



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.785 OF 2017

JOSEPH OGARO OTWORI.....CLAIMANT

VERSUS

DIMAMU AGENCIES LIMITED.....RESPONDENT

JUDGMENT

1. The respondent did not file a reply to the claim even though he entered appearance through the firm of King'oo and Associates Advocates. Despite the said firm being served with several notices by the claimants advocates they failed to attend to the appearances/hearings. The case therefore proceeded as undefended.

2. Claimant was dismissed from his employment where he worked for Dimamu Agencies from 16th October, 2013 till he received his letter of dismissal dated 6th September, 2016. He worked as a loader and his basic salary was Kshs.8000/= p.a. which would be paid every two weeks worked.

3. The claimant did not produce an employment contract as he claims that the respondent retained all the copies. Section 10(7) of Employment Act provides that in any legal proceedings of employer fails to produce a written contract the burden of providing or disapproving an alleged term of employment stipulated in the contract shall be on the employer.

4. On 6th September, 2016, the respondent dismissed the claimant from its employment. This clearly proves there was an employer/employee relationship.

5. The claimant as a result of this dismissal, instituted this cause by a memorandum of claim dated 24th April, 2017 and the same was accompanied by the claimant's statements and documents relied upon at the trial.

6. As earlier stated even though the respondent was served with summons he failed and or neglected to file a response to the claim.

So far as the facts are pleaded there no disputes to be resolved as the respondent did not contradict or challenge them.

7. The claimants evidence is that on 6th September, 2016 they were on duty as usual when the Manager Mrs. Mary Githinji informed them the respondent had decided to terminate them as work had stopped the previous night.

He further says that the day before 5th September, 2016 they had inquired for their unpaid salaries and were told would be paid the following day.

8. The claimant further says that on 14th September, he was issued with a dismissal letter dated 6th September, 2016. The letter indicated the reasons for dismissal were insubordination and inciting his colleagues.

9. The issue in question is whether the claimant dismissal was lawful and valid and secondly did the respondent follow the legal procedures in terminating the claimant.

10. Section 41 of the Employment Act provides as follows

“subject to Section 41 (1) an employer shall, when terminating the employment of an employee on 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 shop floor union representative of his choice present during this explanation”.

11. Section 45 of Employment Act also provides that an employer shall not terminate the employment of an employee unfairly.

Section 45(2) provides that termination is unfair if employer fails to prove (among others) that the reason for termination is valid.

12. Section 43 of the same Employment Act provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reason for termination and where employers fails to do so, the termination shall be deemed to have been unfair.

13. The court has considered the various cases quoted in the claimant’s submissions inter alia.

Samuel Muchiri Gikonyo Versus Henkel Chemical EA Ltd (2014) eKLR and also Peter Apolo Ochieng Vs Amedo Centre Kenya Limited (2016) eKLR where it is well established that termination must be conducted in a procedurally fair manner according to the Employment Law and the rule of natural justice.

14. The respondent in this case failed to establish sound reasons to dismiss the claimant from his employment and furthermore the rightful procedure as well laid down in Section 41 of the Employment Act was clearly floated.

15. The court’s conclusion is that the termination of the claimant was unlawful and wrongful for failure to give valid reasons and secondly the procedure provided in the Employment Law was not followed.

16. The rules of justice and equity were clearly ignored and court awards him remedies as follows;-

17. (a) Days worked – in September, 2016 Kshs.3000/=

(b) Salary in lieu of leave for the years worked Kshs.30,000/=

© Salary in lieu of rest days Kshs.20,000/=

(d) Housing allowance Kshs.40,000/=

(e) Service pay – no basis of proof.

(f) Compensation – no basis or proof

(g) The claimant to be issued with a certificate of service.

(h) No orders as to costs.

Conclusion and Orders

The court finds and holds that the termination of the claimant was unfair for failure to give reasons for such termination and failure to follow the procedure as provided in Section 41 of the Employment Act and was also not in compliance with justice and equity and being guided by Section 49 of the Employment Act awards the following:-

(1) days worked Kshs.3000/=

(2) salary in lieu of leave Kshs.30,000/=

(3) salary in lieu of rest days Kshs.20,000/=

(4) housing allowance Kshs.40,000/=

(5) No order as to costs.

(6) Certificate of service

Delivered, dated and signed in Nairobi this 13th day of August, 2021.

Anna Ngibuini Mwaure

Judge

Appearance

For Claimant Muli & Company.

For Respondent No appearance.

Court Assistant Mamo