



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E591 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

AMALGAMATED UNION OF KENYA METAL WORKERS.....CLAIMANT

VERSUS

POWER PROTECTION LIMITED.....RESPONDENT

JUDGMENT

The Claimant is a duly registered trade Union under the provisions of the Labour Relations Act, 2007, 2007 whose mandate is to represent employees in the Metal and Motor Trades Sectors.

1. The Respondent is a registered Limited Liability Company whose core business is manufacturing of all types of electrical switch boards and control panels.
2. The trade dispute subject of the instant Claim was first reported to the Ministry of Labour and Social Protection in accordance with the provisions of Section 62 of the Labour Relations Act and a conciliator appointed.
3. Upon appointment the conciliator invited the parties for a conciliation meeting and prepared a report dated 3rd October, 2019 in which he made the following recommendations:-

“Recommendations

“After going through both the written and verbal submissions provided by the parties and coupled with the information given by Mr. Okwiri, it became evident that the employee services were terminated unlawfully as the company failed to follow the procedure required in terminating him.

In view of the above, the grievant should be paid his earned leave for two years, his worked days in May 2019, one month salary in lieu of notice, service pay for two years and three months compensation for loss of employment.

If the above is accepted by the parties the matter is for now treated as closed. Any party on the contrary is advised to move to the other level for further direction in accordance with Section 16 (a) of the Labour Relations Act, 2007.

4. Despite the conciliator’s findings the Respondent failed to settle the grievant’s dues forcing the Claimant to institute the instant Claim on behalf of the grievant who is its member. Vide its Memorandum of claim dated 28th September, 2020 and filed in Court on 29th September, 2020, the Claimant avers that the employment of the grievant Samwel Evans Okwiri was terminated un-procedurally and unfairly by the Respondent.
5. The Claimant avers that the grievant was employed by the Respondent on or about June, 2017 in the position of welder/fabricator at a monthly salary of Kshs.22,000/- at the time of separation.
6. The Claimant further averred that the grievant carried out his duties diligently and to the Respondent’s satisfaction until 17th May, 2019 when his employment was terminated on the grounds of alleged theft.
7. The Claimant contended that the grievant’s termination was unlawful and contrary to the provisions of Articles 41, 50(2)(a), (j), (k) of the

Constitution of Kenya, 2010 as read with Section 41 and 43 of the Employment Act, 2007.

8. In the memorandum of claim dated 28th September 2020, the Claimant seeks the following ORDERS:

a. That the Court do find the actions of the Respondent in terminating the services of grievant to be unprocedural as it is in contravention of Articles 41(1) & (2) and 50(2)(a), (j), (k) of the Constitution of Kenya 2010 and Sections 41, 43 and 45 of the Employment Act, 2007.

b. That, based on un-procedural manner in which the grievant lost employment, the Court do issue an Order of unconditional reinstatement of the grievant without loss of benefits, privileges and status.

c. That, only if in the opinion of the Court reinstatement is not practically possible, then the Court do order payment of terminal dues as attached in annexure 8 on page 27 comprising of the following:

i. One month notice of termination..... Kshs.22,000

ii. Days worked in May 2019

x 22,000..... Kshs.12,467

iii. Annual leave days for 2 years 2 years

2 x 22,000..... Kshs.44,000

iv. Annual leave travelling allowance for 3 years

2 years x 3,500..... Kshs.7,000

v. Service pay x 22,000..... Kshs.22,000

vi. 12 months' salary compensation 22,000 x 12..... Kshs.264,000

Total..... Kshs.371,467

vii. Certificate of Service be awarded to the grievant.

viii. That, the Court do consider awarding the grievant compensation of twelve (12) months' salary for unprocedural and unfair loss of employment.

ix. That, the Court do Order payment of costs of the suit in favour of the Claimant.

x. That, the Court do order any other relief the Court may deem fit.

9. The Respondent despite being served with the Summons and the Memorandum of Claim failed to enter appearance or file its defence. The claim proceeded as an undefended Claim and the Claimant was directed to proceed by way of written submissions and witness affidavit.

Claimant's Case

10. In his witness Affidavit sworn on 28th September, 2020, the grievant maintained that he was under the Respondent's employment from June 2017 until 17th May, 2019 when his services were un-procedurally, unlawfully and unfairly terminated.

11. He stated that he was not accorded a chance for a fair hearing prior to the termination of his employment and was condemned unheard contrary to the provisions of Article 50(2)(a), (j), (k) of the Constitution of Kenya, 2010 as read with Section 41 and 43 of the Employment Act, 2007.

