



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE 27 OF 2018

(CONSOLIDATED WITH CAUSE NO. 26 OF 2018)

LOKITALA KAWAE.....1ST CLAIMANT

SAMUEL LEKADAA.....2ND CLAIMANT

VERSUS

COLOURS CROPS LIMITED.....RESPONDENT

JUDGMENT

1. The 1st Claimant filed his memorandum of claim dated 1st February, 2018 on 12th February, 2018 through the firm of Amukhale, Mirito and company Advocates and prayed for judgment against the Respondent for; -

a. Employment entitlement of salary for the days worked, 3 months' salary in lieu of notice, leave allowance and gratuity/service pay totaling to Kshs.286,697.96.

b. Compensation for wrongful/unfair dismissal from employment.

c. Costs and interests at court rates.

2. The 2nd claimant filed his memorandum of claim dated 1st February, 2018 on 2nd February, 2018 also through the firm of Amukhale, Mirito and company Advocates and prayed for judgment against the Respondent for; -

a. Employment entitlement of salary for the days worked, 3 months salary in lieu of notice, leave allowance and gratuity/service pay totaling to Kshs.271,587.99

b. Compensation for wrongful/unfair dismissal from employment.

c. Costs and interests at court rates.

3. The two suits herein were consolidated with the cause number 27 of 2018 marked as the lead file.

4. The Respondent entered appearance in both claims herein on 22nd March, 2018 and filed a response to each of the claim on 23rd March, 2018 denying the claim and prayed for the claims to be dismissed with costs.

Claimants Case

5. The claimants were both employed by the Respondent on the 1st February, 2003 as a security guard. The terms of employment were interalia for the payment of overtime for any hours worked in excess of statutory 8 hours and if either party was to terminate the contract they ought to give 3 months' notice of 3 months' pay in lieu of Notice.

6. The claimants aver that they worked diligently for the Respondent until 18th February, 2016 when the Respondent without any notice or reason orally dismissed them from employment. At the time of termination, the 2nd claimants was earning a salary of Kshs. 12,520 while the 1st Claimant was earning a salary of Kshs. 13,219.

7. The claimants aver that they were not accorded any hearing. They therefore contend that their termination was unfair in the circumstances and prayed for the claim to be granted as prayed.
8. The Respondent in response stated that it employed the claimants on permanent terms beginning 1st January, 2014 till 18th February, 2016 when they were discharged from their duties. According to the Respondent the 2nd claimant was paid a daily wage of Kshs. 260 as per the terms of the contract.
9. Upon the termination, the Respondent avers that the claimants were fully paid his terminal dues as per the award given at the Naivasha Sub-County labour office in accordance with section 47, 48 and 49 of the Employment Act.
10. The 1st claimant on the other hand was also paid on 18th February, 2016 a sum of Kshs 29,124 which money was deposited to his bank account being 18 days worked in February, 2018, overtime pay, attendance bonus, one week off in lieu, unpaid years of service and one-month salary in lieu of notice. An additional sum of Kshs 11,700 was paid to the 1st claimant after the labour office made a calculation for the said additional sum.
11. The Respondent avers that the 2nd claimant was paid 18 days worked in February, overtime up to 18th February, 2016, attendance bonus, one week in lieu of leave, unpaid years of service and one-month salary in lieu of Notice all amounting to Kshs 29,082 where Kshs20,500 went to settle the SACCO deduction and the balance of Kshs 8,582 were paid to the claimants bank Account.
12. Dissatisfied with the Respondent calculation of his entitlements the claimant lodge a dispute at Naivasha Sub-county labour office in March, 2016, where the dispute was heard and determined then the labour office directed that in addition to the monies given to the claimant the Respondent to add Kshs. 11, 700 which the Respondent dutifully deposited in the Claimants bank Account.
13. The Respondent therefore contends that it has fully paid the claimants all their terminal dues and prayed for the claim to be dismissed.
14. The claimants each filed a response to defence on the 26th June, 2018 admitting having preferred the matter to the labour office and stated further that the lodging of a complaint at the labour office is not a bar to proceedings before this Court.
15. At the hearing, the 2nd Claimant, Samuel Lekadaa, testified on his behalf and behalf of the 1st claimant, Lokitala Kawae, adopted his witness statement and produced his documents as per the list documents as his exhibit.
16. On cross examination by Mburu Advocate the claimant testified that he started working for the Respondent on the 1.2.2003 though the contract attached is from 4.2.2004. The witness admitted that the contract annexed as appendix 3 is not signed by him. The witness maintained that he never took any leave. With regard to overtime he admitted that overtime was paid together with salary. On being asked whether he received his terminal dues, the claimant testified that he never received any terminal dues from the Respondent neither the Kshs 8, 582 or the 11,000 awarded later by the labour office.
17. The Respondent's case proceeded for hearing on the 11th November, 2021 with the Respondent calling one witness **Naomi Nyambura Macharia**, who testified that she is the Respondent's Human Resource manager and adopted the witness statement dated 23/3/2018 together with the list of documents filed on even date.
18. Upon cross examination by Naomi Advocate, the witness testified that the claimants were served with termination notices however that they were not subjected to any disciplinary hearing. She averred that the claimants were paid as pleaded and produced as evidence in the Respondent exhibit number 3(a) and (b) of Kshs 8,582 and 11,700 respectively.
19. The claimants filed joint submissions on the 24th November, 2021 however the Respondent opted not to file any submissions.

