



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 960 OF 2016**

**JOSEPH OCHIENG MBORA.....CLAIMANT**

**VERSUS**

**AFRICA REGALIA.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant lodged this claim against the Respondent seeking compensation for unfair termination, payment of one month's salary in lieu of notice, leave pay for one year and salary arrears.
2. The claim is contained in a Memorandum of Claim dated 25<sup>th</sup> May, 2016 and filed in court on the same date.
3. The Respondent filed a Response to the claim on 20<sup>th</sup> June, 2016, generally denying the claim. The response was filed together with a bundle of documents including three witness statements.
4. The Claimant filed a reply to the response to his claim on the 9<sup>th</sup> of November, 2016.
5. Parties filed a joint list of issues for determination in the matter as follows:
  - i. Whether the Claimant was earning a monthly salary of Kshs. 20,500/=
  - ii. Whether the Claimant's dismissal was lawful
  - iii. Whether the Claimant is entitled to the reliefs sought
  - iv. Who should bear the costs of the suit
6. At the trial, the Claimant testified on his own behalf, while the Respondent called one Mrs Jane Wambui Odewale, the proprietor of the Respondent to testify on its behalf. The Claimant filed submissions in the matter.

**The Claimant's Case**

7. The Claimant's memorandum of claim was filed by the Claimant acting in person. On the 11<sup>th</sup> of September, 2017, the Firm of Ochieng' Ogotu & Company Advocates came on record for Claimant.
8. The Claimant's case is that the Respondent employed him as a tailor on the 23<sup>rd</sup> of October, 2005, at a monthly salary of Kshs.12,000/=.
9. The Claimant states that he was not issued with a written employment contract but had an oral agreement with the Respondent.
10. The Claimant further states that his salary was later raised to Kshs. 20,500/= and which was his salary at the time of his dismissal.
11. The Claimant admits taking off days of between three to five days at a time, which were consolidated to form his leave entitlement. He however claims to have had a balance of unutilized 21 days of leave at the time of his dismissal for the year 2015-2016.

12. It is the Claimant's further case that he was summarily dismissed by the Respondent on the morning of 22<sup>nd</sup> of January, 2016.
13. The Claimant states that prior to his termination, the proprietor of the Respondent picked a sample of cloth that he was working on and left with it, saying that she had wanted the customer to have a look before further stitching.
14. He further states that at noon of the same day, the Respondent's secretary one Rachel Wambui called him to the office, where he found the proprietor of the Respondent who informed him that she no longer wanted to work with him.
15. The Claimant's further case is that he was given a dismissal letter and asked to collect his belongings and leave the Respondent's premises.
16. The Claimant further states that he could not read the dismissal letter because he did not have his spectacles but nonetheless, he picked his belongings and vacated the Respondent's premises as she had ordered security to pick him up.
17. It is the Claimant's case that he was neither given a notice to show cause why he should not be dismissed nor was he given a hearing prior to the summary dismissal.
18. The Claimant's states that the reason given for his dismissal in the letter of dismissal, was that he was competing with the Respondent's business.
19. The Claimant denies competing with the Respondent's business nor taking over a road side shop that was previously operated by the Respondent
20. His prayer is that the court declares his dismissal unlawful and wrongful and order that he is paid:
  - i. One month's salary in lieu of notice
  - ii. 21 days Leave allowance
  - iii. Salary for January, 2016
  - iv. 12 months salary as compensation for wrongful dismissal

#### **The Respondent's Case**

21. The Respondent filed a response to the claim on 20<sup>th</sup> of June, 2016, through the Firm of Nyabena Nyakundi & Co. Advocates.
22. The Respondent states that the Claimant was its employee having employed him as a tailor from the year 2005 and earning a gross salary of Kshs. 20,500/= as at the time of dismissal.
23. The Respondent states that the Claimant was issued with a warning letter on 17/2/2015 by one Rachel Kimani who was an office administrator of the Respondent. The reasons given in the letter were habitual lateness to work and refusal to answer questions put to him by the Respondent.
24. It is the Respondent's case that the Claimant used to take his leave in the months of August and September and had already taken his leave for the year 2015.
25. The Respondent further states that the Claimant continuously worked on his personal jobs and even worked for the Respondent's clients behind her back, which practice resulted in losses to the Respondent.
26. It is the Respondent's case that the Claimant was dismissed for working for their competition and taking over a shop where the Respondent had been asked to vacate.
27. The Respondent further states that her clients called to inform her that the Claimant was calling them asking for their business which he did privately separate from the Respondent's and at times used the Respondent's fabric for his own business.
28. The Respondent states that the Claimant took over her customers and her business causing her to close shop.
29. The Respondent's prayer to this court is that the Claimant's suit be dismissed with costs

#### **The Claimant's Submissions.**

30. It was submitted for the Claimant that the Respondent did not have valid reasons to dismiss him and that the dismissal was based on rumours. They sought to rely on the case of *Joan Chebichi Sawe v R. Nairobi HCCA NO. 2 of R002* where the court held that suspicion alone, is not sufficient reason for termination.

