



**Mbindyo v Halar Industries Limited (Cause 92 of 2016)
[2022] KEELRC 4136 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4136 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 92 OF 2016**

**M MBARŪ, J
MAY 26, 2022**

BETWEEN

MUSYOKA MBINDYO CLAIMANT

AND

HALAR INDUSTRIES LIMITED RESPONDENT

JUDGMENT

1. In September, 2010 the respondent employed the claimant as a machine operator at a wage of ksh 10,935 per month but on September 15, 2014 when he reported on duty he found he had been deployed to a different machine which was not functional. As he placed material to form a basic, molten plastic splashed on him and when he tried to cover his face with his hands, he suffered injuries and was treated.
2. When the claimant resumed duty, he unsuccessfully claimed for compensation for his injuries and he sought legal advice as a result of which a demand letter issued to the respondent. on September 1, 2015 the assistant personnel manager acting on instructions from the respondent, Nicholas Musembi summarily dismissed the claimant from his employment on the grounds that he had filed a claim against the employer.
3. The action of summary dismissal was unfair, unlawful and against fair labour practices. The claimant had no notice, fair reasons or any matter to justify the summary action by the respondent.
4. The claim is for the following dues;
 - a. Salary for August, 2015 ksh 10,935;
 - b. Notice pay ksh 10,935;
 - c. Off days worked and not paid ksh 69,984;
 - d. House allowance Ksh 78,732;



- e. Payment for untaken leave for 4 years ksh 43,740; and
 - f. Costs.
5. The claimant testified in support of his claims.
 6. The response is that the claimant was first hired in May, 2011 on contract as a general worker and his basic wage was Ksh 7, 585 plus 15% house allowance. The contract was for 3 months.
 7. The claimant's last salary in August, 2015 was at ksh 12, 418 plus 15% house allowance and the last contract was dated July 1, 2015 for 3 months. There was no unfair termination of employment save the claimant contributed to poor work relations with the management and on September 15, 2014 he was injured while on duty. On October 13, 2014 the respondent paid the medical bills at ksh 211, 593 in accordance with section 34 of the Employment Act and then processed work injury benefits and paid ksh 313, 161 on 15th June, 2015.
 8. The respondent was surprised to receive a demand letter from the claimant's advocates to recover workman compensation benefits for the second time after having settled the claimant's medical bills and compensation under the Work Injury benefits Act. this was an indication of malice on the part of the claimant and which prompted the respondent to issue hi with notice terminating employment dated September 3, 2015 and there was no unfair termination of employment.
 9. The respondent prepared the terminal dues but the claimant refused to collect.
 10. The respondent is willing to pay for salary due in August, 2015 which is ready for collection.
 11. Leave claimed was paid at the end of every year worked and compensation for alleged unfair termination of employment is not justified as termination occurred due to hostility created by the claimant between himself and the respondent for making double claims for work injuries and the claim should be dismissed with costs.
The respondent filed work records.
 12. No evidence was called and the respondent remained absent at the hearing.
 13. The claimant filed his written submissions which have been put into account and the single issue for determination is whether there was unfair termination of employment and the claims made justified.
 14. In a letter dated 3rd September, 2015 the respondent terminated the claimant's employment on the grounds that he had refused to do his duties after his injury.
 15. In the memorandum of reply at paragraph 13, 14 and 15 the respondent's case is that the claimant got injured while at work and was compensated and his medical bills paid but he caused his advocates to make demand for payment which was taken to be double claim and seeking to extort the respondent. that such a claim was with malice, it created hostility and bad blood between the claimant and the respondent.
 16. Termination of employment must be for a lawful and justified reason pursuant to the provisions of Section 43 and 45 of the Employment Act, 2007 (the Act). Even where the employee has committed gross misconduct, justice demands that such an employee be issued with notice and allowed a hearing in accordance with the procedures outlined under section 41 of the Act. see Muthaiga Country Club v Kudheiba Workers [2017] eKLR.



17. Save for the letter terminating employment, there is no case by the respondent that before such sanction issued, whatever misconduct the claimant may have committed and including the alleged refusal to do his work after his injury, there is no evidence of notice, hearing or any element of due process.
18. In the case of *Kenfreight (EA) Limited v Benson K Nguti* [2019] eKLR the court held that the due process enshrined under section 41 of the Act is mandatory and the employer must give the employee a hearing before termination of employment. see *Nation Media Group Limited v Onesmus Kilonzo* [2017] eKLR and *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR.
19. Further, pursuant to section 46 of the Act, an employer cannot justify termination of employment on the grounds that the employee has initiated or intends to initiate a complaint or claim with regard to employment and labour relations. Such is an unlawful and unfair reason to apply.

Section 46(h) of the Act directs that;

The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—

...

(h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or

20. . the initiation of work injury claims whether justified or not, the respondent ought to have allowed the claimant the latitude to address as advised by his advocates and defend any claim filed. To use such matter to dismiss him from his employment is an unfair labour practice.
21. In this regard, the reason leading to termination of employment as noted is unlawful, without justification and amount to unfairness in terms of section 45 of the Act.
22. On these findings, the claimant is entitled to notice pay at the last wage paid all at ksh 12, 415.
23. Compensation is also due at one month's gross wage all at ksh 12, 415.
24. On the claim for off days worked for 4 years, the claimant was 3 months contract terms and each contract ended on its terms and the new contract commenced a new work relationship. T seek and claim for off days for the entire work period of 4 years is to seek unjust enrichment.
25. On the claim for house allowances for 4 years, the claimant filed his payment statements for July, 2015 and outlined is payment of a house allowance and weighed on the basic wage, this is a 15% thereof. The respondent also filed the payment statement for August, 2015 and there is provisions for a house allowance. The claimant cannot claim outside such a provision.
26. On the claim for untaken leave for 4 years, on the payment statement for August, 2015 the claimant is paid a sum of ksh 6, 678 in leave allowance. Such a benefit would only accrue once a year and in any event, the 3 months contract would have leave prorated accordingly. Under clause (5) of the Service Contract Agreement there was provision for 1.75 days per month for annual leave which is commensurate with the provisions of section 28 of the Act. nothing arise from such a claim.
27. On the findings above, save for the award for compensation at Ksh 12, 415 and notice pay at Ksh 12, 415; other claims fail. Each party shall bear own costs.

Orders accordingly.

DELIVERED IN COURT AT NAIROBI THIS 26TH DAY OF MAY, 2022.



M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

