



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2294 OF 2017

(Before Hon. Justice David Nderitu)

NDUNGU GITAU GEORGE.....CLAIMANT

VERSUS

NAWASAKU SAVINGS AND

CREDIT CO-OPERATIVE LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. In a memorandum of claim dated 30th August 2017 and filed in Court on 17th November 2017, the Claimant prays for the following against the Respondents: -

- a. A declaration that the Claimant was wrongfully and unfairly terminated from his employment.*
- b. Outstanding dues Kshs.210,000/=*
- c. Notice period of one-month Kshs.21,000/=*
- d. 12 months' salary as compensation for wrongful and unfair termination Kshs.21,00 x 12 Kshs.252,000/=*
- e. Punitive and aggravated damages for breach of Claimant's constitutional rights.*
- f. Costs and incidental to this suit.*

2. Together with the statement of claim was filed a witness statement and three documents/exhibits.

3. Upon service of the claim, the Respondent filed a statement of reply dated 9th August 2018 and filed in Court on 10th August 2018, in which the Respondent denied the claim in toto and prayed that the same be dismissed with costs. Together with the reply the Respondent filed one witness statement and the documents that they wished to rely on during the hearing.

4. The matter came up in Court for hearing on 9th August 2021 when the Claimant (CW1) testified in support of his claim. The Respondent did not call any witness.

5. At the close of the oral testimony Counsel for both parties were directed to file written submissions and the Claimant's Counsel complied but Counsel for the Respondent did not file written submissions.

Hearing

6. On 9th August 2021, the Claimant (CW1) testified that he was orally engaged by the Respondent as a Stage Manager on 5th December, 2007 at a monthly salary of Kshs.21,000/=. He further testified that on 2nd December, 2016 he was orally dismissed through a phone call. The Claimant tendered exhibits including statements from NHIF and NSSF, as confirmation of his employment with the Respondent who was making the monthly remittances therein. Exhibit 3 is a demand letter addressed to the Respondent by Advocates for the Claimant. The Claimant was cross examined on his testimony by Counsel for the Respondent.

7. On the other hand, the Respondent did not call any witness and did not file written submissions.

Issues for Determination

8. It is not disputed that the Claimant was an employee of the Respondent as pleaded by the Claimant and supported in his oral testimony in Court. The Claimant testified that his monthly salary was Kshs.21,000/= paid in cash, and again there is no evidence to the contrary from the Respondent.

9. Further, the Claimant testified that he worked for the above mentioned period making an aggregate of nine (9) years. Again there is no evidence tendered by the Respondent to the contrary.

10. In view of the foregoing, this Court frames the following issues for determination based on the pleadings and the evidence adduced by the Claimant: -

- (i) Was the termination of the Claimant by the Respondent fair, lawful, and justified?
- (ii) If the termination was unlawful, unfair, and unjust, is the Claimant entitled to the reliefs sought?
- (iii) Who meets the costs of this litigation?

Termination

11. The Claimant testified that on 2nd December, 2016 he was called on phone by someone from the Office of the Respondent and informed that he had been terminated from his employment with the Respondent. He testified that no notice was issued and that he was not called for a hearing. This evidence has not been rebutted through evidence from the Respondent and as such the same stands unchallenged.

12. In their filed statement of reply the Respondent alleged gross misconduct on the part of the Claimant as the reason for termination. However, no evidence was tendered to substantiate the said allegations.

13. In the circumstances, this Court finds that the Respondent had no valid reason to terminate the Claimant. The Respondent therefore failed to meet the threshold set under Sections 35, 41, 43, 44, 45 and 46 of the Employment Act No. 11 of 2007 (the Act).

14. Having found that the Respondent had no valid reason in terminating the Claimant, the Court has to consider the procedural fairness of the dismissal process, albeit for completeness. The Claimant testified that no notice was issued to him before termination as required under Section 35 of the Act and that no payment was made in lieu thereof, contrary to Section 36 of the Act.

