



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NUMBER 213 OF 2015

MAXWELL SIMIYU WAMALWA.....CLAIMANT

-VERSUS-

COMPLY INDUSTRIES LIMITED.....RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

I. INTRODUCTION

1. In a Memorandum of claim dated 14th July, 2015 filed in court on 17th July, 2015 the Claimant prays for the following:

- (a) A declaration that the termination of the employment of the Claimant is contrary to the Employment Act and the Respondent be ordered to reinstate him with full payment of his salaries up to date**
- (b) If prayer (a) above is not granted compensation for Kshs.1,800,284/=**
- (c) General damages for emotional and mental anguish**
- (d) Interest on (b) and (c) at court rate**
- (e) Cost and interest of the suit**
- (f) Any other relief this Honourable court may deem fit to grant.**

2. The claim is accompanied with a verifying affidavit by the Claimant, a list of documents and copies of the named documents, a list of witnesses, and a statement by the Claimant dated 14th July, 2015.

3. Upon service of the summons to enter appearance and the claim, the Respondent filed a Notice of appointment of advocate dated 3rd August, 2015 by MUMIA & NJIRU Advocates and also a statement of defence dated 16th February, 2015 together with copies of documents. The Respondent prayed for dismissal of the cause with costs.

4. The Claimant filed a further list of documents dated 31st October, 2016 with a copy of the document attached. He also filed a further witness statement dated 7th December, 2016.

5. After a prolonged period of dormancy, this cause was on 12th October, 2021 fixed for hearing on 15th November, 2021 and Counsel for the Claimant who was present in court on 12th October, 2021 was directed to serve Counsel for the Respondent, who was absent, with a hearing notice.

6. When the matter came up for hearing on 15th November, 2021 the court noted that Advocates for the Respondent had been served with a hearing notice and there is an affidavit of service on record. The court hence ordered the matter to proceed *ex-parte*, in absence of the Respondent. The Claimant (CW1) testified alone in support of his cause.

7. As stated above, the Respondent did not attend the hearing and hence no evidence was adduced in defence of the cause.

8. The Claimant's Counsel filed written submissions dated 27th November, 2021 on 3rd December, 2021.

II. CLAIMANT'S CASE

9. In summary, the Claimant's case as presented in his pleadings, oral and documentary evidence, and the written submissions by his Counsel is that he was engaged by the Respondent on 1st July, 2007 as a dispatcher and by 2008 he had been elevated to a supervisor in the production unit.

10. In his oral testimony, the Claimant stated that his monthly salary was Kshs.19,152/= payable weekly at the rate of Kshs.4,788/=. He stated that he worked for a period of seven (7) years but was treated like a casual and was not issued with a written contract of employment.

11. The Claimant states that from 1st to 3rd June, 2016 he was denied entry into the premises of his employment on allegations that some theft had occurred whereby properties of the Respondent had been stolen. However, the Claimant testified that he was not in-charge of the unit where the theft occurred and that he was not charged with any offence even after having recorded a statement with the police.

12. The Claimant stated that he was terminated on 14th June, 2014 when he was orally informed by the human resources manager of the Respondent not to report to work any longer.

13. The Claimant testified that he was not granted a hearing and no notice was issued before termination. He therefore testified that the termination as unlawful both in substance and procedure and hence reiterated his prayers as set out in the memorandum of claim.

III. RESPONDENT'S CASE

14. As stated elsewhere in this judgment, while the Respondent filed a response/defence to the claim, there is no memorandum of appearance on record and no evidence was called in reply to the Claimant's testimony.

15. Pleadings and documents filed in court do not add value unless and until they are supported by evidence and produced in court. If a party to a cause does not, as the Respondent herein, call a witness in support of the statements and or allegations in the pleadings, such papers filed add no value to their position in the cause and remain mere papers in the court file.

16. In the circumstances, the Respondent did not present its case and the only evidence available is that of the Claimant as presented and adduced by the Claimant (CW1) in court.

