



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. 1380 OF 2016**

*(Before Hon. Justice Ocharo Kebira on 31<sup>st</sup> March 2022)*

**VINCENT MAKORI MOMANYI.....CLAIMANT**

**VERSUS**

**TECHPAK INDUSTRIES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant was employed by the Respondent as a general laborer in the month of June 2010. At almost six years into the employee-employer relationship, the Claimant's employment got terminated. Holding the termination to be wrongful, the Claimant instituted the claim herein seeking for various reliefs and orders against Respondent.
2. Upon being served with summons to enter appearance the Respondent did enter appearance and file a memorandum of response dated 14<sup>th</sup> June 2017. In the memorandum of response, the Respondent denied the Claimant's claim in toto and the Claimant's entitlement to the reliefs sought.
3. At the close of the pleadings there was a joinder of issues, and consequently the matter took the path of getting to be heard on merit.

**The Claimant's case**

4. In his statement of claim herein above mentioned, the Claimant sought for the following reliefs.

- (a) *Terminal benefits as per paragraph 10 of the Statement of Claim-Kshs.324,263.41*
- (b) *Compensation for unlawful termination.*
- (c) *Costs of the suit and interest.*
- (d) *Interest on [i] [ii] and [iii], above.*
- (e) *Any other relief the Honourable Court may deem fit to grant.*

5. When this matter came up for hearing, the Claimant urged Court to adopt the contents of his witness statement dated 8<sup>th</sup> August 2016 as his evidence in chief, further that the documents that he filed under his list of documents of the even date, be admitted as his documentary evidence. There was no protest from the Respondent, the contents and the documents were so adopted and admitted by the Court.
6. The Claimant orally testified in Court, briefly clarifying matters on his pleadings and witness statement that he held were necessary to. He was then cross examined by counsel for the Claimant before a re-examination by his counsel.
7. The Claimant stated that he started working for the Respondent in the year 2010. That his employment was terminated on the 23<sup>rd</sup> March 2016. His salary was Kshs. 12,416 per a month.
8. The Claimant stated that on the 22<sup>nd</sup> March 2016, he was assigned to work at the production department. In the course of working, a mathematical error occurred within the department, and the supervisor appeared to place blame for the same on him. The following day he

was assigned duties at a different department. At the end of that day he was told that his employment had been terminated.

9. He contended that the termination was abrupt. The same was not preceded by any opportunity given to him to defend himself over any accusations. At the termination he was not paid salary in lieu of notice, and other terminal dues.
10. The Claimant asserted that the termination was without any valid reason.
11. Cross- examined by Counsel for the Respondent, the Claimant stated that, it is the supervisor who told him on the 23<sup>rd</sup> March 2016, that his employment had been terminated. He testified that he was not given any termination letter. Too, that he never absconded duty. On several occasions, he tried to get back to the workplace, even to claim his dues but the gatekeepers couldn't let him in.

### **The Respondent's case**

12. The Respondent presented Mr. Anthony Kimani Kinuthia its Human Resource Manager to testify on its behalf. The witness did adopt his witness statement as part of his evidence in chief, and then sought for admission of the documents that were filed under the Respondent's list of documents as the Respondent's documentary evidence. They were so admitted.
13. The witness stated that the Claimant was employed as a general labourer through various fixed term contracts between 9<sup>th</sup> February 2009 and 1<sup>st</sup> May 2015. The last contract was to expire on the 16<sup>th</sup> April 2016.
14. On the 24<sup>th</sup> March 2016, the Claimant reported to work and was allocated work by the supervisor. However, when the supervisor went back to the area where he had allocated the Claimant to work at, he discovered that the Claimant was absent, and that he had left with people who had worked during the night shift. The supervisor later confirmed this from the clocking out register.
15. He asserted that the Claimant never reported to work thereafter. His employment was not wrongfully and or unfairly terminated as he alleged. The Respondent had a valid justification to terminate his employment, but it did not.
16. In his evidence under cross examination the witness testified the Claimant's letter of appointment clause 10 provided for instant dismissal on account of any misconduct stipulated therein. The Claimant would loss all benefits upon such dismissal.
17. Referred to the time sheet at page 40 of the Respondent's documents, the witness stated that the sheet is normally prepared by the Human Resource Department. He admitted that the document does not bear a signature of the person who prepared it.
18. On the warning letters, the witness stated that there was none issued in the year 2016, to the Claimant. However, those that the Respondent presented to court show the trend of his conduct.
19. Besides the email of May 10, 2016, there is no other document to demonstrate that the Respondent did make any attempt to trace the Claimant.
20. The Claimant's last pay slip shows that he was paid his terminal dues.
21. The witness asserted that the Claimant absconded duty, it would have been futile for the Respondent to look for him. It resorted to electronic communication as a result. In the circumstances there was no disciplinary hearing.

