



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 239 OF 2017

RAPHAEL MUNYOKI MAIRU.....CLAIMANT

VERSUS

CIRCLELINE AGENCY LIMITED.....RESPONDENT

J U D G M E N T

1. The claim before me was instituted by the Claimant vide a statement of claim dated 29th March 2017 and filed in Court on 30th March 2017. The claimant pleaded, *inter alia*:-

a. that he, the Claimant, was employed by the Respondent as a Manager in the Respondent’s clearing and forwarding department in the year 2004, based at the Respondent’s Mombasa office and earning a salary of ksh.45,000 per month.

b. that on 31/12/2016, without any colour of right or justification, the Respondent summarily dismissed the claimant via a telephone call whereby he was told (sic) “your work has ended”.

c. that the dismissal was unprocedural, unlawful and unfair as the claimant was:-

- i. terminated without notice.**
- ii. was never given reasons for the termination.**
- iii. was not accorded a disciplinary hearing.**
- iv. was not given any opportunity to be heard in defence.**
- v. the Respondent did not act in accordance with justice and equity in effecting the termination.**
- vi. the termination was against fair labour practices.**

2. The claimant set out his claim at paragraph 6 of the Statement of Claim and prayed for:-

- a. one month salary in lieu of noticeksh.45,000.00**
- b. service payksh.337,500.00**
- c. unpaid leave days.....ksh.436,153.85**
- d. compensation for unlawful termination ksh. 540,000.00**

Total ksh.1,358,653.85

3. The Claimant also filed, along with the statement of claim, a witness statement and a list of documents, listing some six documents.

4. The Respondent never entered appearance, and did not file any response to the Claimant’s claim, though served with summons and the

Claimant's claim documents. An affidavit of service sworn by one Dominic Mwendwa Muinde, a Court Process Server on 29th May 2017 and filed in Court on 7th June 2017, confirms service upon the Respondent on 26th May 2017.

5. The matter was severally mentioned in Court before being fixed for formal proof. A mention Notice is shown to have been served on the Respondent by registered post on 14th October 2020 and subsequently by email on 7th November 2020. There is on record an affidavit of service sworn by one Nicholus Mwenga kimwele, a Court Process Server, and filed in Court on 3rd December 2020 in that regard.

6. When the matter came up for formal proof on 8th November 2021, the Claimant adopted his recorded and filed statement as his evidence in chief, and further produced as exhibits documents listed on his list of documents referred to at paragraph 3 of this judgment. The documents produced by the Claimant in evidence include a letter dated 10th August 2010 confirming that the Claimant was employed by the Respondent, copies of the Claimant's national identity and employment cards, a bundle of the Claimant's payslips, an unsigned letter by the Claimant to the Respondent dated 2nd February 2017 and a demand letter dated 16th February 2017.

7. The Claimant further testified that he was employed by the Respondent in January 2004 as a Clearing and Forwarding Manager and that the Respondent's letter dated 10th August 2010 refers to the Claimant as such. It was the Claimant's evidence that he earned a salary of ksh.30,000 per month, which was subsequently raised to ksh.45,000 per month.

8. The Claimant reiterated the averments made in his statement of claim, and testified that on 31st December 2016, he was telephoned by the Respondent's Chief Executive Officer (CEO), one Georgina, and told to go home as his employment had been terminated. That the Respondent did not pay the Claimant the amount stated in paragraph 6 of the Statement of Claim, despite demand having been made. The Claimant prayed for reliefs as set out in paragraph 6 of his statement of claim and costs of the claim. He also prayed that he be issued with a Certificate of Service.

9. Counsel for the claimant filed written submissions on 23rd November 2021 pursuant to the Court's Order on 8th November 2021 in that regard. The suit was mentioned in Court on 30th November 2021 and a date for judgment was reserved.

10. Having considered the pleadings filed by the Claimant and evidence adduced, issues for determination appear to me to be as follows:-

- a. Whether termination of the Claimant's employment was fair and lawful.
- b. Whether the Claimant is entitled to the reliefs sought.