12. He posits that the termination of his employment was tantamount to unfair labour practice and contravened the express provisions of Article 41 of the Constitution of Kenya, 2010.

13. The grievant urged this Court to allow the Claim in terms of the reliefs sought therein.

Claimant's Submissions

14. The Claimant in its submissions maintained that the grievant's termination by the Respondent was un-procedural, unfair and unlawful as he was not accorded an opportunity to defend himself on the allegations of theft despite seeking to have a meeting with the Respondent on

the issue.

15. The Claimant further submitted that the termination of the grievant was in violation of the provisions of Articles 41, 47 and 50 of the Constitution of Kenya, 2010 as read with Section 41, 43, 45 and 49 of the Employment Act, 2007.

16. The Claimant submitted that it had proved its case as against the Respondent and is therefore entitled to the reliefs sought in its Memorandum of Claim.

Determination

17. Having considered the pleadings, evidence, submissions and authorities cited by the Claimant the following are the issues for determination:

- a. Whether there existed an employer-employee relationship between the grievant and the Respondent herein;
- b. Whether the termination of the grievant's employment was valid both procedurally and substantively;
- c. Whether the grievant is entitled to the reliefs sought.

Whether there existed an employer-employee relationship between the grievant and the Respondent herein

18. In a claim where there is no response to the memorandum of claim, it is the duty of the Claimant to first establish the existence of an employment relationship as a basis for consideration of all other prayers. Where such relationship is not established, the whole suit would crumble as all the other prayers are premised on the existence of an employment relationship.

19. The Claimant has pleaded that the grievant was under the Respondent's employment from June 2017 until 17th May 2019 he was unfairly and unlawfully terminated from employment. That due process was not followed thus making the termination un-procedural and unfair.

20. As proof of the employment relationship the Claimant produced as exhibit a copy of the grievant's termination letter dated 17th May 2019 and a letter dated 23rd May 2019 from the Claimant to the Respondent requesting for a meeting with the Respondent on 3rd June 2019 to discuss the grievant's termination.

21. The Claimant further produced letters dated 3rd September 2019 and 12th September 2019, and the conciliator's report dated 3rd October 2019 as further proof of the grievant's engagement with the Respondent.

22. In the case of **Monica Kanini Mutua v Al-Arafat Shopping Centre & another (2018) eKLR**, the Court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of the employment.

23. Further, in the case of **Herman Ilangarwa Shidakwa v Armati Security Solutions Limited (2019) eKLR**, the court noted that the respondent had failed to enter appearance or file a defence despite being served with summons and held that the Claimant had proved his employment relationship with the respondent through bank statements, which fact was not contested by the respondent. The Court proceeded to make a finding in that case that the Claimant had been unfairly terminated.

24. In view of the above documents, I find that the Claimant has proved on a balance of probabilities that the grievant was indeed engaged by the Respondent during the period between June 2017 and 17th May 2019.

Whether the termination of the grievant's employment was valid both procedurally and substantively

25. The law relating to fair termination is contained in Section 41, 43 and 45(2) of the Employment Act

26. The Claimant in its pleadings and submissions maintained that the termination of the grievant's services was unfair as it failed to adhere to the mandatory provisions of Section 41, 43 and 45 of the Employment Act, 2007.

27. The statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is found in Section 47(5) of the Employment Act. The Section provides that:

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

28. The grievant was issued with a letter of termination dated 17th May 2019 which reads as follows –

“REF: IA/HP/ACL/22/19

17TH MAY 2019

RE: TERMINATED

Due to your persistent behaviour of stealing which is contrary to rules and regulation of the company, you are hereby summary dismissed of your duties. Note that you have been caught by security officer.

Your faithfully,

POWER PROTECTION LTD

SIGNED

IQBAL ADAM

MANAGER”

29. It is evident from the letter that the grievant was not given an opportunity to defend himself. The termination was therefore contrary to Section 41 of the Employment Act. Further without a hearing there is no proof of the grounds for termination.

30. I therefore find that the termination of the grievant’s employment was unfair in terms of Section 45(2) of the Employment Act.

Whether the Claimant is entitled to the reliefs sought

31. The Claimant in his statement of Claim sought the following reliefs:

a. A declaration that the termination of the Grievant’s employment by the Respondent was unfair and unlawful and in violation of the Grievant’s Constitutional rights provided for under Articles 28, 41(1) and 47 of the Constitution.