### **Analysis and Determination.**

22. From the parties' pleadings, their evidence, and the submissions by counsel, the following issues emerge for determination, thus;
  - (a) *Was the Claimant's employment terminated?*
  - (b) *If the answer to [a] above is in the affirmative, was the same procedurally and substantively fair?*
  - (c) *What reliefs can be availed to the Claimant if any?*
  - (d) *Who should bear the costs of this suit?*
23. There is no contestation that at all material times the Claimant was an employee of the Respondent and that on or about the 23<sup>rd</sup> March 2016, the parties separated. What is, as regards how the separation occurred? The Claimant claims he was summarily dismissed, while the Respondent contends that he unauthorizedly absented himself from duty, implicating desertion from service which was a gross misconduct.
24. Considering the rival contentions of the parties I am of the view that this Court should first decide whether the Respondent has established that the Claimant deserted duty.
25. Desertion of duty is one of those acts obtaining in the catalogue set out in Section 44 of the Employment Act, 2007, that will, if committed by an employee amounts to gross misconduct, and consequently able to attract the penalty of summary dismissal. For this reason, the consequence, there is firm jurisprudence that an employer alleging desertion must show the efforts he made to reach out to the employee

and putting him on notice that termination of his or her employment was in contemplation.

26. The Court in **Ronald Nyambu Daudi vs- Tarnado Carriers Limited [2019] eKLR**, aptly expressed itself on this, and I agree, thus;

*“10. Desertion of duty is a grave administrative offence, which if proved would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer must show efforts made towards reaching out to the employee and putting them on notice that termination on this ground is under consideration”*

27. In the Respondent’s witness statement that was adopted as part of his evidence in chief, the witness did not bring out any evidence to demonstrate the efforts that the Respondent made to reach out to the Claimant if at all he absconded duty as it alleged. In his testimony in Court too [read in chief], he never led any evidence towards establishing the efforts. When the witness was cross-examined on this issue, he stated that the Claimant absconded duty, therefore it would have been futile for the Respondent to look for him. This statement brings the Respondent out as an employer who was ignorant of what the law required of it in the circumstances such like were in the instant matter. Further it is testimony that the Respondent did not make any efforts in the nature hereinabove mentioned.

28. It is imperative to point out that counsel for the Respondent did submit that on the 1<sup>st</sup> April 2016, the Respondent wrote to the Claimant informing him of the consequences of his absence from the workplace without lawful cause or leave. That the letter also required him to inform the Respondent of his whereabouts. Further that the Claimant did not Respondent. It is imperative to state too that the Claimant denied ever receiving any notice from the Respondent. In my view, in a circumstance like is in this matter, it is not enough for the employer to state that it wrote a letter to the employee. It must demonstrate to the requisite standard that indeed the letter left its address to the employee. In essence service of the alleged letter or communication must be proved. Prove of service could entail evidence of postage like a certificate of postage, an extract of a postage register for the relevant day, a statement or affidavit by the person who posted the letter, for example.

29. By reason of the above premise I am impelled to unequivocally state that service of the alleged letter of 1<sup>st</sup> April 2016 was not proved. The decision cited by counsel for the Respondent does not come to the aid of its case, therefore.

30. In an attempt to demonstrate that an effort was made by the Respondent, it produced an email correspondence of May 10, 2016, allegedly sent to the Claimant. I have carefully considered the evidence by the Respondent, including all the documents it placed before this Court, I have not been able to discern any evidence pointing towards the fact that indeed the email address purported to be the Claimant’s was his known email address. Besides the bare assertion that the email correspondence was delivered, there is nothing to demonstrate the delivery.

31. The Claimant stated in his testimony, that on a number of occasions he tried to get back to the place of work even for his terminal dues but at all those occasions, he would not be allowed access. This evidence was not challenged at all. It was not shaken in cross examination. Desertion from service must be a voluntary act on the part of the concerned employee and in order to draw any inference in this regard, intention of the concerned employee should be taken into consideration. In this circumstance, refusal of access to the place of work, it is impossible to arrive at a conclusion that there was a voluntary relinquishment on the part of the Claimant.

32. By reason of the foregoing, I come to an inescapable conclusion that the separation did not occur as a result of desertion of duty by the Claimant as alleged by the Respondent, but through a termination that occurred in the manner expressed by the Claimant.

**Whether the Termination was procedurally and substantively fair.**

33. In the case of **Lydia Mora Obara vs Tusker Mattresses (2021) eKLR** this Court stated;

*“31. Section 45 of the Employment Act dictates that no employer shall terminate the employment of an employee unfairly. Section 45 (2) (c) provides the foundation for insistence on engagement of a fair procedure, if a termination of employment were to be considered fair.”*

34. Section 41 of the Employment Act supplies the structure for procedural fairness, it 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 the 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.”*

35. In **Jane Nyandiko vs Kenya Commercial Bank Limited (2017) eKLR**, the Court held, and which was cited with approval by the Court of Appeal in the case of **National Bank of Kenya vs Anthony Njue (2019) eKLR**, thus;

*“Section 45 of the Employment Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the*

*employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.*

*The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also, not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41.....”*

36. The mandatory elaborate procedure set up under section 41 of the Act, requires notification, a hearing and consideration of the employee's representations and his co-worker's before termination. Therefore, the process has three aspects, and absence of any one of them will definitely obviate the fairness of the process leading to the decision to terminate an employee's contract of service or summarily dismissing the employee.

