



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 344 OF 2017**

*(Before Hon. Justice Ocharo Kebira on 24<sup>th</sup> February 2022)*

**GEOFFREY WASILWA.....CLAIMANT**

**VERSUS**

**LABEL CONVERTERS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claim herein was instituted vide a Statement of Claim dated 20<sup>th</sup> February 2017, wherein the Claimant sought for the following reliefs:

- a) *That the court does find the reasons and procedure for termination were wrongful and unfair.*
- b) *That the court does find that the Respondent's action of continued withholding, failing, refusal and/or neglecting to pay the claimant his rightful terminal benefits and other unpaid dues unlawful and untenable.*
- c) *That the court does find that the Respondent's action of terminating the claimant for joining a union is unlawful.*
- d) *That as a result the court does order that the Respondent do pay the Claimant all his terminal benefits and other unpaid dues computed as hereunder:*
  - a) *12 months' salary in compensation for unfair termination*
  - b) *1 month pay in lieu of notice*
  - c) *Leave days @ 1.75 per month*
    - *30 days for months worked\*596= Ksh. 17,880*
    - *17.5 \* 596 (10 months) = Kshs 10,430**Total leave payments= Kshs. 28,310*
  - d) *Underpayment 56\*26\*30= Kshs. 43,680*
  - e) *Damages for dismissal on account of joining KUPRIPUPA Union.*
  - f) *Cost of this suit*
  - g) *Any other relief that this Honourable Court may deem fit and expedient to grant.*

2. Upon being served with summons to enter appearance, the Respondent filed its memorandum of appearance dated 13<sup>th</sup> March 2017, on the 24<sup>th</sup> March 2017. Apparently, it did not file any response to the claim within the requisite period.

3. On the 25<sup>th</sup> February, 2019, the matter was placed before Justice Radido for directions, when by reason of the premise above stated he directed that the matter be set down for formal proof. Without any application and subsequent leave of Court, the Respondent filed a response to the claim dated, on the 28<sup>th</sup> February, 2019.

4. The matter came up for the formal proof on the 8<sup>th</sup> November 2021, the Claimant testified, and got cross examined by Counsel for the Respondent, for that is the only right it had in the circumstances. In the circumstances of the matter, the Respondent therefore did not present any witness to testify on its behalf.

5. At the Close of the Claimant's case, the Court gave directions that the parties file their respective written submissions within specific timelines, they didn't oblige. Consequently, this Judgment is without the benefit of the parties' submissions.

#### **Claimant's Case.**

6. The claimant's case is a relatively straightforward one. In the year 2015, the Respondent offered to employ the Claimant as a machine operator, offer which he accepted. On or about the month of May 2016, the Claimant joined the Kenya Union of, Printing, Publishing, Paper Manufacturers and Allied Workers Union [KUPRIPUPA]. On the 1<sup>st</sup> of September, 2016, the Respondent issued a notice addressed to all casual employees, expressing its decision to outsource non-core function services. Employees were instructed to join the employment of entity that was to offer the outsourced services, and anybody who was not keen to, was to be sacked.

7. The Claimant contended that on the 6<sup>th</sup> September, 2016 he was terminated on the ground that he had joined a trade union. The termination was verbal. It was without, notice and justifiable cause, wrongful and unfair.

8. The claimant further states that he was neither given an opportunity to be heard nor was he served with a warning letter, both actions he believes to be contrary to the provisions of the law. He avers that the Respondent did not pay him the terminal dues owed to him.

9. At the time of the termination, he was earning Kshs. 10,800 as his monthly salary.

10. Cross examined by Counsel for the Respondent, he stated that he was employed by the Respondent as a casual worker, in May 2015. He confirmed that the Respondent was remitting NSSF dues to the relevant agency as and when they were due. His salary was being paid Bi-weekly.

11. On the notice dated 1<sup>st</sup> September, 2016, the Claimant stated that the same was affixed on the notice board. It was not served on him personally.

12. The union was not given any notice of the outsourcing, therefore the union never told them that there was going to be the outsourcing.

13. He had a card to prove his membership with the union.

14. The Claimant further reiterated under cross examination that his salary was Kshs. 10,800, therefore earning Kshs,5,950 in every two weeks. He was being paid overtime as reflected on his pay slip. However, the overtime pay was made only once.

