



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1636 OF 2014**

***(Before Hon. Lady Justice Maureen Onyango)***

**JOSHUA MUEKE KITHUKU.....CLAIMANT**

**VERSUS**

**ARM CEMENT LIMITED.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The Claimant was employed by the Respondent as a night security guard stationed at the Respondent's Athi River Factory, at a monthly salary of Kshs.8,525.00, effective 9<sup>th</sup> September 2011. On 25<sup>th</sup> April 2013, the Claimant was arrested for alleged theft and later released upon payment of Kshs.5,000.00 cash bail. However, his services were terminated on 20<sup>th</sup> August 2013.

The Claimant's case is that he was maliciously prosecuted which then led to the unlawful termination of his employment hence the institution of this suit on 17<sup>th</sup> September 2014. The claim against the 2<sup>nd</sup> Respondent was withdrawn on 22<sup>nd</sup> July 2019. The Claimant seeks the following remedies against the 1<sup>st</sup> Respondent—

- a. The Court establishes that the Claimant had the right to work for the 1<sup>st</sup> Respondent up to the age of 60 years unless lawfully terminated.*
- b. The Court establishes that the 1<sup>st</sup> Respondent acted in bad faith to breach the Claimant's right to continue in employment up to 2031 December being his retirement date.*
- c. The Court establishes that the 1<sup>st</sup> Respondent caused the Claimant shame, damage of reputation and mental anguish.*
- d. Reinstatement without loss of any rights, privileges, benefits and status.*
- e. The Court do order the 1<sup>st</sup> Respondent to pay Kshs.60,025.28 being—*
  - i. Unpaid salary from April to August, 2013 totaling to Kshs.57,409.99.*
  - ii. 2013 Easter Holidays Overtime of Kshs.1,216.30.*
  - iii. Annual leave earned from September 2011 totaling to Kshs.23,391.60.*
  - iv. Leave travelling allowances of Kshs.3,200.00.*
  - v. Less the sum of Kshs.25,192.61, received through the bank.*
- f. Damages for premature termination/breach of contract amounting to Kshs.2,603,262.24.*
- g. The Court awards exemplary damages as determined by Court for—*
  - i) Defamation/ reputation damages.*

ii) *Injury to feeling damages; and*

iii) *Other aggravated damages.*

*h. The Court awards any remedy not herein claimed as it deems just to grant.*

*i. That The Court orders for compound interest of the awarded quantum at the rate of 14%.*

*j. The costs hereof be in the cause.*

The 1<sup>st</sup> Respondent filed a response on 23<sup>rd</sup> April 2018 contending that the Claimant was not a member of the Kenya Quarry and Mine Workers Union hence the negotiated CBA is inapplicable to him as he was employed as a casual.

### **The Claimant's Case**

During trial, the Claimant testified that he was never issued with a letter of appointment and that his salary was consolidated. He denied being a casual employee. It was his testimony that he worked overtime. He told this Court that he would report at 6 pm and leave at 6 am the following day for all days without taking any rest days or annual leave. He adopted his Evidence by Affidavit as his evidence.

The Claimant testified that no charges resulted from his arrest. He told this Court that he never reported to work after the arrest as he was told to conclude his case with the police first. It was his testimony that he was never given a notice to show cause, called for a disciplinary hearing or given notice before his employment was terminated.

He urged this Court to grant him the remedies sought. It was his contention that there was no proof of payment for the Easter Holidays he worked nor was there proof that he had taken annual leave.

On cross examination, he denied being complacent on the night the theft took place or that items went missing. It was his testimony that he never heard the dog bark. The Claimant conceded that carrying out arrests, investigations and charging accused persons was the duty of the police. He further conceded that prosecution of accused persons was the work of the government.

He admitted that the Kshs.25,192.61 paid to him included service pay, 26 days accrued leave, notice pay and travelling allowance. He further admitted that he had not called a witness to confirm his allegations regarding defamation.

During re-examination the claimant that he signed the joining report but the handwriting in the form was not his. He contended that he was never paid Kshs.3,000.00 house allowance indicated in the joining form and pointed out that the same never reflected in his pay slip.

### **The 1<sup>st</sup> Respondent's Case**

It was the 1<sup>st</sup> Respondent's case that the report made to the police was based on very reasonable grounds, the Claimant having stolen from the company and failed to prevent a felony. As such, the Respondent was not responsible for the actions of the police or how the case was handled.

The 1<sup>st</sup> Respondent averred that due process was followed before the termination of the Claimant's employment where he was given an opportunity to respond to the charges against him but never responded to the same. The reasons for the termination of his employment were also given to him. The 1<sup>st</sup> Respondent further averred that it was not a guarantee that a contract of employment would subsist until retirement as actions such as breach of the contract would lead to its termination.

It was the 1<sup>st</sup> Respondent's contention that there was no basis for the Kshs.2,603,262.24 claimed as aggravated damages and that the same was not awardable in a contract of employment and neither did this Court have the jurisdiction to hear the claim for aggravated damages for defamation. The 1<sup>st</sup> Respondent further contended that it didn't owe the Claimant payment of unpaid salary, overtime, benefits or any allowances as he was paid all his dues amounting to Kshs.25,192.61.

