



**Fikiri v Kamyn Industries Ltd (Cause 618 of 2015)
[2023] KEELRC 3107 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3107 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 618 OF 2015
AK NZEI, J
NOVEMBER 23, 2023**

BETWEEN

JARED FIKIRI CLAIMANT

AND

KAMYN INDUSTRIES LTD RESPONDENT

JUDGMENT

1. The claim herein is shown to have been initially filed in the Chief Magistrate’s Court at Mombasa on 7/7/2006 as Civil Suit No. 2210 of 2006. The suit was subsequently transferred to this Court whereat it was registered as Cause No. 618 of 2015. The Claimant’s claim before this Court is as presented vide a further amended claim/plaint dated/amended and filed on 26/11/2021.
2. It is pleaded in the said further amended claim that the Claimant was, at all times material to the suit herein, employed by the Respondent in various capacities from 1/3/2983 to 2005, for a total of 22 years. That on 12/11/2005, the Respondent suddenly and without notice or reason locked the Claimant out of its premises and purported to unilaterally terminate his employment.
3. The Claimant further pleaded:-
 - a) that he was not afforded an opportunity to be heard, was not given notice of intended termination of his employment and was not paid his dues.
 - b) that termination of the Claimant’s employment was for no genuine reason and was without due process as provided under Sections 18,35,41,43,44,45 and 49 of the *Employment Act* 2007.
 - c) that the Claimant was entitled to a lawful termination letter, without which he should be considered as an employee of the Respondent until retirement age.
 - d) that now that the Claimant has attained retirement age, he is entitled to his retirement benefits.



- e) that the Respondent's illegal and inhuman act of suddenly and summarily terminating the Claimant's employment caused the Claimant shock, economic imbalance and embarrassment, loss and damage.
 - f) that the Claimant's family underwent difficulties from the time of the Claimant's termination, including his children not going to school.
 - g) that the Respondent did not give the Claimant any recommendation upon dismissing him unfairly, and that the Claimant was not able to be employed elsewhere.
4. The Claimant set out his claim against the Respondent as follows:-
- a) 3 months' salary in lieu of notice.....ksh. 37,827
 - b) Severance pay.....ksh. 159,923.
 - c) Leave allowance for the years 2005 to 2021 (12,609x16)ksh. 201,744
 - d) Unpaid half (1/2) salary for the days worked in November 2005ksh. 6,304.05
 - e) Unpaid salary from December 2005 to December 2021 (12,606x12x16)..... ksh. 2,420,928
 - f) Unpaid house allowance from December 2005 to December 2021 (1891x12x16).... ksh. 363,072
 - g) Overtimeksh. 78,553
 - h) Retirement/terminal benefits (from 1/3/1983 to December 2021) 40 years of service:
 - (i) NSSF.....ksh. 76,800
 - (ii) NHIF.....Ksh. 99,840
 - (iii) Staff Retirement Pension Scheme from 1/7/2001 to November 2005, and December 2001 to December 2021 (less 26,641 paidksh. 225,358.95
 - i) Gratuity
 - (i) From March 1983 to November 2005ksh. 184,932
 - (ii) From December 2005 to December 2021ksh. 134,493

Total ksh. 3,991,660
 - j) General damages for breach of contract.
 - k) Certificate of service.
 - l) A declaration that termination of the Claimant's employment was unfair.
 - m) Costs and interest.
5. There is on record an unsigned and undated amended Response to claim shown to have been filed herein on 21/4/2022. An unsigned pleading is not a pleading properly so called, and I will say no more regarding the said document.



