



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1045 OF 2017**

*(Before Hon. Lady Justice Anna Ngibuini Mwaure)*

**GODFREY ADEDE.....CLAIMANT**

**VERSUS**

**NATION MEDIA GROUP LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimants in this and all other suits for which this is a test suit are all former employees of the Respondent. They allege that they were each employed by the Respondent as follows:
2. The Claimant, **Godfrey Adede** alleges that he was employed by the Respondent as a Press Technician Grade A2 Production Department on 1<sup>st</sup> April 2010. He was paid a monthly salary of Kshs.26,760/= together with other entitlements. He expected to work and retire at the age of 60 years.
3. The Claims by the Claimants in the other suits for which this is a test suit are as follows:
4. **BILLY KIMANI MAINA** alleges he was employed on 2<sup>nd</sup> September 2008 as a Press Technician Grade A1 at the Respondent for a salary of Kshs.26,000/= together with other entitlements.
5. **RASHID WETOTO LUKHADU** alleges he was employed as a Press Technician Grade A2 on 6<sup>th</sup> March 2012 at a monthly salary of Kshs.36,123/= together with other entitlements.
6. The Claimants aver that on 7<sup>th</sup> April 2016, they had a routine staff meeting where they had discussed among other matters, salary increments, bonding and unity. That a follow up meeting was held on 15<sup>th</sup> April 2016 with the Production Manager, Mr. Aswani present where the salary increment agenda was brought up. The Claimants aver that the manager promised that he would have the matter discussed at the management level and would give feedback the following week.
7. The Claimants aver that they had not gotten the feedback and decided to convene a meeting on 14<sup>th</sup> June 2016 with the management to discuss the same. That despite communicating the same and reporting to work earlier than required, the Production manager attended the meeting late by 5.30 pm and had appeared angry, scornful and spiteful in his address. They aver that he threatened to chase them away from the building.
8. In spite of the above, the Claimants aver that while there was a delay in commencing the day's work, production had been done on time and there was no delay in publishing and distribution of newspapers. The Claimants aver that they had received an email from the Production manager requiring reasons for the delay in commencing duties. They apologized on the same and explained why they were late from their services. (Email was authored by Godfrey Adede and he admits the same).
9. However, the Claimants aver that on 23<sup>rd</sup> June 2016 they received letters of summary dismissal with the reason being disobedience of lawful and proper orders from a superior. They allege that their termination was unfair and unjustifiable and did not comply with procedural and substantive fairness as espoused in the law.
10. They pray for payment of 3 months' salary in lieu of notice, salary for the 23 days worked in June 2016, unpaid housing allowance, compensation for unlawful dismissal, annual leave, consequential loss as a result of the dismissal, costs and interest and issuance of a certificate of service.

11. The Respondent filed a Response to each of the Claims denying the claim. The Respondent avers that the assertion that the Claimants were expected to work till attaining the age of 60 was merely for information purposes which did not create any right or expectation of continued employment.

12. Additionally, the respondent denies the allegation that the Claimant's remuneration was basic pay and avers that as per the contract, the salary paid was all inclusive of basic pay and housing allowance. It states that not only did the Claimant herein disregard his obligations as set out in his employment contract, he also incited his colleagues to do so a result of which nearly paralyzed its production operations.

13. The Respondent avers that the termination was procedurally and substantively fair and in consonance with the law. It prays for the dismissal of the suit.

14. When the case came up for hearing the parties all agreed to use Cause No. 1045 of 2017 as a test suit and the findings of the said case be adopted for Cause 1046 of 2017 and 1047 of

2017.

15. The test case was heard on 2<sup>nd</sup> August 2021 when parties were heard and evidence was taken.

### **Claimant's Case**

16. The Claimant adopted his witness statement and testified reiterating the contents of the Statement thereof. He also relied on the documentary evidence filed and attached in his claim.

17. On cross examination, the Claimant testified that his salary was all inclusive but did not provide for house allowance. He also stated that he was informed of his right to appeal the decision to dismiss him summarily but he chose not to.

18. During his reexamination, the Claimant testified that he had not taken any leave in 2016 and was not paid for the same. He also added that he had not cleared with the company because his letter of termination had listed accusation which he stated was wrong. He also testified that the termination letter he received had not come from the Human Resource office.

19. The Claimant concluded by stating that he did not commit any

act that would warrant a summary dismissal.

