



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.1132 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

EVANS ONDIEKI SIBWOGA.....CLAIMANT

VERSUS

ESSENTIAL MANAGEMENT CONSULTANCY.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The memorandum of claim was filed by the Claimant dated 10th June, 2018. A response was also filed and is dated 6th June 2018.

CLAIMANT'S CASE

PLEADINGS

2. The Claimant says he was employed by the Respondent as a machine attendant from 1st December, 2009 for two years upto 30th December, 2011.

He says he worked till the termination of that contract and it was renewed from 3rd March, 2014 to 2nd March 2016.

He says on 28th August, 2015 the Claimant's employment was unlawfully terminated.

3. He says before the termination he got injured on 31st October, 2013 and his right hand finger was cut off.

He says he filed suit for the injuries at the Chief Magistrate's Court and once the Respondent was served with the demand letter he immediately terminated his employment.

He says at the time of his termination he was earning a gross salary of Kshs.13,595.13 per month.

He now claims damages as per particulars of claim tabulated on paragraph 8 of his memorandum of claim.

4. Claimant in his evidence before the honourable court on the day of hearing on 11th November, 2021 reiterated that he was employed by the Respondent and he worked for him for 5 years.

He says when working there he was injured and was taken to hospital by the respondent.

5. He says after that the Respondent started harassing him and was thereafter sent home after he consulted an advocate for follow up of his claim for injuries.

He says he was not invited for any disciplinary meeting before his termination.

He also says his working schedules were from 7.00a.m to 7.30p.m and from Mondays to Saturdays and even on Sundays on some days. He says they were never paid for overtime.

RESPONDENT'S CASE - PLEADINGS

6. The Respondent concedes that the Claimant worked for him from 1st December, 2009 and was offered another contract upto 2nd March, 2016 from 3rd March, 2014.

He says that pursuant to clause 2.8 of the contract the mode of termination was clearly explained and it gave option for Respondent to terminate the Claimant's employment subject to paying one month salary in lieu thereof.

7. He says he ordered it's Human Resource Department by it's letter of 1st October, 2015 to make the necessary payments to the Claimant and the same was followed up.

8. He says the Respondent had provided the Claimant with necessary gear and protective equipment and he did not report the accident to the management.

He says the reliefs sought therefore have no basis and Claimant is put to strict proof.

He says the Claimant is not entitled to the claims prayed and same should be dismissed with costs.

9. The Respondent did not call a witness in court and in fact did not appear during the hearing. The Claimant had served the hearing notice and had equally filed the affidavit of service dated November, 2021.

Similarly the Respondent did not file submissions.

CLAIMANT'S SUBMISSIONS

10. Claimant's submissions were filed on 15th December, 2021. The Claimant says he was unlawfully terminated from his employment for the reason that he got injured at his place of work. He says his termination was on the ground that he filed a case in court for injury compensation sustained at the place of work.

11. He relied on several authorities including **MARY CHEMWENO KIPTUI VS KENYA PIPELINE COMPANY LIMITED (2014) eKLR** where the court held that before an employee can exercise their right to terminate the contract of an employee there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity.

12. He states that also in the **CASE OF JOSEPH KEITANO IKABWA VS KHETIA GARMENT LIMITED (2016) eKLR** termination of employment of a Claimant was held to be unfair and unlawful as the Respondent failed to observe requisite provisions of law and procedure under the Employment Act. The Claimant says that in order for termination of an employee to be lawful three things must be satisfied.

There must be a reason for termination and the reason must be fair and thirdly the procedure followed must be fair.

13. The Claimant in his submissions avers these three were not proved and therefore the Claimant's termination must be declared unfair and unlawful.

The Claimant then deserve the claims prayed for in the memorandum of claim.

ISSUES FOR DETERMINATION

14. (i) Was there a valid reason to terminate the Claimant's employment.

(ii) Is Claimant entitled to the reliefs sought?

DECISION

15. The Claimant says he was employed and worked for the Respondent from 2010 to 2015 August. He says his employment was terminated because he got injured when working and once he consulted his advocate and filed a case he was terminated.

The Respondent admits they terminated his services but in accordance to the terms of the contract whereby it is provided that each party can terminate the contract by giving one month notice in writing or one month salary in lieu of notice.

The Respondent also says they paid the Claimant terminal dues.

16. The law relating to termination of employment is well stipulated in Section 41 and 45 of the Employment Act 2007.

In Section 45 of the said Act an employer must have a valid reason to terminate the employment of an employee.

If there is no valid reason even if notice is given the termination will be regarded as unlawful.

Furthermore as held in the **CASE OF KENAFRIC INDUSTRIES LIMITED VS JOHN GITONGA NJERU (2016) eKLR** three things must be proved before termination can be held to be fair.

There must be a reason to terminate the employment and the reason must be valid and thirdly the procedure used must be fair. These requirements are mandatory.

17. Section 41 of the Employment Act 2007 also provide that an employer shall before terminating the employment of an employee, on grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understands the reason for which the employee 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.

18. In other words the employer cannot just issue a notice to terminate the employment of his employee without giving him a reason for such termination and according him an opportunity to explain himself.

The CASE OF WALTER OGAL VS TEACHERS SERVICE COMMISSION (2013) eKLR said it very clearly that for termination to pass the fairness test there must be both substantive justification and procedural fairness.

The substantive justification has to do with establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer to effect termination.

19. The case before me the Respondent did not give the Claimant the reason for terminating his employment. The Claimant simply states that on 28th August, 2015 his services were terminated.

20. As for the issue of the procedure clearly there was no invitation to a hearing to be given an opportunity to explain himself.

The Respondent contrary to Section 43 (1) of the Employment Act therefore failed to prove the reason for the termination of employment and furthermore did not follow the procedure stipulated in the law.

The court therefore finds that the termination of the Claimant was unfair and unlawful and therefore enters judgement in his favour.

REMEDIES AWARDED

21. Having entered judgement in favour of the Claimant,

I proceed to award him the following reliefs:-

- (i) Unpaid leave allowance is not provided in the letter of appointment and so is declined.
- (ii) Pension benefits also not provided in the letter of appointment and so is declined.
- (iii) I will award him general damages at 5 months equivalent at $\text{kshs.13,595.13} \times 5 = \text{Kshs.67,975.65}$ and I have taken into consideration that the claimant worked for the respondent for about five years.
- (iv) Unpaid extra working allowances not proved what they entail and is declined.
- (v) Payment in lieu of notice Kshs.13,595.13
- (vi) House allowance no specifics and so is declined.

Costs are awarded to the Claimant and interest at court rates from date of Judgement until full payment.

The effect of this award is total of Kshs.81,570.78

- (vii) Certificate of service to be issued to the Claimant also within 30 days from today's date.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 10TH DAY OF MARCH, 2022.

ANNA NGIBUINI MWAURE

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 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.

ANNA NGIBUINI MWAURE

JUDGE