37. There is no doubt that the procedure as provided for in the provision was not adhered to at all owing to the approach the Respondent gave the matter. It isn't difficult therefore to conclude that the termination was procedurally unfair.

38. Section 43 of the Employment Act, 2007 places a duty upon the employer to prove the reason[s] for the termination of an employee's employment. A further burden is bestowed upon an employer, by the provisions 45[2]. The burden to prove that the termination was valid and fair. Having found as I have hereinabove, that contrary to the Respondent's assertion, the Claimant didn't abscond duty, it is impossible for this Court to conclude that the Respondent did discharge the twin burdens.

39. Consequently, I find that the termination of the Claimant's employment was substantively unfair.

#### **What reliefs can be availed to the Claimant if any.**

40. The Claimant sought *inter alia* compensation for unlawful termination. Section 49[1][c] of the Employment Act, donates authority to court to grant compensation for unfair termination of an employee's employment. The award is discretionary, its grant and the extent thereof depend on the peculiar circumstances of each case.

41. Having found that the termination of the Claimant's employment was both substantively and procedurally unfair, and considering, the circumstances of the separation as hereinabove came out, that the contract of employment under which the Claimant was serving at the time of separation had only one month and six days to determine, the several warning letters that the Claimant had and the length of time he had been in the employment of the Respondent, I find that the compensatory relief is merited, and to the extent of 4 [four] months gross salary.

42. At this juncture it is necessary to determine what the gross salary for the Claimant was at the time of separation, as the litigants herein have not taken a common position over the same. The Claimant contended that his gross salary was Kshs. 12,416.00 per a month. He tendered before Court, a number of pay slips, the latest amongst them being the one for May 2015. According to the same his basic salary was Kshs. 10,759 plus a House allowance of Kshs. 1,614.00, therefore a gross salary of Kshs. 12,373.00.

43. The Respondent's Counsel submitted that the Claimant was earning a figure of Kshs. 10,759. I can only say that that was his basic salary, but add that under section 49[1][c], in computing the extent of an award contemplated therein, it is the gross pay that is invoked. The Claimant is awarded Kshs. 49,492, under the head.

44. He further claimed for notice pay, contending that he was entitled to a one month's termination notice, and in absence of the same one month's salary in lieu. He was not given any notice before the termination. Clause 7 of the agreement dated 1<sup>st</sup> May 2015 produced by the Respondent provided for a notice period of one month. The Respondent's witness stated that this was not paid. The Claimant is entitled to the same. I award him Kshs. 12,373.

45. The Claimant also sought for compensation for holidays worked but not compensated for. A close scrutiny of the pay slips presented by him to court, reveals overtime [OT] payments thereon. I have noted that, the payments in respect thereof are in two categories, one at 1.5 and the other at 2.0. I have no doubt that the latter covers compensation for holidays worked and off days worked. The Claimant for reasons known to him did not testify on these rates.

46. A further relief is sought, gratuity. As this court stated in the case of **Josphine Mwende -vs- University of Nairobi – ELRC Cause No. 110 of 2017** citing the Court of Appeal decision in **H. Young & Company Limited -vs- Javan Were Mbango [2016] eKLR**, gratuity can only be granted if the contract between the employer and employee provided for it. In this matter, I have considered the employment contract, and conclude that the same didn't make a provision for gratuity, I am consequently unable to make an award for the same. The prayer is declined.

47. The Claimant expressly pleaded, and testified that throughout the period he was in the employment, he was not accorded an opportunity to proceed for his leave at any one time. All the contracts of employment, which the Respondent tendered before court, provided for annual leave. The Respondent placed before court, numerous documents in a bid to rebut the various claims by its rival in this matter, however none of those documents supplies material from which this Court can discern that the Claimant was ever allowed to proceed for his leave. Leave is a statutory right, even where it is not provided for in a contract, it must be enjoyed by an employee. It is a right that cannot be out contracted.

48. Having said this, I award the Claimant compensation for untaken but unpaid for annual leave days for only 3 years, considering the provisions of section 90 of the Employment Act. Therefore Kshs. 37,119.00.

49. In the upshot, Judgment is hereby entered in favour of the Claimant in the following terms:

- a) **The termination of the Claimant's employment was procedurally and substantively unfair.**
- b) **Compensation pursuant to section 49[1][c] of the Employment Act- Kshs. 49,492.00**
- c) **Compensation for untaken leave days – Kshs. 37,119.00**
- d) **One month's salary in lieu of notice-Kshs. 12,373.00.**
- e) **Interest on (b) (c) and[d] at Court rates from date of filing suit till full payment.**
- f) **Costs of the suit.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>st</sup> DAY OF MARCH, 2022.**

**OCHARO KEBIRA**

**JUDGE**

Delivered in presence of;

Ms. Kalova for the Respondent.

Ms. Kerubo holding brief for Arati for the Claimant.

**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.

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**OCHARO KEBIRA**

**JUDGE**