### **Respondent's Case**

20. The respondent called upon MR. SEKOU OWINO (RW1), the Head of its Legal Department who relied on his witness statement dated 12<sup>th</sup> June 2018. He also placed reliance on the documentary evidence filed in this court dated 30<sup>th</sup> July 2021.

21. He testified that newspapers are treated as perishable goods and the earlier they get into the market the better and that a delay in production and transportation amounts to a loss to the company. He added that the delay in production caused by the Claimant led to the Respondent paying day shift workers overtime in order to assist the Claimants to do their duties.

22. Upon cross examination on the Claimant's salary, the Respondent testified that the Claimant was paid an exclusive salary of Kshs.26,670/= and there is no breakdown to show that included house allowance. Additionally, he testified that a Show Cause letter was issued but there was no proof of the same even though the Claimant (Godfrey Adede) admitted he wrote an email explaining why he delayed to be at this station of work on 14<sup>th</sup> June 2016.

23. The Respondent's witness testified that the Claimant was not invited to a disciplinary meeting before his services were terminated. He stated that on 23<sup>rd</sup> June 2016, the group head of Production who has the right to terminate employees under his department informed the human resource department of his decision and copied the Claimant.

24. He stated that the Claimant had worked for 23 days of June as he was terminated on 23<sup>rd</sup> June 2016 but he never collected his dues as he had not gone to clear. He also added that he had been paid for his leave days.

25. Upon re-examination, the Respondent's witness clarified that he had no document to show losses caused because the Respondent had taken emergency measure to ensure there was no delay. Regarding the notice to show cause, he testified that there is an email on record from the Production Manager to the Claimant asking for an explanation to which the Claimant responded to. That this response was used to make the decision to terminate him.

26. Parties agreed to conclude the matter via written submissions. At the time of retiring to prepare this judgement the Respondent had not filed their submissions but the Claimant's submissions where on record and are dated 12<sup>th</sup> August 2021.

### **Submissions**

27. The Claimant's Counsel submitted that the termination was unfair and relied on the provisions of Section 41 of the Employment Act. Counsel argued that the Claimant was never given any plausible reasons as to why his employment was coming to an end neither was he

given a chance to be heard or to make any representations to his employer.

28. He further relied on the provisions of Section 43 of the Act which places the burden to prove the termination of an employee was fair on the employer. He argued that the Respondent did not prove the same and as such stated that the termination was unfair according to the provisions of Section 45 of the said Act. He also relied on cases of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** and that of **Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers v Mombasa Sports Club** to support his position.

29. Counsel sought the court's indulgence in being guided by the Court of Appeal decision of **International Planned Parenthood Federation v Pamela Ebot Arrey Effiom [2016] eKLR** where the Court held that:-

*“Termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair.”*

30. Counsel submitted that the Claimant's employment contract clearly stipulated at clause 8 (a) (ii) that the employer was required to give three (3) months' notice in writing or pay three (3) months' salary in lieu of notice. He stated that notice not having been given or paid, this claim is valid and payable under Section 36 of the Employment Act, 2007.

31. On house allowance, Counsel submitted that the same is payable under Section 31 of the Employment Act, and stated that the same is outstanding and still payable.

32. Counsel concluded that given that the termination was unfair, he urged the court to award the Claimant 12 months' gross salary in compensation.

### **Analysis and Determination**

33. The disputed facts in this case are: -

- (i) Was the Claimant guilty of misconduct to warrant dismissal from employment;
- (ii) Was fair procedure applied before terminating the Claimant from employment;
- (iii) Is the Claimant entitled to the prayers sought?

### **Was reasonable grounds given for summary dismissal?**

34. Section 41 of the Employment Act, 2007 provides –

#### **41. Notification and hearing before termination on grounds of misconduct**

**(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.**

35. Further Section 45(2)(a) provides that termination of employee's employment is considered unfair if the employer fails to prove the reason given is valid.

36. The Respondent's witness SEKOU OWINO, the Head of the Respondent's Legal Department in his witness statement as well as in his evidence in Court testified that he was aware the Claimant failed to attend to his normal duties on 14<sup>th</sup> June 2016 despite being asked to do so by his superiors. He says the Claimant incited some of his colleagues not to attend to their duties and thus delayed newspaper production and hence occasioned losses to the Respondent.

37. In cross examination by the Claimant's Advocate Mr. Sekou says he was not present during these happenings but was informed by Mr. Aswani.