15. Under re-examination by his counsel, the Claimant reiterated that, his salary was Kshs. 10,800, he was a member of the union, he was paid overtime but once, and that the notice was put on the notice board. He further stated that the Respondent never gave him any employment letter.

#### **Determination.**

16. From the material placed before this Court, I am convinced that the Claimant was an employee of the Respondent as a casual worker, earning a basic salary of Kshs. 5,940 bi-weekly. However, I am not prepared to agree that he was a member of the union stated, for he has not placed before this Court any sufficient evidence that he was.

17. The Claimant contended that he was terminated from his employment in a manner that was substantively and procedurally unfair, stating that the Respondent did not have any valid and justifiable reason to terminate the employment. That the requisite procedure was not followed in the termination. Section 43 of the Employment Act,2007, places upon an employer a burden of proving the reason or reasons for termination of an employee's employment. In the instant matter, the Respondent did not put forth any evidence before Court to support its defence against the Claimant's case. It did not give any evidence from which the Court can discern the reason or reasons for the termination. One can therefore without difficulty come to a conclusion that it didn't discharge the burden under the provision.

18. Having found that the burden was not discharged, then the statutory default implication should be allowed to set in, the termination should be deemed unfair in terms of section 45 of the Employment Act. Consequently, I find that the termination was substantively unfair.

19. Section 41 of the Act, provides for the procedure that an employer intending to terminate an employee's employment must adhere to, if the termination were to be considered procedurally fair. The procedure has three components, the information component- the employee whose employment the employer intends to terminate must be informed of the intention and the grounds forming basis of the contemplation, second, the hearing component- he or she must be accorded an opportunity to make representations on those grounds, and this component is incomplete if he is not given an opportunity to be accompanied by a colleague, or if he is a member of a union, a shop floor representative, when making the representation. Lastly, the consideration component, the employer should consider the representation before making the

decision to terminate.

20. A reading of section 45 [2][c] reveals that the duty to establish that the procedure was fair in terms of the provisions of section 41 of the Act, always lies on the employer. The Respondent did not place any evidence before the Court to establish that the termination was fair, and rebut the Claimant's evidence that was to the contrary. It did not discharge its burden under section 45[2][c], therefore. The termination was procedurally unfair.

21. Having found as I have hereinabove, I now turn to the reliefs sought. The Claimant has prayed for *inter alia* a compensatory award pursuant to the provisions of section 49[1][c] of the Employment Act. He prays for the maximum compensation awardable thereunder. I take cognizance of the fact that grant of the relief is discretionary, the extent of the grant too. It depends on the circumstances of each case. I have considered the circumstances of this matter, the finding that the termination was both substantively and procedurally unfair, the length of the period in which the Claimant remained in the employment of the Respondent, and the fact that the Claimant did not contribute in any manner to the separation, and come to a conclusion that he should be awarded compensation to an extent of 8 month's gross salary, therefore Kshs.86,400.

22. He further sought for notice pay. His evidence that the termination was without notice remained unchallenged. I am of the view that his employment was one terminable by notice pursuant to the provisions of section 35 of the Employment Act. He is awarded Kshs. 10,800 under this head.

23. The Claimant has sought for Kshs. 28,310 as unpaid leave days compensation, and a figure of Kshs. 43,680 for what he terms as underpayments. These figures do not find justification in the Claimant's pleadings, witness statement turned evidence in chief, or the oral testimony he made in Court. The figures were just thrown to the Court, a practice which must cease. The Court declines to grant the reliefs.

24. Lastly, he seeks for general damages for dismissal on account of being a member of the union. Having found as I have hereinabove done, that the Claimant did not prove that he was a member of the union, this relief cannot be availed to him therefore.

25. Costs follow the event unless there are exceptional circumstances dictating otherwise. There are no such circumstances obtaining here. Costs for this claim shall be in favour of the Claimant.

26. In the upshot, Judgment is hereby entered for the Claimant in the following terms;

**(i) A declaration that the termination of the Claimant's employment was both substantively and procedurally unfair.**

**(ii) Compensation pursuant to the provisions of section 49 [1][c] of the Employment Act, Kshs. 86,400.**

**(iii) One month's salary in lieu of notice, Kshs. 10,800.**

**(iv) Interest on [i] and [ii], above at court rates, from the date of termination till full payment.**

**(v) Costs of this suit,**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**OCHARO KEBIRA**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**OCHARO KEBIRA**

**JUDGE**