6. The suit came up for hearing on 15/2/2023, and being satisfied that a hearing notice had been duly served on the Respondent's Counsel on record and an affidavit of service duly filed, I allowed the hearing to proceed ex-parte. The Claimant testified and adopted his filed witness statements dated 7/12/2012, 26/11/2021 and 16/6/2017 as his testimony. It was the Claimant's testimony that he was employed by the Respondent as a Machine Operator on permanent basis in 1983, and rose through the ranks to the position of quality controller, then a supervisor (quality production) and then sales coordinator; which position placed the Claimant in the Respondent's management until he was terminated in 2005.
7. It was the Claimant's further testimony that at the time of termination in 2005, he was earning ksh. 14,500, inclusive of house allowance. The Claimant produced in evidence a bundle of 13 documents listed on a list of documents dated 6/2/2023, which included payslips. The Claimant testified that he was terminated but was not given any termination letter. That on his last working day, which was a Saturday, he was stopped at the Respondent's gate/security check and that this was the end of his employment as he was not allowed in again. The Claimant further testified that prior to his termination, the Respondent's Manager had questioned him regarding some company property that had been burnt as rubbish while the Claimant was away visiting a patient at Coast General Hospital on permission given to him by the said Manager. That the alleged burnt property was not on the Claimant's line of duty. That the Respondent's General Manager told the Claimant, after three days, that he had terminated his employment, refused to pay him and did not issue him with a certificate of service.
8. The Claimant testified that he was 44 years at the time of termination in 2005, and was 62 years at the time of hearing of the suit herein. That the Respondent used to pay NSSF and NHIF for the Claimant. That the Respondent had not contacted the Claimant since the date of termination, and had not paid his dues. The Claimant closed his case, and the Respondent's case was closed.
9. It is to be noted that the Respondent did not testify, and did not call any evidence. The evidence adduced by the Claimant stands unchallenged, and therefore unrebutted. Upon considering the said unrebutted evidence as well as the Claimant's pleadings filed herein, issues that present for determination, in my view, are as follows:-
 - a) whether termination of the Claimant's employment by the Respondent was unfair.
 - b) whether the Claimant is entitled to the reliefs sought.
10. On the first issue, the Claimant pleaded and testified that his employment was terminated without notice and without being given an opportunity to be heard. Section 41 of the Employment Act sets out a mandatory procedure that must be adhered to by any employer contemplating terminating an employee's employment for misconduct, poor performance or physical incapacity. The section provides:-
 - (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 this explanation.
 - (2) Notwithstanding any other provision of this part, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

11. On the other hand, Section 35(1) (c) provides that where an employee is serving on a contract whereby wages or salary are payable periodically at intervals of or exceeding one month, that contract is terminable by either party at the end of the period of twenty eight days next following the giving of notice in writing.
12. The import of the foregoing statutory provisions is that the Claimant was entitled to be notified of the intended termination of his employment, to be given the reasons for the impending termination, and to be given an opportunity to be heard before termination. This was not done in the present case.
13. Anything short of the foregoing is unfair. I find and hold that termination of the Claimant’s employment by the Respondent was unfair, and I so declare.
14. Having made a finding that termination of the Claimant’s employment was unfair, and having noted that one of the reliefs sought by the Claimant is damages, I award the Claimant the equivalent of ten months’ salary being compensation for unfair termination of employment. That is ksh. 14,500 X 10 = ksh. 145,000.
15. I also award the Claimant ksh. 14,500 being one month salary in lieu of notice.
16. The other claims made by the Claimant are rather strange in that after pleading and testifying to unfair termination of his employment in November 2005, the Claimant appears to be making claims purportedly “arising” from the date of termination to the date he attained retirement age. Those claims, that is the claims for leave allowance from 2005 to 2021, unpaid salary from December 2005 to December 2021, unpaid house allowance from December 2005 to December 2021, overtime, NSSF and NHIF from December 2005 to December 2021 are, in my view, frivolous and untenable, and are declined.
17. The claim for severance pay is declined as termination of the Claimant’s employment is not shown to have resulted from redundancy under Section 40 of the *Employment Act*. The claim for gratuity is disallowed pursuant to Section 35(6) (d) of the *Employment Act* as the Claimant is shown to have been a member of and a contributor to NSSF. The claim for a certificate of service is allowed pursuant to Section 51(1) of the *Employment Act*. The claim for days worked in November 2005 is allowed at Ksh. 6,3004.05 as prayed.
18. In sum, judgment is hereby entered for the Claimant against the Respondent as follows:-
 - a) compensation for unfair termination of employment.....ksh. 145,000
 - b) one month salary in lieu of noticeksh. 14,500
 - c) unpaid days worked in November 2005.....ksh. 6,304.05Total ksh. 165,804.05
19. The awarded sum shall be subject to statutory deductions under Section 49(2) of the *Employment Act*.
20. The Respondent shall issue the Claimant with a Certificate of service for the years worked, from the year 1983 to 2005, within thirty days from the date of this judgment.
21. The Claimant is awarded costs of the suit and interest at Court rates.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD NOVEMBER 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

