



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 2389 OF 2016**

**ORAO KENNEDY.....CLAIMANT**

**VERSUS**

**CREATIVE CONSOLIDATED SYSTEMS LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant avers vide his memorandum of claim dated 21<sup>st</sup> November, 2016, that he was employed by the respondent as a cleaner with effect from 27<sup>th</sup> February, 2014. He claims that he served as such until 21<sup>st</sup> July, 2016 when his services were unlawfully terminated. He prays for several reliefs from court, including compensatory damages for wrongful termination, one month's salary in lieu of notice, salary for days worked and unpaid leave days.
2. The respondent neither entered appearance nor filed a response in answer to the memorandum of claim. The claim was therefore undefended. The claimant through his Advocate produced an Affidavit of Service sworn by one Richard Wachira on 18<sup>th</sup> June, 2016, wherein he deponed that he had effected service of the statement of claim and summons to enter appearance upon the respondent. To this end, he annexed copies of the Summons and claim to the Affidavit, both of which contained the receiving stamp of the respondent.
3. It is against this background, that the court directed on 10<sup>th</sup> May, 2021, that the matter proceeds for formal proof hearing.
4. Subsequently, on 14<sup>th</sup> October, 2021, the matter proceeded for formal proof hearing as directed, and the claimant testified in support of his claim.
5. At the outset, the claimant sought to rely on his witness statement which he asked the court to adopt as part of his evidence in chief. He also produced the documents filed together with his claim as exhibits before court.
6. The facts of the case as presented by the claimant are that, he was employed by the respondent as a cleaner on 27<sup>th</sup> February, 2014 and that he discharged his duties with zeal and determination. He stated that on 21<sup>st</sup> July, 2016, he received a letter of termination from the respondent. The claimant alleges that he was not given any notice prior to his termination and was not compensated appropriately. He prayed that his claim be allowed as prayed.

**Submissions**

7. The claimant filed written submissions through which it urged the court to find that his termination was unfair as the respondent had failed to discharge its burden under sections 43 and 45 of the Employment Act.

**Analysis and determination**

8. From the pleadings on record as well as the evidence placed before court, this court is being called to determine the following twin issues;

**a) Was the claimant's termination unfair and unlawful?**

**b) Is the claimant entitled to the reliefs sought?**

**Was the claimant's termination unfair and unlawful?**

9. The claimant has alleged that his termination was wrongful and unfair. It is therefore imperative to mirror the facts and circumstances of this case against the relevant provisions of the Employment Act.

10. Under **Section 43(1)** of the Employment Act (Act), an employer has the burden of proving reasons for termination and failure to do so, such termination is deemed to be unfair. Further, **section 45 (2)** of the Act, provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.

11. That is not all. Under **section 45 (2) (c)** of the Act, an employer is required to prove that it complied with the requirements of fair process in terminating the services of an employee. **Section 41(1)** of the Act elaborates what entails fair procedure. In this regard, it requires an employer to notify an employee of the intended termination. As such, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.

12. Accordingly, for termination to meet the legal threshold, an employer must justify that there was reason to terminate the services of an employee and that such termination was in line with fair procedure. Such procedure entails giving the employee an opportunity to explain his side of the story or rather state his defence.

13. In the instant case, the claimant's letter of termination which is dated 11<sup>th</sup> August, 2016 reads as follows;

*“RE: TERMINATION OF EMPLOYMENT*

*TAKE NOTICE that the company hereby gives you a month notice terminate (sic) your services in accordance with the Employment Act. The notice commences from 11<sup>th</sup> July, 2016. TAKE FURTHER NOTICE that you are expected to handover all the company's properties and equipment's including the scrubber machine to the Human Resources Manager's office on or before 10<sup>th</sup> July, 2016.*

*Yours faithfully...”*

14. As can be discerned from the letter of termination, no reasons were advanced for the claimant's termination. Therefore, the very first limb of the requirement was not proved at all. In the circumstances, it is not possible to determine whether the reasons for the claimant's termination were valid or fair, as none were tendered at all.

15. Further, there is no evidence that the claimant was notified of any reasons to warrant his termination. Similarly, there was no evidence to suggest that the respondent gave the claimant an opportunity to tender his defence against the allegations if any. Besides, the letter of termination did not refer to any process that was undertaken prior to the letter being issued.

16. Coupled with the foregoing, the respondent did not tender any defence to rebut the assertions by the claimant. Further, and as indicated herein, the respondent did not participate in the hearing hence did not tender oral evidence to refute the assertions by the claimant. Therefore, this leaves only one possibility, and that is, there were no reasons to justify the claimant's termination and no disciplinary hearing or such related process was undertaken.

17. It is also discernable from the letter of termination that despite the respondent issuing “a months' notice” to the claimant, the same letter also requires him to handover all company property in his possession on or before, 10<sup>th</sup> July, 2016, which notably, was several days past the material date since the claimant averred that he was served with the said letter on 21<sup>st</sup> July, 2016. Therefore, it can be only be inferred that the termination was abrupt and the reference to the notice was merely on paper but not practical.

18. Be that as it may, and if it were the case that the respondent gave the claimant the requisite notice, it would still be irregular as no reasons were tendered at all.

19. In the case of **Kenfreight (E.A.) Limited v Benson K.Nguti, Civil Appeal No. 31 of 2015**, the Court of Appeal held that;

**“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken”.**

20. It was therefore not sufficient to merely issue the claimant with a letter of termination. The respondent was required to go a step further and explain to the claimant the reasons for the termination in the presence of another employee or a union official in a language that he understands. As I have stated herein, there was no evidence that the respondent took any steps to explain to the claimant the reasons for his termination.

21. The upshot of the foregoing is that the claimant's termination has one resultant effect, that is, the same was unfair and unlawful as it fell below the legal parameters stipulated under sections 43(1) and 45(2) of the Employment Act.

22. Having found as such, I now turn to the reliefs due to the claimant.

## **Reliefs**

23. Having found that the claimant's termination was unfair and unlawful, I will award him four (4) month's gross salary as compensatory damages. This award is informed by the fact the respondent did not advance any reasons whatsoever, for the claimant's termination and did not comply with the requirements of fair procedure in so doing.

24. I further award the claimant one (1) month's salary in lieu of notice, for reasons elucidated elsewhere in this judgment.

25. The claimant has averred that he worked upto 21<sup>st</sup> July, 2016 when he was issued with the letter of termination by the respondent, hence I will award him salary for 21 days as no evidence was tendered to the contrary.

26. As regards, the claim for leave and overtime, I will decline to make any award as no evidence for instance, leave records, were produced by the claimant to justify the entitlement.

#### **Orders**

27. Accordingly, I enter Judgment in favour of the claimant against the respondent as follows;

**(a) A declaration that the claimant's termination by the respondent was unfair and unlawful.**

**(b) The claimant is awarded compensatory damages in the sum of Kshs 39,200/= which sum is equivalent to 4 months gross salary.**

**(c) One month's salary in lieu of notice being Kshs 9,800/=.**

**(d) Salary for 21 days worked in July, 2016 being Kshs 6,860/=.**

**(e) The claimant shall have the costs of the suit.**

**(f) Interest on the amount in (b) (c) and (d) at court rates from the date of Judgement till payment in full.**

**DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>th</sup> day of November, 2021.**

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**STELLA RUTTO**

**JUDGE**

#### **Appearance:**

For the Claimant Mr. Waiganjo

For the Respondent No appearance

Court Assistant Barille Sora

#### **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 had 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.

**STELLA RUTTO**

**JUDGE**