



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 2013 OF 2016

**KENYA BUILDING CONSTRUCTION TIMBER AND
FURNITURE INDUSTRIES EMPLOYEES UNION**

CLAIMANT

VERSUS

IMARA ENTERPRISES LIMITED

RESPONDENT

JUDGMENT

The claimant is a trade union registered in Kenya to represent employees in the sectors set out in its Membership Clause. The suit herein is filed by the Claimant on behalf of Godfrey Were Ludenyo, the grievant who was its member while working for the Respondent.

Vide its Memorandum of claim dated and filed in Court on 29th September, 2016, the claimant Union avers that the grievant's employment was unlawfully, wrongfully and unfairly terminated by the Respondent, a registered limited liability company.

The Claimant avers that the grievant was employed by the respondent from 7th January, 2002 in the position of turn boy/driver's mate and was earning a consolidated monthly salary of Kshs.9,100/-.

The Claimant further states that the grievant worked diligently, faithfully and to the Respondent's satisfaction until 11th June, 2014 when his employment was illegally and unlawfully terminated by the Respondent after he resumed duties from leave.

The Claimant contended that the grievant's termination was illegal and unfair as he was neither given reasons for the dismissal nor was he accorded a chance to make his representation (if any) prior to the termination, which is contrary to the provisions of the Employment Act, 2007 and the Constitution of Kenya, 2010.

In the instant suit the claim seeks the following reliefs on behalf of the grievant: -

- a) A declaration that the dismissal of the grievant was unfair and unlawful.
- b) Kshs.445,518 being terminal benefits of the grievant comprising of the following:
 - i. Two months' salary in lieu of notice
Kshs.14,638 x 2 months Kshs.29,276
 - ii. Leave Kshs.14,638 x 12 years Kshs.175,656
 - iii. Prorata Leave
2.25 days x 5 months x 15 days Kshs.6,334
 - iv. Service
Kshs.563 x 12 years x 15 days Kshs.101,340

v. Underpaid Wages

(Kshs.14,638 – 9,100) x 24 months Kshs.132,912

Total Kshs.445,518

- c) Compensation for loss of earning
- d) Any other relief that the Court may deem fit
- e) Cost of the suit

The Respondent despite being served with the Summons and the Memorandum of Claim failed to enter appearance or to file its defence. The matter therefore proceeded as an undefended Claim. The Claimant filed its Witness Affidavit and written submissions which the claimant relies on together with the claim.

Claimant's Case

The Grievant, GODFREY WERE LUDENYO, in his Witness Affidavit sworn on 3rd December, 2020 confirmed having been employed by the Respondent on 7th January, 2002 but was never issued with an appointment letter to that effect.

He states that he worked continuously until 11th June, 2014 when his employment was unlawfully and unfairly terminated by the Respondent's director one Mr. Kamata. The grievant avers that no notice of termination was issued to him prior to his termination and that his terminal dues were not paid at the time

of separation.

The Claimant therefore urged the Court to allow its Claim in terms of the reliefs sought therein.

Claimant's Submissions.

In its submissions the Claimant maintained that the grievant's termination was unfair and unlawful as it was contrary to the provisions of Section 43 and 45 of the Employment Act, 2007.

The Claimant further submitted that the Respondent's failure to participate in the proceedings means that the Claim is undefended and should thus be allowed as prayed. The Claimant relied on the case of **Kenya Hotels & Allied Workers Union v Jet Bar Cottage (2014) eKLR.**

The Claimant further maintains that the Respondent is bound by the terms of the Building and Construction Wages Order which came into effect on 1st February, 2012 in absence of neither a CBA nor a signed recognition agreement between the parties. It therefore argued that the grievant is entitled to the reliefs as sought in the Memorandum of Claim.

In conclusion the Claimant urged this Honourable to allow its Claim as prayed. The Claimant relied on the provisions of Section 49 of the Employment Act, 2007.

Determination

Having considered the pleadings, evidence, submissions and authorities cited by the Claimant, the following are the issues for determination:

1. Whether an employee-employer relationship existed between the Claimant and the Respondent herein
2. Whether the termination of the Claimant's employment by the Respondents was wrongful, unfair and unlawful
3. Whether the Claimant is entitled to the reliefs sought

Whether an employee-employer relationship existed between the Claimant and the Respondent herein

In an undefended claim, the claimant is under obligation to prove that an employee/employer relationship existed between the grievant and the Respondent.

The Claimant maintained that the grievant was under the Respondent's employment until 11th June 2014 when he was unfairly and unlawfully terminated. It further maintained that the grievant received a consolidated salary of Kshs.9,100/- at the time of leaving employment. The claimant stated in the witness statement that he was never issued with a letter of appointment. He was further not issued with payslips.

