



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1092 OF 2017

MESHACK MOKUA SAMSON CLAIMANT

VERSUS

ASILLE TRADING (E.A.) LIMITED RESPONDENT

JUDGMENT

1. INTRODUCTION

1.1 In a statement of claim dated 25th May 2017, the Claimant prays for the following:-

- i. “A declaration that the said termination was unfair.
- ii. An order directing the Respondent to pay the sum of Kshs.159,755/= as particularised in paragraph 31 of the claim to the claimant.
- iii. An order for the payment of Kshs.177,600/= to the Claimant being compensation for the unfair termination of employment.
- iv. An order directing the Respondent to issue a certificate of service to the Claimant.
- v. The costs of this suit with interest thereon at Court rates.
- vi. Any other relief as the Court would deem just and expedient”

1.2 Along with the statement of claim was filed a verifying affidavit, Claimant’s list of witnesses, Claimant’s witness statement, and a bundle of copies of documents.

1.3 On 24th July 2017, the Respondent entered an appearance dated 21st July 2017. However, no reply to the claim or defence was filed for or on behalf of the Respondent.

1.4 Subsequently, the matter was certified ripe for hearing and the same came up in Court for hearing on 27th July 2021 but the hearing did not proceed on that day as the Claimant was said to be unwell. The Court fixed the matter for hearing on 3rd August 2021 and ordered counsel for the Claimant to serve a hearing notice upon Advocates who had entered appearance for the Respondent. There is an affidavit of service of the hearing notice for 3rd August 2021.

2. HEARING AND EVIDENCE

2.1. During the hearing on 3RD August 2021 the Claimant gave his affirmed oral testimony and reiterated the contents of the statement of claim and produced the documents in the list of documents as exhibits in support of his cause.

2.2. The Claimant testified that he was engaged by the respondent on 1st April 2012 as a casual at a monthly salary of Kshs.13,200/=. He stated that the employment thereafter was converted into a contract of six months in the first instance and thereafter he became a month-to-month employee or what is referred to as permanent employee.

2.3. The Claimant stated that the Respondent failed or refused to give a copy of the written contract. He stated that he worked as a machine operator and thereafter as a forklift and machine attendant. The claimant added that he used to work in the mixing room and delivery as and when directed to do so.

2.4. The Claimant stated that as of April 2015, his monthly salary stood at Kshs.14,800/=.

2.5. The Claimant stated that in the month of November 2015 the Respondent decided to recover from his salary an amount that had been paid to the National Environment Management Agency (NEMA) for reason of expired drugs that were found in the first aid kit box. The Claimant stated that it was neither his duty nor responsibility to manage the first aid kit box and that the move by the Respondent to obligate the claimant to meet the fine was malicious and unlawful.

2.6. In the same month of November 2015, the Claimant stated that he was terminated after returning to work from a delivery in Gikomba area of Nairobi County yet he was not the driver. The Claimant stated that during that delivery the driver had driven carelessly and that the driver had been fined and that the claimant and the driver had paid the fine.

2.7. The Claimant testified that he was not issued with notice of termination and or reasons therefor.

2.8. The Claimant stated that he worked for the respondent from 1st April 2012 to November 2015.

2.9. The Claimant stated that for the period he was in employment of the Respondent he was not paid house allowance and he did not take leave. He stated that he was not paid his terminal dues. He concluded his oral testimony by stating that his termination was unprocedural, unfair and unlawful and pleaded with the Court to grant him prayers sought for in the statement of claim.

2.10. As stated above, the Respondent did not attend the hearing and therefore upon conclusion of the Claimant's oral testimony, Claimant's evidence in chief was not challenged and stands as such. No evidence was tendered on the part of the Respondent.

2.11. Counsel for the Claimant addressed the Court through written submissions dated 4th August 2021. In support of Claimant's case, counsel relied on provisions of the law and precedents. Counsel identified two issues for determination: -

- a) "Whether the termination of the claimant's employment was substantively and procedurally fair.
- b) Whether the claimant is entitled to the relief sought."

3. ISSUES FOR DETERMINATION AND ANALYSIS

3.1. The Court has thrashed through the memorandum of claim, the oral testimony from the Claimant, together with the exhibits produced, and the filed written submissions. The Court identifies the following issues for determination in this cause:-

- a) Was the Claimant an employee of the Respondent for the period alleged, and if yes, what were the terms of that employment?
- b) Was the termination of the Claimant's employment by the Respondent fair, procedural and lawful?
- c) What reliefs is the Claimant entitled to if the termination was unlawful? What is the quantum thereof?
- d) Who meets the costs of this cause?

4. EMPLOYMENT

4.1. The Claimant's testimony, as supported by the pleadings, is that he was an employee of the Respondent in various capacities from 1st April 2012 to 11th November 2015.

4.2. Although the engagement is said to have been contractual for a fixed term at the inception, it appears, and that is the evidence on record, that the same subsequently became permanent employment with salary paid monthly.

4.3. Contrary to Section 9 of the Employment Act No. II of 2007 (the Act) the Respondent failed or refused to reduce the employment contract into writing and or failed or refused to supply the Claimant with a copy thereof. The Court makes the conclusion that the Claimant was an employee of the respondent on permanent basis for the stated period. This position is taken based on the statement of claim, the exhibits produced in Court and the oral testimony by the claimant. The Court will thus rely on the minimum terms provided for under the Act to infer the terms of employment. See **Robai Musinzi V Mohammed Safdar Khan (2012) eKLR and Joseph Okelo Adhiambo & another V YJ Elmi & others (2012)**.