IV. ISSUES FOR DETERMINATION

17. After sifting through the pleadings, documents, and the oral testimony by CW1, and the written submissions by Counsel for the Claimant, the following issues commend to this court for determination:-

(i) What were the terms and conditions of employment of the Claimant by the Respondent?

(ii) Was the termination of the Claimant by the Respondent fair and lawful?

(iii) Is the Claimant entitled to the reliefs sought?

(iv) Who meets the costs of this litigation?

V. TERMS OF EMPLOYMENT

18. In paragraph 3 of the memorandum of claim the Claimant pleads that ***“At all material times relevant to this suit the Claimant was employed by the Respondent as a supervisor.”*** In paragraph 5 the Claimant further pleads that ***“The Respondent on the 9th July, 2014 summarily terminated his employment unlawfully and unfairly.”***

19. In his oral testimony, as noted above, the Claimant stated that he was in employment of the Respondent from 1st July, 2007 to 9th July, 2014 and that he was a supervisor from 2008 till his termination. He stated that his monthly salary as at the time of termination was Kshs.19,152/=.

20. Claimant's Counsel in his written submissions has agreed that regardless of the initial terms of engagement the Claimant became a term contract employee upon expiry of one (1) month under **Section 37 of the Employment Act** (the Act). In any event, **Section 37(4) of the Act** empowers this court to vary or interpret the terms of service so as to be consistent with the Act.

21. In the circumstances, this court finds and holds that as at the time of termination the Claimant was a month to month employee at a monthly salary of Kshs.19,152/=:, and that he worked for the Respondent for the period from 1st July, 2007 to 9th July, 2014.

VI. TERMINATION

22. The circumstances and events leading to termination of the Claimant have been set out elsewhere in this judgment. There is no evidence adduced to contradict or controvert what the Claimant stated. His statement and evidence is to the effect that there was an alleged theft at the premises of the Respondent, his employer. The claimant and others were arrested and locked up at Central police station, Nakuru, whereat he recorded a statement and posted bail. The Claimant testified that he was not charged with any offence and the bail money was subsequently refunded to him.

23. However, after the arrest and release the Claimant attempted to report back to work but he was dismissed verbally through the Human Resource Manager, one DANIEL WENANI. The Claimant testified that he was not issued with a notice and was not accorded a hearing.

24. As already stated elsewhere in this judgment, notwithstanding that the Respondent filed a response to the claim seeking dismissal of this cause it did not call or adduce any evidence on record and as such the account from the Claimant on how he was terminated stands unchallenged.

25. The need for substantial and procedural fairness has been emphasized by this court in several decisions including **Mary Chemweno -vs- Kenya Pipeline Company Limited (2017) eKLR**, and **Loice Otieno -vs- Kenya Commercial Bank Limited (2013) eKLR**, and **Walter Ogal Anuro -vs- Teachers Service Commission (2012) eKLR**.

26. Further, Section 43 of the Act places a burden on the employer to prove the reason for termination and **Sections 41, 45, and 47** fortify the cardinal importance of both substantial and procedural fairness in termination.

27. In absence of any evidence from the Respondent in rebuttal to that of the Claimant this court finds and holds that the Claimant was denied substantial and procedural fairness and hence his termination was unfair and unlawful.

VII. RELIEFS

28. The reliefs that the Claimant is seeking have been set out in first page of this judgment as extracted from the statement of claim. This court shall examine each of the reliefs as hereunder.

29. On prayer (a) this court has already found that the termination of the Claimant was substantially and procedurally unfair and the same is hereby declared unlawful. The other part of the prayer is denied as **Section 12(3) (vii)** of the **Employment and Labour Relations Court Act** provides that reinstatement may only be ordered within three (3) years of termination. The Claimant was terminated on 9th July, 2014 which is over five (5) years ago.

30. Prayer (b) is for compensation in alternative to reinstatement. The Claimant is seeking for Kshs.1,800,284/=. This claimed amount is made up of various components as advanced by Claimant's counsel in the written submissions.