11. On the first issue, Section 41 of the Employment Act provides:-

1. "Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the ground of misconduct, poor performance or physical incapacity explain to the employee, in a language that 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 such 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 presentations 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".

12. The Respondent did not comply with the mandatory procedural requirements of Section 41 of the Employment Act. The Respondent did not explain to the Claimant the reasons for which the Respondent was considering terminating the Claimant's employment and did not give the Claimant an opportunity to be heard on those reasons.

13. I find, hold and declare that the Respondent contravened the mandatory provisions of Section 41 of the Employment Act 2007, and that termination of the Claimant's employment was unfair, unprocedural and unlawful. The Court of Appeal had the following to say in the case of NATIONAL BANK OF KENYA –VS- SAMUEL NGURU MUTONYA [2019] eKLR:-

"...to move and terminate without giving regard to Section 41 of the Employment Act and its provisions, giving the Claimant a hearing in the presence of his representative, the termination became procedurally unfair....

where an employer fails to abide with the procedural requirements of Section 41 of the Employment Act, even where payment in lieu of notice is made immediately, such does not cure the procedural unfairness visited upon the claimant...

The Respondent failed to meet the provisions of Section 45 of the Employment Act. The Claimant is therefore entitled to reliefs sought."

14. On the second issue, I find and hold that the Claimant is entitled to some of the reliefs sought, which I proceed to address.

15. The Claimant pleaded, and subsequently proved, on a balance of probability, that he was employed by the Respondent as a Clearing and Forwarding Manager, and that at the time of termination of his employment on 31st December 2016, he was earning a monthly salary of ksh.45,000. The Claimant produced in evidence a bundle of his payslips for the months July 2012, August 2012 and September 2012, and his gross monthly pay is shown to have been ksh.45,000. The Claimant's pleading and evidence that his employment was terminated by the

Respondent without notice was not controverted by the Respondent who never defended the suit. The claim for ksh.45,000, being one month salary in lieu of notice, was proved and is allowed.

16. The Claimant is not entitled to service pay as the payslips produced by him in evidence showed that he was a member of the National Social Security Fund (NSSF) into which contributions were made for the Claimant's benefit in accordance with the law governing the Fund. Section 35(6) of the Employment Act 2007 precludes an employee who is a member of a registered pension provident fund scheme under the Retirement Benefit Act, a gratuity or service pay scheme established under a collective agreement, any other scheme established and operated by an employer whose terms are more favorable than the service pay scheme established under the section, and the National Social Security Fund, from payment of service pay.

17. The Claim for unpaid annual leave days was not specifically pleaded, and was not proved. The same is declined.

18. On the claim for compensation for wrongful and unfair termination, I have already made a finding at paragraph 13 of this judgment that termination of the Claimants employment was unfair, unprocedural and unlawful. The claim for compensation for unfair and unlawful termination is allowed, and I award the Claimant ten (10) months salary as compensation for unfair and unlawful termination.

19. The claim for issuance of a Certificate of Service is merited and the same is allowed. Section 51(1) of the Employment Act 2007 provides:-

“an employer shall issue to an employee a certificate of service upon termination of his employment unless the employment was continued for a period of less than four consecutive weeks.”

The Claimant's employment continued from the year 2004 to 31st December 2016, for a period of twelve (12) years. The Claimant pleaded and testified as much.

20. Consequently, judgment is hereby entered in favour of the Claimant against the Respondent as follows:-

a. One month salary in lieu of notice.....= ksh.45,000

b. Ten months' salary being compensation for unfair and unlawful termination of employment.....= ksh.450,000

Total **=ksh.495,000**

21. The Respondent is ordered to issue the Claimant with a Certificate of Service pursuant to Section 51 (1) of the Employment Act 2007 within thirty days from the date of this judgment.

22. The Claimant is awarded costs of this claim and interest at court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JANUARY, 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Makau for Claimant

No appearance for Respondent