4.4. As at the time of termination the claimant's monthly basic pay was Kshs.13,283.50, and that is per the payslip for the month of October 2015 that was produced as an exhibit in the bundle of documents filed in Court. However, and in a situation that has not been explained the basic pay for the months of November and December 2014, is indicated to be Kshs.14,300/=. For May 2015, the basic salary is indicated as Kshs.14,800/= and that for the month of August 2015 is indicated as Kshs.13,283.50. This same amount is reflected as basic pay for the months of September and October, 2015.

4.5. The above fluctuation in the payslips in regard to the basic pay has not been explained at all in the pleadings, the oral testimony, and the written submissions. Yet the payslips indicate that the Claimant all along worked in the same Department identified as DEPT. 1.

4.6. In the interest of justice and fairness the Court takes the position that the last established basic pay, as per the evidence on record is that of October 2015 which stands at Kshs.13, 283.50. This is the same amount that is indicated as the gross pay for that month and it is therefore that figure that the Court shall logically apply in calculating any amounts that may be due to the Claimant.

5. TERMINATION

5.1. In the pleadings, oral testimony and the written submissions, the Claimant is categorical that his termination was unlawful.

5.2. In substance, the Claimant's case is that there was no lawful reason for termination and that none was given. However, the Respondent, as the employer, is obligated under Section 43 of the Act to prove that the termination was lawful. However, the Respondent, after entering appearance, did not file defence or response to the claim and tendered no evidence during the trial.

5.3. In regard to the procedure applied, the Claimant stated that no notice was issued to him and that no disciplinary hearing was held. That evidence is not challenged and in line with the provisions of Section 45 of the Act the Court finds that the termination was procedurally defective.

5.4. Without further ado, the Court finds that the termination of Claimant's employment by the Respondent was substantially and procedurally defective, unfair, irregular and unlawful.

6. RELIEFS

6.1. The reliefs sought by the Claimant against the Respondent have been reproduced verbatim at the beginning of this Judgment. The Court shall proceed to deal with the same now.

6.2 Prayer (i) is for a declaration that the termination was unfair. In the foregoing paragraphs of this Judgment the Court has found that the termination was defective both in substance and procedure and as such the Court finds no difficulty in declaring the same unfair and unlawful.

6.3. In prayer (ii), the claimant prays for a variety of awards as follow: -

a) One (1) month salary in lieu of notice. As noted above the last verifiable monthly pay for the claimant is to be found in the last payslip for the month of October 2015. The same was produced as an exhibit in this cause and it clearly indicates the basic and gross pay as Kshs.13,283.50 and Kshs.13,283.60 respectively.

The Court awards Kshs.13,383.60 as one month's salary in lieu of notice.

b) In this regard to service pay the Court finds that the claimant worked for the respondent for the period between 1st April 2012 to 11th November 2015. That is for an aggregate of about 46 months. Since the Claimant was not a member of any pension scheme, as far as the payslips indicate, then service fee pay may be awarded under this head as follows: -

$Kshs.13,383.60/30 \times 15 \times 46/12 = 25,651.90.$

c) On unpaid leave, the Claimant testified that he was not allowed to take leave for the entire period that he was engaged by the Respondent. Under this head, as provided for under Section 28 of the Act, the pay for the leave days not taken is calculated as follows:

$Kshs.13,383.60/30 \times 21 \times 46/12 = 35,913$

d) On the unpaid house allowance, Section 31 of the Act obligates an employer to pay to an employee house allowance or in the alternative provide reasonable accommodation. From the evidence adduced, the Respondent failed to meet this legal requirement for the entire period of 46 months that the Claimant was in employment. House allowance is calculated at 15% of the basic pay and thus:-

$15/100 \times Kshs.13,383.60 \times 46 = 92,347$

e) Section 49(1) provides for compensation for unlawful termination not exceeding 12 months' salary. In the circumstances of this cause, no unique qualifications have been identified on the part of the Claimant or a skill that would make Claimant's services unique. However, the conduct of the Respondent was grossly unfair and unlawful. The Claimant did not in his oral testimony or in submissions indicate how long it took him to obtain another job if at all he did. But the Court takes cognizance of the fact that in our economy, at whatever level, it is not easy to secure employment.

In the circumstances and doing the best that the Court can do, the Court awards the Claimant four (4) months' salary as compensation for unlawful termination calculated as follows:-

f) $Kshs.13,383.60 \times 4 = 53,534/=.$

7. COSTS

7.1 Costs of litigation ordinarily follow event and this Court has no reason to depart from this well-established rule and as such costs of this cause are awarded to the Claimant based on the award. The costs may be agreed or taxed in accordance with the applicable law.

8. AWARD AND DISPOSAL

8.1. On a balance of probability, the Court finds that the Claimant has proved his case and inters Judgment for the Claimant in the following terms.

a) A declaration is hereby issued that the termination of the Claimant in his employment by the Respondent was unfair, unprocedural and unlawful.

b) The following awards are issued to the Claimant:-

i. One month's salary in lieu of notice - Kshs.13,383.60

ii. Service pay – Kshs.25,651.90

iii. Pay for leave days not taken - Kshs.35,913

iv. Unpaid house allowance – Kshs.92,346.15

v. Compensation for unlawful termination – Kshs.53,534.00

c) Total - . Kshs.220,829/-

d) The Respondent is ordered to issue the Claimant with a certificate of service in accordance with Section 51 of the Act.

e) Costs of the cause to the Claimant to be agreed or taxed.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 3RD DAY OF SEPTEMBER 2021.

DAVID NDERITU

JUDGE