15. The Claimant testified that no hearing was held, and that evidence stands unchallenged. It is evidently clear that the Claimant was not subjected to due process and on this account again this Court finds that the termination was unlawful for lack of procedural fairness.

16. The need and requirement for both substantive and procedural fairness has been expressed in many decisions of the Court; See **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR**; **Kenfreight (EA) Limited v Benson K. Ngubi (2016) eKLR** and **Loice Otieno v Kenya Commercial Bank Limited (2013) eKLR**. This Court concludes and finds that the Respondent failed in meeting the legal substantive and procedural threshold required in dismissing the Claimant.

Reliefs

17. The remedies sought by the Claimant against the Respondent have been set out in the first page of this judgment and this Court now proceeds to consider each relief sought.

18. The request for a declaration that the termination was unfair, unjust, and unlawful is spent as the foregoing paragraphs have found in favour of the Claimant in that respect.

19. On outstanding dues in the sum Kshs.210,00/=, as far as the Court can deduce, this is made up of one month's salary in lieu of notice (Kshs.21,000/=) and unpaid leave (Kshs.189,000/=) going by paragraph 17 of the statement of claim. There is no dispute that no notice was issued to the Claimant by the Respondent and as such Section 36 of the Act applies. Hence as far as payment in lieu as notice is concerned the said is awarded as follows: -

Kshs.21,000 x 1 month = **Kshs.21,000/=**

20. On unpaid leave in the sum of Kshs.189,000/= the Court finds that this claim has not been proved on a balance of probability. This is so because the Claimant had legal avenues to demand and have the Respondent produce records of employment for the material period to establish the number of leave days pending. No effort was made and no application was made in Court to that effect. It is not enough for a party to just plead an issue and expect the Court to automatically grant the same. Even where an issue is not outrightly contested, a party has a legal burden to prove each allegation on a balance of probabilities if the Court is to find in their favour.

21. On the unpaid salary for November 2016, the Court finds that the Claimant was terminated on 2nd December 2016 and was therefore entitled to November salary. No evidence has been offered by the Respondent to dispute this relief. This Court concludes and finds that the

Claimant was not paid the salary for November 2016 and the Claimant is entitled to the same as hereunder: -

$Kshs.21,000 = \times 1 \text{ month} = \mathbf{Kshs.21,000/=}$.

22. On compensation for unlawful termination, the Claimant testified that he found a job as a Driver. He did not indicate how long it took him to obtain a new job. The Court also takes judicial notice of the fact that there are no special qualifications for a Driver or a Stage Manager. However, the Claimant had worked for the Respondent for a considerably long period of nine (9) years.

23. The maximum compensation of 12 months under Section 49(1) may only be granted under special circumstances.

24. In the circumstances and doing the best that this Court can do this Court grants the Claimant six (6) months' gross salary as compensation under this head as follows.

$Kshs.21,000 \times 6 = \mathbf{Kshs.126.000/=}$

This amount in subject to statutory deductions.

25. On the issue of punitive and aggravated damages for breach of the Claimant's constitutional rights the Court has observed that there is no evidence on what and how such rights were violated. There is also no pleading on the specific rights that were allegedly violated. This relief is denied for lack of specificity and evidence.

26. The Claimant is awarded costs of this cause based on the award and the same may be agreed or taxed.

Disposal

27. This Court therefore issues the following order in this judgment:-

(a) A declaration be and is hereby issued that the termination of the Claimant by the Respondent was unlawful for lack of both substantive and procedural fairness.

(b) The Claimant is granted the following: -

(i) One month's salary in lieu on notice Kshs.21,000

(ii) Unpaid salary for November 2016 Kshs.21,000

(iii) Compensation for unlawful termination Kshs.126,000

TOTAL Kshs.168,000

(c) This amount shall earn interest at court rates from the date of this judgment till payment in full.

(d) Costs to the Claimant.

DATED, VIRTUALLY DELIVERED, AND SIGNED AT NAIROBI ON THIS 17TH DAY OF SEPTEMBER 2021

DAVID NDERITU

JUDGE