Claimants submissions

20. The claimants submitted on three issue, whether the termination of the claimants employment by the Respondent was lawful and justified, whether the claimant are entitled to the reliefs sought and who pays the costs of the cause.
21. It was submitted for the claimant that the claimant were unfairly terminated from employment having been dismissed without reason or notice as contemplated under the Employment Act. It was argued that as much as the matter was taken to the labour office for determination, the same does not bar a dissatisfied party from lodging a claim at this Court.
22. It was submitted that the Respondent's allegation that they paid the claimants their terminal dues were no backed with any evidence and the alleged award from the labour office was not brought as evidence before the Court. It was therefore argued that the failure by the Respondent to produce any records of the employees in espousing their position in accordance with section 10 of the Employment Act ought to be construed against them.
23. It was submitted that the claimants were unfairly terminated from employment when they were not subjected to any disciplinary hearing neither were they given reason for their termination.it was argued that the letter of termination allegedly served upon the claimants does not give the reason for the termination when the law under section 41 of the Employment Act is couched in mandatory terms. In this they cited the case of **Mary Chemweno Kiptui V Kenya Pipeline Company Limited [2014] eklr**.
24. It was also submitted that the termination failed the test of procedural and substantive fairness and argued that if both test failed then the

termination ought to be declared unfair. In this they cited the case of **Walter Ogal Anuro V Teachers Service Commission [2013] eKLR** and the case of **Emily Muhonja V KenKnit(K) Limited[2016] eKLR**.

25. It was then submitted that the claimants have demonstrated the unfair termination as per section 47(5) of the Employment Act. Conversely that the Respondent has failed to demonstrate reason for the termination and whether it subjected the claimants to the proper procedure before the termination.

26. Accordingly, it was submitted that the claimant are deserving of the reliefs sought.

27. I have examined the evidence and submissions of the parties herein. From the evidence adduced by the claimants, they were indeed employed by the respondent and as per the contract of employment they were entitled to leave and overtime pay and if the contract was terminable, 1 month's notice was to be issued.

28. The claimants were members of NSSF. The respondents contend that they terminated the claimants lawfully and paid them all their dues. They produced the termination letters dated 18/2/2016, indicating that the services of the claimants had been terminated with effect from 18/2/2016. No reasons were advanced. No notice was given.

29. This matter was referred to the labour office. The respondents contend that they then agreed and paid the claimants all their dues and there is no evidence of the same.

30. The claimants were terminated without being given any due process as expected under Section 41 of the Employment Act 2007 which states as follows;

“41. Notification and hearing before termination on grounds of misconduct

(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, 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”

31. I therefore find the termination of the claimants unfair and unjustified and I award them as follows;

1ST CLAIMANT LOKITALA KAWAE

1. 1 month salary in lieu of notice 13,219/=

2. 10 months salary as compensation for the unlawful termination

= 13,219 x 10

= 132,190/=

3. Salary for February 2016. 18 days worked = 18/30 x 13, 219 = 7,931/=

TOTAL = 153,340/=

2ND CLAIMANT – SAMUEL LEKADAA

1. 1 month salary in lieu of notice = 12,526/=

2. 10 months salary as compensation for the unlawful termination

= 10 x 12,520 = 125,200/=

3. Salary for February 2016 and 18 days worked

18/30 x 12,520 = 7,512/=

TOTAL = 145,232/=

The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

Dated at Nakuru this 21ST day of JANUARY, 2022

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

And delivered on this 21ST day of JANUARY, 2022 by

HON. JUSTICE D. NDERITU

JUDGE