The 1<sup>st</sup> Respondent closed its case without calling any witness having failed to secure one. Thereafter, parties were directed to file their written submissions with only the Claimant filing his submissions. There is no record of the 1<sup>st</sup> Respondent's submissions in the court file.

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

The Claimant submitted that the 1<sup>st</sup> Respondent's decision to terminate the Claimant's employment on account of charges that were never proved was unwarranted. He further submitted that no reason was given for the termination, which was contrary to section 47(5) of the Employment Act.

It was the Claimant's submissions that he was never given any notice to show cause, was never subjected to disciplinary proceedings or given a termination notice. As such, he was denied substantive justice contrary to sections 41 and 45 (4) (b) of the Employment Act thus the termination of his employment was unfair, unprocedural and unlawful.

The Claimant submitted that the amount of Kshs.25,192.60 paid to him was not sufficient compensation for the unfair loss of employment.

The Claimant submitted that he was in the Respondent's employment until 15<sup>th</sup> August 2013 when he saw the circular regarding the termination of his employment. As such, he is entitled to the unpaid salary claimed for April through to August 2013.

It was the Claimant's submissions he was entitled to the overtime claimed as he worked overtime without any compensation. It was his further submission that he was entitled to payment in lieu of leave claimed as he never took the same yet it was an entitlement under the CBA. He contended that he was also entitled to payment of leave travelling allowance as he was never paid the same yet it was also an entitlement under the CBA.

The Claimant submitted that he is entitled to compensation for unfair termination of employment having proved that he was never accorded a hearing as required by section 41 of the Employment Act and that there was no valid reason for the termination of employment. He urged this Court to award him the maximum compensation of 12 months inclusive of house allowance. Lastly, the Claimant contended that he should be awarded costs of this suit and interest thereof as it is the Respondent's failure to have the matter resolved that led to the filing of the suit.

### **Analysis and Determination**

I have carefully considered the pleadings filed, the evidence adduced together with the Claimant's submissions. The issues for determination before this Court are whether the Claimant's employment was lawfully terminated, whether he was defamed and whether he is entitled to the reliefs sought.

### **Termination**

The Claimant testified that he was never issued with a notice to show cause, subjected to disciplinary proceedings or given notice indicating the reasons for the termination of his employment. Further, he told this Court that once he was released on cash bail, he never reported back to work as he was told to first conclude his case with the police. That he learned of the termination of his employment from a notice put on the notice board, dated 12<sup>th</sup> August 2013. This was never controverted by the 1<sup>st</sup> Respondent hence remained an unrebutted fact.

The notice of 12<sup>th</sup> August 2013 referred to by the Claimant read as follows–

*“August 12, 2013*

#### *ATTENTION SECURITY*

*The following security guards have been terminated and are no longer in our employment. They should not be allowed entry into the premises–*

- 1. Paul Makenzi*
- 2. Kantet Ikam*
- 3. Peter Maundu*
- 4. Joshua Kithika Mueke*
- 5. Peter Masai*
- 6. John Maiyo*
- 7. Stanley Bett*
- 8. Martin Onditi*
- 9. Musyoka Ndundu*

#### *OTHERS*

- 1. Solomon Musilla – Weigh bridge clerk*
- 2. Patrick Masalia – Lab*

*REGARDS*

*Signed*

*PETER NDANGA KWINGA, HSC*

The 1<sup>st</sup> Respondent did not dispute the authenticity of this notice but instead adduced as evidence, a termination letter dated 9<sup>th</sup> May 2013 which was issued to the Claimant that read as follows–

MR. JOSHUA KITHIKA

SECURITY GUARD

May 9, 2013

Dear Sir,

**RE: TERMINATION OF SERVICE**

Following your having been charged in court as a result your direct or indirect involvement in the theft of four steel bars in the Nova factory on 28<sup>th</sup> April 2013, your services have been terminated with effect from the date of this letter.

Your final dues comprise of:

1. Wages for days worked in May up to 9<sup>th</sup> May 2013
2. 17 days severance pay for one year
3. Accrued leave days-26
4. Travelling allowance-Kshs.3,500.00

Less any advances/loans due to the company.

Yours sincerely

ARM CEMENT LTD

Signed

Peter Ndanga Kwinga, HSC

Plant Human Resources Manager

I accept the contents of this letter.

Name \_\_\_\_\_ Signature \_\_\_\_\_ Date \_\_\_\_\_

This letter was not signed by the Claimant to signify that he had received the same and accepted the contents thereof. Neither did the 1<sup>st</sup> Respondent controvert the claimant's assertion that the reasons for the termination of his employment were never communicated to him or that he was not issued with the letter and refused to sign.

Failure to issue the Claimant with the said letter meant that he was never made aware of the termination and the reasons for the same. Further, the validity of the reasons was never tested through a disciplinary hearing bearing in mind that the Claimant was never charged with any criminal offence even after being arrested, locked up in the cells and released on a police cash bail.