32. Having found that the Grievant’s termination was indeed unfair and unlawful this Court makes a declaration that the Grievant’s termination was unfair and unlawful and was in violation of her rights as protected under Articles 28, 41(1) and 47 of the Constitution of Kenya, 2010.

b. Unconditional reinstatement of the grievant without loss of benefits, privileges and Status

33. Reinstatement is provided for under Section 49(4) of the Employment Act, 2007 as follows –

(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

- a. the wishes of the employee;**
- b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and**
- c. the practicability of recommending reinstatement or re-engagement;**
- d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;**
- e. the employee’s length of service with the employer;**
- f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;**
- g. the opportunities available to the employee for securing comparable or suitable employment with another employer;**
- h. the value of any severance payable by law;**
- i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;**
- j. any expenses reasonably incurred by the employee as a consequence of the termination;**
- k. any conduct of the employee which to any extent caused or contributed to the termination;**

l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

m. any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.

34. In the case of **Kenya Airways Limited v Aviation Allied Workers Union Kenya & 3 Others Civil Appeal No. 46 of 2013**, the Court of Appeal held that:

"The remedy of reinstatement is discretionary. However, the Industrial Court is required to be guided by factors stipulated in section 49 (4) of the Employment Act which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract for employment should not be ordered except in very exceptional circumstances. The court should also balance the interest of the employee with the interest of the employer.....".

35. In this case there is no proof of exceptional circumstances to justify an order of reinstatement. Further, the grounds cited in the letter of termination are not consistent with an order of reinstatement. The prayer for reinstatement is accordingly declined.

36. The Claimant sought in the alternative, compensation in the following terms:

i. One month notice of termination Kshs.22,000/-

37. The grievant is entitled to compensation under this head by dint of Section 35 of the Employment Act, 2007.

ii. Days worked in May 2019 x 22,000..... Kshs.14,385

38. The Claimant in its pleadings and submissions maintained that the grievant was summarily dismissed on 17th May, 2019 without payment of his salary for the days worked.

39. The Respondent having failed to tender any evidence to rebut this position, the grievant is awarded salary for the 17 days worked in May 2019.

iii. Annual leave days for 2 years Kshs.44,000/-

40. The grievant is entitled to annual leave under this head. Reference is made to the provisions of Section 28 of the Employment Act, 2007 that provides that each employee shall be entitled to leave of 21 days after two consecutive months of service.

41. In the case of **Meshack Kiio Ikulume v Prime Fuels Kenya Limited (2013) eKLR** the Court held that it is the employer's duty to keep certain records including annual leave taken and leave due and produce the same in legal proceedings.

42. Having worked for two years, the Claimant is entitled to pay in lieu of leave for two years calculated as 21 x 2. I award the Claimant **Kshs.30,800/-** under this head.

iv. Annual leave travelling allowance for 3 years 2 years x 3,500..... Kshs.7,000

43. The grievant is not entitled to any compensation under this head for want of proof. No evidence has been availed to this Court to prove that the grievant's terms of engagement with the Respondent provided for payment of leave travelling allowance. This claim therefore stands **dismissed**.

v. Service pay x 22,000..... Kshs.22,000

44. The grievant is entitled to compensation under this head as prayed and I award him **Kshs.22,000/-**

vi. 12 months' salary compensation

45. This Court having made the finding in (i) that the termination was unfair, the grievant is entitled to compensation under this head. Taking into consideration the factors set out in Section 49 (4) of the Employment Act, 2007, I award the Claimant four (4) months' salary as compensation under this head in the sum of **Kshs.22,000 x 4 months = Kshs.88,000/-**

46. I have taken into account the manner in which the Claimant was terminated, his length of service and the fact that having been properly served, the Respondent failed to defend itself.

vii. Certificate of Service be awarded to the grievant

47. The grievant shall be issued with a certificate of service pursuant to the provisions of Section 51 of the Employment Act, 2007.

48. The Respondent shall pay Claimant's costs for this suit and interest from the date of this judgment until payment in full.

49. In conclusion the Judgment in favour of the Claimant as against the defendant is entered in the following terms:

i. One month's pay in lieu of notice..... Kshs.22,000

ii. Salary for 17 days worked in May 2019.....Kshs.14,385

iii. Annual leave..... Kshs.30,800

iv. Service Pay..... Kshs.22,000

v. Four (4) months' salary as compensation...Kshs.88,000

Total Kshs.177,185

50. The Claimant is awarded costs and interest at Court rates from the date of this Judgment until settlement in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF FEBRUARY 2022

MAUREEN ONYANGO

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 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 had 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 Civil 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.

MAUREEN ONYANGO

JUDGE