31. It was submitted for the Claimant that the Respondent did not adhere to fair procedure when dismissing the Claimant contrary to *Section 41 and 43 of the Employment Act*. They sought to rely on the case of Amos **Kitavi Kivite v Kenya Revenue Authority (2020) eKLR**.

32. It is the Claimants submission that he has proved his case on a balance of probability and therefore he is entitled to the remedies sought.

33. The court identified the following issues for determination:

- i. Whether the Claimant was earning a monthly salary of Kshs. 20,500/=
- ii. Whether the Claimant's dismissal was lawful
- iii. Whether the Claimant is entitled to the reliefs sought
- iv. Who should bear the costs of the suit

#### **Whether the Claimant was earning a monthly salary of Kshs. 20,500/=**

34. Although this was listed by both parties as an issue for determination, both the Claimant and the Respondent's witness in their oral testimonies, were in concurrence that the Claimant's salary at the time of dismissal was Ksh.20,500/=. I say no more.

#### **Whether the Claimant's dismissal was lawful**

35. The Claimant was summarily dismissed vide a dismissal letter dated the 22<sup>nd</sup> January, 2016.

36. The said dismissal letter informed the Claimant that the reasons for his dismissal, as working for the Respondent's competition without permission which act, the Respondent considered to amount to sabotage of its business, and which act was a practice the Claimant had adopted in the last 24 months to the date of the dismissal and which had resulted in losses to the Respondent's business.

37. The question for the court to answer becomes whether the summary dismissal of the Claimant was wrongful within the meaning of Sections 41, 43 and 45 of the Employment Act, 2007.

38. The Claimant's evidence is that he was not given notice to show cause and no charges were preferred against him in whatever form for which he was required to respond, prior to his dismissal.

39. The dismissal letter states reasons for the Claimant's dismissal for which he was not given an opportunity to make representation, either orally or in writing in answer to the reasons given for the summary dismissal contrary **Section 41(2) of the Employment Act, 2007**, which provides as follows:

***“Notwithstanding any other provision in 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”.***

40. The Respondent did not adduce any evidence to prove or even suggest there having been a disciplinary hearing prior to the dismissal of the Claimant. In the case of **Loice Otieno V Kenya Commercial Bank Ltd[2013] eKLR Radido J** held as follows as regards procedural fairness during dismissal:

*“...In my view, an employer must demonstrate as a matter of fact that it*

*(i) Explained to the employee in a language the employee understood the reasons why it was considering the termination*

*(ii) Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons*

*(iii) Heard and considered any explanations by employee or his representative...”.*

41. The reasons enumerated by the Respondent for dismissing the Claimant could be valid reasons as his actions were demonstrated to have sabotaged the Respondent's business leading to its closure. In the case of **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR** the Court of Appeal held that it was an eminently reasonable action by any employer to dismiss the 1st Respondent as employee, if faced with the conduct displayed by the 1st Respondent. The Claimant's conduct would be valid and justifiable grounds to dismiss him from the service of the Respondent, had the Respondent adhered to the provisions of Section 41 which section sets the threshold for procedural fairness (See **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR**).

39. The procedure adopted by the Respondent in the dismissal, fell short of the requirements of Sections 41, 43 and 45 of the Employment Act, 2007 and Articles 41 and 47 of the constitution. In the case of **David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR** the Court held that the requirements of section 41 of the Employment Act have a long pedigree in administrative/public law and are referred as the rules of natural justice, which rules the Respondent violated in the manner in which it conducted the dismissal of the Claimant.

42. The court concludes that the dismissal of the Claimant was not carried out in compliance within the parameters set out in section 41 of the Employment Act and therefore the dismissal was unprocedural and unfair.

#### **Whether the Claimant deserves the reliefs sought**

43. The holding that the Claimant was unfairly dismissed, entitles him to compensation as is envisaged under Section 49 of the Employment Act, 2007.

