in it all the ingredients contemplated under Section 41 of the *Employment Act* or any of them. The termination of the Claimant's employment was in my view, procedurally unfair.

106. Before I pen off on this issue, this point deserves a comment by this Court. The Claimant's Counsel submitted that once a Court find that the termination of an employee's employment was procedurally unfair, it needs not proceed to consider the aspect of substantive justification and placed reliance on the decision in Patrick Abuya v. Institute of Certified Public Accountants of Kenya (ICPAK) & another [2015] eKLR. I see it differently, the Court must consider the two aspects, Procedural and substantive fairness. For purposes of the compensatory relief under Section 49[1][c] of the Act, it normally makes a difference that liability is attaching against the employer on the ground that the termination or dismissal was as a result of lack of both procedural and substantive fairness, and not lack of only one of the aspects.

107. I now turn to consider aspect substantive justification. The Respondent asserted that the termination of the Claimant's employment was for a valid and fair reason and therefore in accord with the provisions of Section 45 of the *Employment Act*. The Claimant maintained a contrary view.

108. Section 43 of the Act places upon the employer in a dispute regarding termination of an employee's employment to prove the reason for the termination. It isn't enough for the employer to assert that the employee's employment was terminated for this reason or that reason. It must establish that the reason[s] genuinely existed. The law under section 45 of the *Employment Act*, places a further burden on the employer to prove that the reason[s] was valid and fair.

109. The Respondent's first witness asserted that the Claimant was dismissed from employment following his absenteeism from duty on the 3rd and 4th July 2017. The Court notes that the evidence of the witness and that of the Respondent's witness agreed on the point that when the Claimant reported back to work on 5th July 2017, he attended the Human Resource office where he was warned and allowed to work. In my view, it was unfair, and unreasonable to make an infraction on which he had been pardoned a ground for termination of his employment. At best, the infraction could be a factor that the Respondent could consider when making a final decision in a future disciplinary hearing.

110. Assuming that the view above is wrong, I will still hold that the termination was substantively unfair as it lacked a valid reason. The Claimant maintained that he was unwell on 3rd July 2017, [a fact that RW2 seems to appreciate in his witness statement] and was treated at Shalom Hospital, whereby he

was given sick off sheet, which he handed over to the Factory Manager. The Factory Manager shred the same. In my view, the Manager was a crucial witness who ought to have testified for the Respondent but whom inexplicably, the Respondent never presented to testify. I hesitate not to make an adverse inference against the Respondent, that had the witness testified, he could have given evidence adverse to the Respondent. I find that the Claimant was unwell on the 3rd July 2017, and treated at the said Hospital. The sick off sheet was destroyed by the Factory Manager. In the circumstances, no reasonable employer could dismiss an employee from employment as the 2nd Respondent did. The 2nd Respondent didn't have a valid reason to terminate the Claimant's employment.

111. In the upshot, I hold that the termination of the Claimant's employment was procedurally and substantively unfair.

Is the Claimant entitled to the reliefs sought?

112. The Claimant sought for notice pay, contending that his employment was terminated without notice. The 2nd Respondent asserted that notice pay was made. I have carefully considered the material placed before me and I hold that, there is none from which it can be discerned that the payment was made.

113. The Respondent's Counsel submitted that should this Court find that the Claimant is entitled to notice pay, then it should be equivalent to seven day's salary as his contract, and the CBA mentioned above provided for seven days' termination notice. This Court isn't persuaded by this submission. The Claimant's employment was on where his salary was paid at the end of every month. Section 35 of the Act provides that such type of employment is terminable by a twenty eight days' notice. In my view, the requirement of this provision cannot be out contracted. A contract of employment cannot be allowed to give a lesser notice period than that contemplated in the law, and more especially considering that the benefits and rights that the *Employment Act* has given, are the minimum that should be availed to an employee. Having found that the termination of his employment was unfair, I hold that he is entitled to the notice pay contemplated under Section 36 of the *Employment Act*.

114. The Claimant further sought for service pay. Service pay is benefit provided for under Section 35 of the *Employment Act*. However, it is important to point out that the provision excludes a certain of employees from enjoying the benefit, among them are those employees who are members of NSSF. From the Claimant's own documents, it is revealed that he was a member of the Fund. As such, this Court cannot avail to him the benefit.

115. The Claimant's Counsel submitted that under the CBA, the Claimant was entitled to gratuity. The Respondent's Counsel submitted and I agree that as this relief wasn't sought by the Claimant in his pleadings, it cannot be availed to him.

116. The Claimant made a claim for underpaid salary. The Claim is independent of that of unfair termination and which I presume is anchored on the provisions of Section 48 of the *Labour Institutions Act*. The Claimant wants this Court to believe that he was at all material times employed as a tailor and not a mass production machinist, unfortunately for him, I am not convinced to believe. The Contracts of employment that the Claimant entered into with the Respondent at the various times including the one under which he was serving at the time of separation, gave his job specification as mass production machinist. This Court hasn't been furnished with any or sufficient material to be a basis for it to conclude that the parties intended a different job specification.

117. This Court is keen not to enter into the space of writing a contract for the parties. With this, I hold that at all material times, the Claimant was employed as a mass production machinist and was not underpaid at any point. His claim under this head fails.

118. The Respondent didn't demonstrate that the Claimant either took his annual leave for the year 2017, or that he was compensated in lieu thereof. With due respect all that it did was to make a bald assertion that he was paid. If he was, nothing could have been easier than the Respondent explaining how the payment was made and when, and tender documents to establish the fact. It didn't. Resultantly, I hold that the Claimant is entitled to compensation for the leave days earned in 2017 but which days he never utilized.

119. Section 49[1][c] of the *Employment Act*, 2007, bestows upon this Court the authority to award a compensatory relief for an employee who has successfully challenged termination of his or her employment as unfair. However, it is pertinent to state that the authority is discretionarily exercised depending on the circumstances of each case. I have carefully considered that the Respondent inexplicably acted contrary to what the law required of him as regards procedural and substantive fairness, that the Respondent terminated his employment notwithstanding that his absence from duty was as a result of illness, and as such it didn't act with equity and justice, and that at the time of separation, the Claimant had only 45 days remaining on his contract, and conclude that he is entitled to the compensatory relief to an extend of three months' gross salary.

120. In the upshot, Judgment is hereby entered in favour of the Claimant in the following terms: -

I. A declaration that the termination of his employment was both procedurally and substantively unfair.

II. Payment in lieu of notice, KSHS. 15,264.40.

III. Compensation for leave days earned but untaken, KSHS. 8,531.77.

IV. Compensation for unfair termination of employment, KSHS. 45,793.20.

V. Interest at court rates on the sums awarded in [b], [c], and [d], above from the date of this judgment till full payment.

VI. The 2nd Respondent to issue the Claimant with a certificate of service within 30 days of today.

VII. Costs of the suit.

READ, SIGNED AND DELIVERED THIS 28TH DAY OF NOVEMBER, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Ms. Sabayi for the Claimant.

Mr. Kiprono for the Respondent.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of

the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.