



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 41 OF 2020**

**ANTHONY YAMO IHITO.....CLAIMANT**

**VERSUS**

**BASCO PRODUCTS (KENYA) LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant lodged this suit vide a Memorandum of Claim dated 23<sup>rd</sup> June, 2020 and filed in court on even date. The Claimant seeks payment of 12 months salary as compensation for unlawful termination, gratuity and three months' salary in lieu of notice.
2. The Respondent entered appearance through the Firm of **Wekesa & Simiyu Advocates** and filled a Memorandum of Response to the Claimant's claim dated 20<sup>th</sup> July, 2020 and filed on 23<sup>rd</sup> July, 2020.
3. The Claimant testified during the hearing in support of his case. He adopted his witness statement dated 22<sup>nd</sup> June, 2020, and produced his bundle of documents as exhibits in the matter.
4. The Respondent presented one **Winfred Gicharu**, her former Human Resources Officer to testify on her behalf. Ms. Gicharu adopted her witness statement of 20<sup>th</sup> July, 2020 and produced documents filed in the matter in support of the Respondent's case.
5. Both parties filed submissions in the matter.

**The Claimant's Case**

6. The Claimant states that he was employed by the Respondent on 12/5/2007 in the position of Sales Executive on a monthly basic salary of Kshs. 48,450/-
7. It is the Claimant's further case that he was later promoted to the position of Team Leader Western Region, due to his diligence and hard work, and his salary raised to Kshs. 316,446/- and which was his salary at the time of termination.
8. It is the Claimant's case that he was terminated on 31<sup>st</sup> January, 2020, without valid reasons and contrary to the legal procedures related to termination. He states that he was neither accorded a fair hearing nor was he told the reasons that informed the termination.
9. It is the Claimant's case that upon his termination, he was not paid gratuity for the years he served the Respondent, and neither was he paid in lieu of termination notice.
10. The Claimant states that though his termination was based on an audit report, he is not aware of any audit conducted by the Respondent that could have informed his termination as alleged. He further avers that he did his work well and was never appraised in relation to it.
11. The Claimant further states that he was issued a termination notice dated 3<sup>rd</sup> January, 2020 and the same was to take effect on 31<sup>st</sup> January, 2020, and hence the notice was less than the one month required under his employment contract.
12. The Claimant states that immediately he was issued the termination notice, he was removed from the Company Management System and given a complete black out.
13. The Claimant avers that he was paid full salary for the month of January, 2020, and accumulated and unutilized leave days. He states that

he was not paid terminal benefits and further states that although the Respondent paid NSSF contributions, the amount paid is minimal compared with the years he had worked for the Respondent.

14. On cross-examination, the Claimant confirmed that his contract did not provide for payment of gratuity. He further confirmed that he was registered under NSSF and his statutory deductions were remitted.

### **The Respondent's Case**

15. The Respondent's case is that she entered into an open contract of employment with the Claimant on 16<sup>th</sup> April, 2007, where he was assigned the role of a Sales Executive, Western Region on a monthly salary of Kshs.48,450/-

16. The Respondent states that the terms of employment between her and the Claimant, were spelt out in the contract of service executed between them and produced in evidence before this court.

17. It is the Respondent's case that she paid for, and on behalf of the Claimant, all the requisite statutory deductions up to the time of termination including NSSF and NHIF, and that it did remit the deductions to the relevant statutory bodies.

18. The Respondent states that the Claimant was terminated pursuant to the termination clause provided in his contract of employment. The Respondent further states that it issued the Claimant the requisite one month's termination notice as per his contract of service, and that the notice period was to run between 3<sup>rd</sup> January, 2020 and 31<sup>st</sup> January, 2020.

19. It is the Respondent's assertion that the Claimant served in the entire notice period, and was paid his full salary for the month of January, 2020.

20. The Respondent further states that the Claimant handed over the employer's property under his custody at the end of the notice period and cleared with the Respondent.

21. The Respondent state that at the end of the notice period, it paid the Claimant a total of Kshs.516,602/- on account of salary for the month of January, 2020 and for the accumulated leave days. The Respondent contend that this amount was the full and final settlement owed to the Claimant.

22. It is the Respondent's case that payment of gratuity was not a term of the contract between her and the Claimant and therefore does not owe the Claimant a gratuity.

23. The Respondent avers that it issued the Claimant with a certificate of service as required by law.

24. The Respondent states that the termination of the Claimant was fair, lawful and in accordance with his contract of employment.

### **The Claimant's Submissions**

25. It is submitted for the Claimant that his termination was unlawful as it did not comply with the provisions of the employment Act, 2007. It is further submitted that the Claimant was not given proper notice, valid reasons nor a hearing prior to his termination contrary to the law. He sought to rely on the holding in the case of **Walter Ogal Anurovs v Teachers Service Commissions (2013) eKLR**

26. The Claimant submitted that he is entitled to the relief sought. It is further submitted that the claim for gratuity is justified as no proof has been given to show that the NSSF deductions were remitted.

### **The Respondent's Submissions**

27. It is submitted for the Respondent that the termination of the Claimant was fair and lawful as the termination was made pursuant to a termination clause expressly provided in the Claimant's contract of employment. The Respondent cited the cases of **James Chutha Gatherer v Nation Media Group Limited (2013) eKLR** to support this position.