44. The Claimant has prayed that this court awards him One month's salary in lieu of notice, 21 days Leave allowance, Salary for January, 2016 and 12 months' salary in compensation for wrongful dismissal

#### **One month's salary in lieu of notice**

45. The Claimant was evidently not issued with any notice prior to the dismissal nor paid in lieu thereof, contrary to Section 35 of the Employment Act. For this reason, the court awards him a one-month salary in lieu of notice.

#### **21 days Leave allowance**

46. The Claimant's case is that he is owed pay for 21 accumulated and unutilized leave days as at the time of his dismissal. The Respondent on its part states that the Claimant always took his leave in the months of August and September of every year. The Claimant was dismissed in January of 2016.

47. Keeping of employee records is an obligation of the employer and for reason that nothing has been produced to show that indeed the Claimant utilized his leave days, leads the court to the conclusion that the Claimant is entitled to the 21 days leave pay as claimed and the same is awarded.

#### **Salary for January, 2016**

48. The evidence before this court is that the Claimant was dismissed on the 22<sup>nd</sup> of January, 2016. The Respondent has also produced evidence showing that the Claimant had been advanced a salary of Kshs. 10,000/= in the month of January, 2016, and which advance, the Claimant has not denied.

49. The Claimant's monthly gross salary is Kshs. 20,500, the daily pay comes to Kshs. 684/=. For the 22 days worked in the month of January, the total pay is Kshs. 15,048/- and for reason of the advance, the Claimant is owed Kshs. 5,048/= and which is hereby awarded.

#### **12 Months' Salary in Compensation**

50. In determining an award of compensation, the court is guided by the provisions of Section 49 of the Employment Act, 2007. The Supreme Court in the case of *Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR* had this to say on the award of compensation:

***"...To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies".***

51. Section 49(4) provides as follows in regard to the award of remedies listed under Section 49 (1) and (3) of the Employment Act:

***(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following -***

***(a) the wishes of the employee;***

***(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and***

***(c) the practicability of recommending reinstatement or re-engagement. (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;***

***(e) the employee's length of service with the employer;***

***(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;***

***(g) the opportunities available to the employee for securing comparable or suitable employment with another employer;***

***(h) the value of any severance payable by law;***

***(i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;***

*(j) any expenses reasonable incurred by the employee as a consequence of the termination;*

*(k) any conduct of the employee which to any extent caused or contributed to the termination;*

*(l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and*

*(m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.*

52. The Claimant according to evidence adduced was in the service of the Respondent for about ten and a half years. The evidence before court is that the Respondent dismissed the Claimant for working for their competition and taking over a shop where the Respondent had been asked to vacate.

53. The Respondent further states that her clients called to inform her that the Claimant was calling them asking for their business which he did privately separate from the Respondent's and at times used the Respondent's fabric for his own business.

54. The evidence before court is that the Claimant took over the Respondent's customers and business, causing it to close shop.

55. The reasons proffered for the Claimant's dismissal indicate that to a large extent, the Claimant contributed to his dismissal.

56. The court further takes into consideration the fact that the Respondent's business is no longer in operation and for reason that the Claimant has a skill which presents opportunities to secure comparable employment and further bearing in mind that remedies under Section 49 of the Employment Act are awarded to compensate the employee and not to punish the employer (See *Jephtar & Sons Construction & Engineering Works Ltd vs. The Attorney General HCT-00-CV-CS-0699-2006*; *Mosisili vs. Editor Miller Newspapers CIV/T/275/2001*), the court finds and holds that an award of one-month salary in compensation, would be fair and just in the circumstances.

57. In conclusion, judgment is hereby entered for the Claimant against the Respondent in the following terms:

1) A declaration that the dismissal of the Claimant from the service of the Respondent was wrongful and unfair.

2) The Respondent to pay the Claimant:

i. One-month salary in lieu of notice at Kshs. 20,500/=

ii. 21 days Leave allowance at Kshs. 20,500/=

iii. Salary for January, 2016 at Kshs. 5,048/=

iv. 1 month's salary as compensation for wrongful dismissal amounting to Kshs.20,500/=

v. Costs of the suit

58. It is so ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 14<sup>TH</sup> DAY OF OCTOBER, 2021.**

**CHRISTINE N. BAARI**

**JUDGE**

Appearance:

N/A for the Claimant

Ms. Wavinya h/b for Mr. Nyabena for the Respondent

C/A Chrispo