Section 47(5) of the Employment Act provides as follows –

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

It was thus the burden of the claimant to prove the existence of an employment relationship between the grievant and the Respondent herein and the unfair termination thereof.

In the case of **Monica Kanini Mutua v Al-Arafat Shopping Centre & Another [2018] eKLR**, the Court held that in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of the employment.

Further, in the case of **Herman Ilangarwa Shidakwa v Armati Security Solutions Limited [2019] eKLR**, the court noted that the respondent had failed to enter appearance or file a defence despite being served with summons and held that the claimant had proved his employment relationship with the respondent through bank statements, which fact was not contested by the respondent. The Court also held that the claimant had been unfairly terminated.

In the case of **Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited (2014) eKLR** the Court considered letters placed on record by the Claimant and made the following findings:

“There is abundant evidence showing the Claimant was, and the Court finds he was, an employee of the Respondent on the terms and conditions stated in the Statement of Claim.”

In the instant case the Claimant availed his NSSF Member Statement of Account for the period between 1st January 1987 until 31st December 2013 which clearly indicates the Respondent as the grievant’s employer.

In the circumstances I find that the Claimant has established existence of an employment relationship between the grievant and the Respondent herein.

Whether the termination of the Claimant’s employment by the Respondent was wrongful, unfair and unlawful

The Claimant has submitted that the Respondent did not adhere to due process while dismissing the grievant from employment contending that he was not accorded a hearing prior to his termination. There is no evidence to controvert the grievant’s averments that there was no valid reason for the termination of his employment. Hearing and notification before termination are mandatory requirements under **Section 41 of the Employment Act, 2007** while under Section 43 an employer is obligated to prove valid reason for the termination.

I find that indeed the Claimant was unfairly dismissed from employment by the Respondent.

In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

Whether the Claimant is entitled to the reliefs sought

The Claimant sought the following remedies:

1. Underpaid wages (Kshs.14,638 – 9,100) x 24 months Total Kshs.132,912

I have considered the Regulation of Wages (General) (Amendment) Order for the period the grievant was under the Respondent’s employment and note that the only years when his wages were underpaid were in 2012, 2013 and 2014. He is therefore only entitled to relief under this head for the said period only.

Underpayment in the year 2012 between May 2012 and April 2013

(Kshs.9,266.30 – Kshs.9,100) x 12 months = Kshs.1,995.60/-

Underpayment in the year 2013 between May 2013 and April 2014

(Kshs.10,563.60 – Kshs.9,100) x 12 months = Kshs.17,563.20/-

Underpayment between May 2014 and date of termination

Kshs.1,463.60 x 2 months = Kshs.2,927.20/-

Total Underpayment (Kshs.1,995.60/- + Kshs.17,563.20/- + Kshs.2,927.20/-) = Kshs.22,486.00

2. Notice Period for two months Kshs.29,276/-

The Claimant in its pleadings and submissions maintained that the grievant is entitled to be paid two months' salary in lieu of notice. It however failed to attach any evidence to support this assertion. In the absence of the same I find that the grievant is only entitled to one month's notice by dint of Section 36 of the Employment Act, 2007 and I accordingly award him in the sum of **Kshs.14,638.00**.

3. 12 months' compensation for unfair termination

Having found that the grievant's termination was unfair he is entitled to compensation under this head. Taking into account the grievant's length of service and the fact that he did not contribute by his conduct to his termination, he is entitled to compensation which I award him at 12 months' salary as prayed in the sum of (14,638 x 12) **Kshs.175,656.00**.

4. Leave

The Claimant maintains that the grievant is entitled to payment for leave days earned by not taken. In the absence of any evidence from the Respondent to controvert this assertion I find that the grievant is entitled to the same. Reference is made to the case of **Meshack Kii Ikulume v Prime Fuels Kenya Limited (2013) eKLR** where the Court held that it is the employer's duty to keep certain records including annual leave taken and leave due and produce the same in legal proceedings. In absence of any record I find that the Claimant is entitled to the relief as prayed.

Kshs.14,638 x 12 years = **Kshs.175,656.00**.

5. Service

The grievant is not entitled to any relief under this head as he was a member of NSSF.

Conclusion

In conclusion judgment be and is hereby entered in favour of the grievant as against the Respondent in the following terms:

- a) A declaration be and is hereby issued that the grievant's termination was unlawful and unfair.
- b) Underpayments Kshs.22,486.00
- c) Pay in lieu of notice Kshs.14,638.00
- d) Compensation for unlawful termination Kshs.175,656.00
- e) Leave earned but not taken Kshs.175,656.00

Total Kshs.388,436.00

The Claimant is awarded costs and interest shall accrue at Court rates from the date of Judgment until settlement in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF JANUARY 2021

MAUREEN ONYANGO

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 Civil 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.

MAUREEN ONYANGO

JUDGE