38. He also admits that he testified that the Respondent issued the Claimant with notice to show cause but he has not such notice to show the Court.

39. The letter of dismissal issued to the Claimant dated 23<sup>rd</sup> June 2016, the reasons given therein are “*disobeying lawful and proper command of the superior to commence your duties, as a result of which newspaper production for that day delayed.*”

40. Further “*You were the instigator of the action by your colleagues not to attend to their work*” and also he was advised that his explanation was not acceptable and cannot be tolerated by the management.

41. The reason given for summary dismissal to the Claimant is “*mere generalities*” and there was no effort by the Respondent to prove these allegations. There is reference to Mr. Aswani who was the Claimant’s supervisor who is alleged to have asked Claimant to report back on duty and is also the one who is purported to have given him the notice to show cause letter. He was not called to write a witness statement to prove these allegations. So the reason given that the Claimant disobeyed lawful orders remain mere allegations.

42. Respondent also avers that the Claimant instigated other staff members to abstain from work. Again no staff member was called to affirm such allegations. In reliance to the case of **Kenya Union of Domestic, Hotels and Educational Institutions & Hospitals Workers v Mombasa Sports Club, Cause No. 440 of 2013** where Radido J. stated “*no employer shall terminate the employment of an employee unfairly. The termination of an employer is unfair if employer fails to prove the reason for termination are valid and is a fair reason.*”

43. In **International Planned Parenthood Federation v Pamela Ebot Arrey Effiom [2016] eKLR**, the Court of Appeal held that –

*“Termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair.”*

44. The Court is persuaded the Claimant was not given valid reason as to why his employment was to come to an end.

45. Further he was not given a chance to be heard or to make representation to his employer. What is on record is that once Claimant was asked to explain delay in reporting to work on 14<sup>th</sup> June 2016, he sent an email on 15<sup>th</sup> June 2016 which had his explanation. He was then issued with a letter for summary dismissal on 23<sup>rd</sup> June 2016.

46. Section 41(2) of the Employment Act clearly provides that an employer before terminating employment of an employee or summarily dismissing him/her under Section 44(3) and (4) shall hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person of any chosen by the employee within subsection (1) make.

47. There is no evidence on record that the Claimant was accorded an opportunity by the Respondent to be heard as regards the allegations contained in his letter of termination.

48. In the case of **Donald Odeke v Fidelity Security Ltd, Cause No 1998 of 2011**, Ndolo J. observed “*an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them. It does not matter what offence the employee is accused of. If the employee is not heard the termination is ipso facto unfair. I submit that fair procedure was not applied hence dismissal was unfair and unlawful.*”

49. After careful consideration of the pleadings and evidence adduced as well as the submissions hereto I am persuaded the Claimant’s dismissal was unfair, unlawful and in contravention of laws of natural justice.

### **Reliefs Awarded**

50. Having found the Claimant’s termination was unlawful, I now award the following reliefs premised under Section 49 of the Employment Act: -

(i) Three months’ salary in lieu of notice as prayed is declined. The correct provision according to the Claimant’s letter of appointment dated 1<sup>st</sup> April 2010 is 8(c) which provided for one month in lieu of notice Kshs.54,273

(ii) Salary for 23 days worked in June 2016 Kshs.41,609

(iii) House allowance is not proved for the reason that Claimant signed a contract with the Respondent from 1<sup>st</sup> April 2010 and never raised issue of house allowance. Further the same letter of appointment states the salary was all inclusive package. Claimant has not also proved how he came to the figure of Kshs.15,000/= house allowance.

(iv) I will award 6 months’ salary since the Claimant had worked consistently for the Respondent for about 6 years Kshs.325,638

(v) The Respondent did not produce any records to prove he used to give leave off to the Claimant so I will allow the prayer for leave pay as claimed Kshs.133,381

(vi) The prayer for consequential loss is not awarded as the Claimant is adequately compensated for unlawful dismissal.

(vii) Costs are awarded to the Claimant

(viii) Interest at Court rates until payment.

### **Conclusion**

**51. The Claimant is awarded Kshs.554,901/= plus costs. Interest is also awarded at Court rates from this date till full payment but subject to statutory deductions.**

52. Also certificate of Service to issue forthwith to the Claimant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2021**

**ANNA NGIBUINI MWAURE**

**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.

**ANNA NGIBUINI MWAURE**

**JUDGE**