28. It is submitted that the Respondent complied with the material facts of the employment and separation in force between her and the Claimant as it had issued the Claimant with termination notice and the Claimant served for the entire notice period. She cited the case of **Five Forty Aviation Limited v Erwan Lanoe (2019) eKLR** to buttress this position.

29. It is submitted for the Respondent that the Claimant having been registered for NSSF is not entitled to gratuitous payment per Section 35(5) and 35(6) of the Employment Act. The Respondent cited the holding in the case of **Boaz Mochama Machogu v New World Auto Limited (2012) LLR 174(ICK)** to buttress this position.

### **Analysis and Determination**

30. I have considered the pleadings herein, the parties' oral testimonies and the written submissions. The issues for determination are:

- i. Whether the Claimant was unfairly terminated

- ii. Whether the Claimant is entitled to the reliefs sought.

### **Whether the Claimant was unfairly terminated**

31. The question of whether or not termination is fair, is depended on adherence or lack thereof by an employer of the twin requirements of procedure and substantive justification. Adhering to one and contravening the other, renders the termination unfair or the dismissal wrongful.

32. The Respondent in this matter has stated that she terminated the Claimant's services, pursuant to a termination clause provided at Clause 4 of his contract of service. The question for this court become what the place of a termination clause is in a contract of employment *vis-à-vis* the termination/dismissal procedures enumerated under the Constitution, the Fair Administrative Actions Act and the Employment Act, 2007.

33. The Respondent's letter dated 3<sup>rd</sup> January, 2020, giving the Claimant notice of the separation/termination states as follows:

***“It has however been noted with concern that your performance has been deteriorating month on month..... The Management has found it prudent for both parties to part ways amicably as the CTC is no longer sustainable, as there is no ROI. Please note that this serves as a one month notice to separate w.e.f 03.01.2020.”***

34. Section 41 of the Employment Act states:

***“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.”***

35. Further, Section 4 of the Fair Administrative Actions Act, 2015, provided as follows in respective of termination procedure:

***“(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) Every person has the right to be given written reasons for any administrative action that is taken against him.***

***3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***

***a) prior and adequate notice of the nature and reasons for the proposed administrative action;***

***b) an opportunity to be heard and to make representations in that regard.”***

36. On the question of substantive justification, Sections 43, 45 and 47(5) of the Employment Act respectively, requires that an employer must prove the reasons for termination/dismissal, prove that the reasons are valid and fair and prove that the grounds are justified

37. In light of the foregoing provisions, it follows that the traditional power of the employer to terminate the services of an employee by simply invoking the termination clause in the employment contract, no longer holds. In ***Kenfreight (EA) Limited v Benson K. Nguti (2016) eKLR***, it was held that it is not enough to terminate employment by notice or payment in lieu thereof; termination should be based on valid reasons and fair procedure.

38. The termination letter which also served as termination notice, stated that the reasons for the Claimant's termination was poor performance. The Claimant was not accorded an opportunity to respond to the issues raised or be heard in relation thereto, contrary to the express requirements of the Section 41 of the Employment Act and Section 4 of the Fair Administrative Actions Act. Further, nothing points to the validity or fairness of the reasons for the termination. In ***Loice Otieno v Kenya Commercial Bank Limited Cause No. 1050 of 2011*** it was held that it is a mandatory requirement to comply with the principles of natural justice.

39. I find and hold that the termination of the Claimant fell short of both the procedural and the substantive Fairness test. The termination is unfair.

### **Whether the Claimant is entitled to the remedies sought**

40. The Claimant seeks payment of 12 months' salary for unfair termination, three months salary in lieu of notice and service gratuity.

### **Compensation for unfair termination**

41. The termination of the Claimant has been held to be both procedurally and substantively unfair. In determining an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the Employment Act.

42. The Claimant was in the service of the Respondent for 12 long years. It has not been proved that he contributed in any way to his termination, and neither has it been shown that he has secured alternative employment.

43. Considering the Claimant's long service (**See Alfred Muthomi & 2 Others v National Bank of Kenya Limited [2018] eKLR**), I find and hold that the Claimant has made a case for maximum compensation and is hereby awarded 12 months' salary for unfair termination.

**Gratuitous Pay**

44. The pay slips produced in evidence before this court indicate that the Claimant was a registered member of the NSSF and that the Respondent paid both the employer and the employee contribution to the Fund.

45. Section 35(6) of the Employment Act exempts employees covered under NSSF from the payment of service pay or any other form of pension. Moreover, the Claimant's contract of service did not provide for payment of gratuity which would have been an exception to this provision. (**See Boaz Mochama Machogu v New World Auto Limited (2012) LLR 174(ICK)**)

46. The claim for gratuity fails and is dismissed.

**Three Months' Salary In lieu of Notice.**

47. The Claimant's contract provided for a one month notice period. Section 35 of the Employment Act also gives one month as the statutory notice period.

48. The Claimant was issued with a one-month notice. He served in the entire notice period, and has admitted payment of his full salary for the notice period. The claim lacks merit and is dismissed.

49. In conclusion, Judgment is entered for the Claimant as against the Respondent as follows: -

- i. 12 months' salary in lieu of notice at Kshs. 3,797,400/-
- ii. Costs of the suit and interests until payment in full.

50. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10<sup>TH</sup> DAY OF MARCH, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. P. D. Onyango Present for the Claimant

Mr. Obwoka h/b for Mr. Masafu for the Respondent

Christine Omollo- C/A