Section 41 of the Employment Act provides as follows–

*(1) 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.*

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.*

In light of the foregoing, I find that the termination of the Claimant's employment failed to meet the threshold for substantive and procedural fairness as set out in Section 41 and 43 of the Employment Act hence was unfair within the meaning of Section 45(2). It is now trite law that before an employee is summarily dismissed, he/she must be afforded a hearing as envisaged in Section 41 of the Employment Act. (See: **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR**, **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** and **Kenya Union of Domestic, Hotels, Educational Institutions, Hospital & Allied Workers v B.O.M Deb Gichihe**

## Primary School [2019] eKLR.

### Defamation

The Claimant averred that because the 1<sup>st</sup> Respondent reported a theft incident to the police which resulted in his arrest and failed to prove the same, it tarnished his reputation before its 1,000 employees. However, the Claimant never produced a witness to show that his estimation had been lowered following the allegations of theft, and neither did he prove that the report made to the police had been prompted by malice in a bid to tarnish his name.

Additionally, the Claimant did not satisfy the ingredients for defamation. In the case of **Miguna Miguna v Standard Group Limited & 4 Others [2017] eKLR**, the Court held that:

*“A claimant in a defamation suit ought to establish that there is a defamatory statement; that the defendant has himself published or caused another to publish that statement and the statement refers to the Claimant.”*

I find that the Claimant has failed to prove a case for defamation

### Remedies

The Claimant has sought an order for reinstatement. The same cannot be granted as more than 3 years have passed since termination of his employment. Further, he has not demonstrated exceptional circumstances to warrant the grant of the said orders as set out in Section 49(4) (d) of the Employment Act which provides that the court takes into account –

**(d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;**

The Claimant sought unpaid salary from April to August 2013. The termination letter was never issued to the Claimant. The notice of 12<sup>th</sup> August 2013 indicated that his employment had been terminated and his final dues were transferred to his Equity account on 13<sup>th</sup> September 2013 as indicated in the document termed “*Full and Final Dues Computation*” annexed to the Defence by the 1<sup>st</sup> Respondent. I thus find that the Claimant’s employment was terminated vide the notice of 12<sup>th</sup> August 2013 and not the termination letter dated 9<sup>th</sup> May 2013. The sum of Kshs.25,247.61 that was paid to the Claimant did not include any salary for the days worked. The Claimant is therefore entitled to his salary until 12<sup>th</sup> August 2013 inclusive of house allowance.

The Claimant sought payment of leave not taken overtime worked on 29<sup>th</sup> March 2013 being Good Friday and 1<sup>st</sup> April 2013 being Easter Monday. The 1<sup>st</sup> Respondent did not produce evidence to controvert this assertion despite the obligation to keep records showing the Claimant’s working hours and weekly rest days under Section 74(1)(e) of the Employment Act. The Claimant is therefore entitled to payment for overtime for the two days.

The Claimant has sought payment of leave not taken for the 1 year 11 months he worked for the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent did not adduce any evidence to controvert the Claimant’s assertion that he had not taken leave days’ despite having the obligation to do so under Section 74(1)(f) of the Act. From the computation of the Claimant’s dues, it is indicated that he was paid in lieu of 26 leave days. As such, the Claimant is only entitled to payment in lieu of leave for the remaining 11 months.

The Claimant is not entitled to the claim for leave travelling allowance as the same was paid to him. He is also not entitled to the claim for aggravated damages having failed to prove a case for defamation, premature arrest and false imprisonment. Further, having withdrawn his case against the 2<sup>nd</sup> Respondent, the case of false imprisonment and malicious prosecution cannot stand against the 1<sup>st</sup> Respondent. Lastly, he is not entitled to payment of damages for premature termination of contract as he cannot be compensated for work not done since it will be tantamount to unjust enrichment.

Having been unfairly dismissed, the Claimant is awarded 5 months’ gross salary as compensation of Kshs.64,109.15 for the unfair termination of his employment. Section 50 of the Employment Act and 12(3)(v) of the Employment and Labour Relations Court Act gives this Court the powers to award the same. In granting this award, I have considered the circumstances outlined in Section 49(4) of the Employment Act being the impossibility of reinstating the Claimant, the manner in which the termination occurred, the fact that he was terminated for an invalid reason and his length of service to the Respondent. The tabulation is based on Kshs.9,321.83 being the claimant’s last basic salary and Kshs.3,500 being house allowance to which he was entitled to under the CBA and the joining report which served as his letter of appointment.

In summary, judgment is entered for claimant against the 1<sup>st</sup> Respondent as follows –

1. Salary up to 12<sup>th</sup> August 2013..... Kshs.57,409.99
  2. Overtime on Good Friday and Easter Monday.....Kshs.1,216.30
  3. Pay in lieu of 11 months leave not taken
- or paid for.....Kshs.3,944.00

4. Compensation.....Kshs.64,109.15

**Total** **Kshs.126,679.44**

The Respondent shall pay claimant's costs for the suit and interest shall accrue on decretal sum from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**