



**IN THE REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**ELRC. CAUSE NO. 16 OF 2016**

**HENRY KEVERENGE KISALI..... CLAIMANT**

**-VERSUS-**

**ULTIMATE ENGINEERING COMPANY LTD.....RESPONDENT**

**JUDGMENT**

1. The Claimant was employed by the respondent as a Project foreman on 2.3.2009 earning Kshs 30,000. By a letter dated 31.7.2013 he was promoted to Project Supervisor and his salary was reviewed to Kshs 50,000 per month. He was also a member of CFC pension scheme courtesy of his employer.

2. By a letter dated 5.5.2014, the respondent suspended him for 2 days starting 7.5.2014 on grounds that there were several allegations of theft of materials at KPLC Loresho site. The suspension was intended to pave the way for the investigations and as such he was barred from being seen in the office or contacting any member of staff of the respondent.

3. The suspension was extended from 9.5.2014 to 19.6.2014 when the respondent wrote a letter to CFC Pension Scheme giving notice that the claimant was no longer its employee and claimant should not be allowed to withdraw his contributions until then, the claimant was not aware that he had been dismissed because he was never given any dismissal letter.

4. Aggrieved by the said action, he brought this suit contending that his employment was unfairly and unlawfully terminated and sought the following reliefs:

- a. Employment benefits Kshs 1,189,000**
- b. Compensation for unlawful suspension (12 months salary) Kshs 600,000.**
- c. Compensation for unlawful termination Kshs 600,000**
- d. Service pay**
- e. General damages**
- f. Costs and interest**

5. The respondent entered appearance but never filed defence to controvert the allegations and the reliefs sought and the suit proceeded as undefended. Before the trial, the claimant applied and obtained court orders requiring the respondent to deposit the sum of Kshs 2,869,500 in court as security pending determination for the suit but the respondent never complied. Thereafter the claimant filed notice to act in person and prosecuted his suit on 16.3.2021.

6. The claimant testified as Claimant Witness 1 and basically relied on the averments in his statement claim and the bundle of his documents filed therewith as his evidence.

7. Having carefully considered the uncontroverted pleadings and evidence presented by the claimant, it is a fact that he was employed by the respondent from 2.3.2009 until 19.6.2014 when his services were terminated by the respondent. The issues for determination are:

- a. Whether the reason for termination was valid*

b. *Whether the procedure followed was fair.*

c. *Whether he is entitled to the reliefs sought.*

### **Reasons for termination**

8. The respondent suspended the claimant to pave the way for investigations into the allegations of alleged theft and after 40 days it dismissed the claimant. The claimant has denied the alleged theft but the respondent did not adduce any evidence to prove that the claimant committed the alleged theft or any other misconduct.

9. Section 43 of the Employment Act provides that in any legal proceedings where an employee alleges unfair termination of employment, the employer is required to prove the reason for the termination. Again section 45 of the Act provides that termination of employees' contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason related to the employees conduct, capacity and compatibility or based on employee's operational requirements.

10. In this case, since the respondent did not participate in the hearing, he did not discharge the said statutory burden of proof and as such the termination of the claimant's contract of service was substantively unfair.

### **Procedure followed**

11. Section 45 of the Act further provides that termination of employment contract is unfair if the employer fails to prove that it was done in accordance with a fair procedure. A fair procedure under subsection (5) is one which complies with section 41 and 51 of the Act. Section 41 provides that before terminating the services of an employee on grounds of misconduct, physical capacity or poor performance, the employer must explain the reason to the employee in the presence of another employee and thereafter accord the accused employee and his companion an opportunity to air their representations which must be considered before the termination is decided.

12. In this case, the claimant alleged that he was not granted any hearing and he even learned of his dismissal from a letter written by the respondent to the CFC pension scheme. The respondent did not rebut the claimant's evidence and consequently I find that it has also failed to discharge its burden of proving that the dismissal was procedurally fair.

13. It is now trite law that where the employer fails to prove that termination of the employees contract of service was substantively and procedurally fair, the termination is unfair and unlawful within the meaning of section 45 of the Employment Act.

### **Reliefs**

14. Under section 49(1) the claimant is entitled to salary in lieu of notice plus compensation for unfair termination of his employment contract. I award him Kshs 50,000 being one month salary in lieu of notice. I further award him Kshs 300,000 being six (6) monthly salary in lieu of notice considering that he served the respondent for over 4 years without any warning letter. I have also considered the fact that the employer did not prove that the claimant contributed to the dismissal through misconduct.

15. The claim for House allowance is dismissed because the appointment letter provided that his salary was gross pay and he agreed. Likewise, the claim for leave, overtime and emergency kitty is dismissed for lack of particulars and evidence.

16. The claim for special damages of Kshs 1,189,000 are not backed by any agreement between the employer and the claimant and it is dismissed. Likewise, the claim for compensation for unlawful suspension is dismissed for lack of basis in law and contract. He did not adduce any evidence to prove that he was not paid salary for the period he was on suspension. He also did not produce any evidence to prove that his contract of service provided for a shorter suspension period than 42 days.

17. The claimant for general damages has not been proved and it is therefore dismissed. Likewise, the claim for service pay is dismissed because the claimant was a member of his employer's pension scheme.

18. However, the claim for certificate of service is granted since it is a right under section 51 of the employment Act.

19. In the end I enter judgement of the claimant in the sum of Kshs 350,000 plus costs and interest at court rates from the date hereof. The award of damages is subject to statutory deductions.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY, 2021**

**ONESMUS N. MAKAU**

**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> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall**

**be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**