31. One component is payment *in lieu* of notice. There is no explanation offered as to why the Claimant is seeking payment of three months' pay *in lieu* of notice yet, as this court has found above, the Claimant was a month to month employee and hence only entitled to one (1) month's notice (28 days) under **Section 35 (1) (c)** of the **Act**. This court finds, in absence of any evidence to the contrary, that the Claimant is entitled to one (1) month's pay *in lieu* of notice hence **Kshs.19,152/= X 1 = Kshs.19,152/-** only.

32. The other component under this head is compensation for unfair and unlawful termination under **Section 49(1)(c)** as read with **Section 50 of the Act**. The law provides that an employee who has been unfairly and unlawfully terminated may be compensated with an award "**equivalent of a number of month's wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.**"

33. **Section 49(4)** provides for the factors that this court may take into account in granting any of the remedies provided for under that section of the Act. This court has found that the Claimant cannot be lawfully reinstated. The Respondent has not expressed any willingness on its part to re-engage the Claimant. The Claimant had served the Respondent for about seven years at the time of termination, which is a considerably lengthy period of time.

34. The Claimant testified that he did not in any way contribute to his termination but he also admitted that he received a sum of Kshs.99,434/= in terminal dues after termination. The Claimant did not inform the court in his testimony or in the pleadings whether he looked for and or found another job after termination and how long that took him.

35. Taking into account all the factors above and the entire circumstances of this cause, this court finds that an award of the maximum 12 months' salary would be a fair award for compensation of the unfair and unlawful termination.

36. Counsel for the Claimant got the principle applicable wrong. An award under this head is not amenable to a multiplier factor for the years worked. So the seven (7) years multiplier applied by Counsel is absolutely wrong and unlawful. Hence the award under this head is **Kshs.19,152/= X 12 = Kshs.229,824/=**. This amount is subject to statutory deductions.

37. No evidence was adduced by the Claimant to demonstrate that there were leave days and or public holidays not taken and hence due for compensation. The Claimant was free to summon any witness from the Respondent to produce his employment records failure to which this court would have had a basis to presume that that evidence if produced would have been against the Respondent and or even compel production thereof.

38. In any event the Claimant admitted that he was paid a sum of Kshs.99,434/= and the compensation thereof is in a documentation dated 17th July, 2014 which is on record and not contested by the Claimant. The said computation indicates that he was paid for leave days not taken from 2008 to 2014. For the above reasons this court shall not award any amounts in respect of leave days and public holidays.

39. No evidence was adduced by the Claimant on what statutory deductions were made and not submitted to the relevant bodies. It is not enough for a party to plead to some facts; he/she who alleges must prove to the satisfaction of the court on a balance of probability if the court is to rule in his/her favour.

40. No evidence was adduced at all in respect of prayer (c) on general damages for emotional and mental anguish. There is absolutely no basis, factual or legal, for this court to make an award under this head and the same is hereby denied.

VIII. COSTS

41. Costs follow event and the Claimant is awarded costs of this cause based on the award made.

IX. DISPOSAL

42. In conclusion, this court makes the following orders in favour of the Claimant:-

(a) A declaration be and is hereby issued that the termination of the Claimant by the Respondent was unfair and unlawful for lack of substantial and procedural fairness.

(b) The Claimant is awarded the following:-

(i) One month's salary *in lieu* of notice –

- **Kshs. 19,152/=**

(ii) Compensation for unfair and

unlawful termination - **Kshs.229,824.00**

TOTAL - Kshs.248,976.00

Less paid on termination as

admitted by the Claimant - **Kshs. 99,434.00**

Balance due and payable - **Kshs.149,542.00**

This amount shall earn interest at court rates from the date of this judgment till payment in full.

(c) Costs to the Claimant.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 7TH DAY OF MARCH, 2022.

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DAVID NDERITU

JUDGE