



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1430 OF 2016

BONIFACE MUKOHE ISMOND.....CLAIMANT

VERSUS

METAL CANS & CLOSURE KENYA L.....1ST RESPONDENT

IN TIME MAN POWER SOLUTIONS.....2ND RESPONDENT

JUDGEMENT

On 15th December, 2013 the claimant was employed by the 1st respondent as a security guard at a monthly wage of Ksh.21, 000. Later the 1st respondent partnered with the 2nd respondent to take over the management of human resource without involving the employees.

On 7th February, 2015 the respondents wrongfully and unlawfully terminated the claimant's employment and refused to pay his terminal dues.

On 10th February, 2015 the 1st respondent wrote to the 2nd respondent of its decision to terminate the claimant's employment.

On 11th February, 2015 the 2nd respondent in compliance with the 1st respondent dismissed the claimant without notice, hearing or payment of his dues. he is claiming the following;

- a) Notice pay Ksh.21,000;
- b) Leave for a year Ksh.14,700;
- c) Compensation for unfair termination of employment Ksh.252, 000.

The claimant testified in support of his claim that upon employment he worked diligently. On 7th February, 2015 he was asked to clean/wash one of the director's vehicles and in the evening he said that the vehicle had a scratch. The claimant was given a warning. This was not part of his duties. The next day he was not allowed back to work. There was no hearing or any time given to allow him an opportunity to defend himself. There was unfair termination of employment.

In response, the 1st respondent's case is that vide an agreement it procured the services of the 2nd respondent, a personnel outsourcing company to provide them with employees who possess the necessary qualifications, competence and ability to handle the available work. The claimant was not working for them as alleged and the claims of unlawful termination of employment do not arise.

The response is also that the claims made are without proof and should be dismissed with costs.

No evidence was called by the respondent. on the date allocated for hearing, the claimant was heard on his case and an adjournment allowed to give the respondents time to call its witness. On the appointed day, the respondent did not attend.

The claimant filed his written submissions which have been put into account.

By letter dated 10th February, 2015 the 1st respondent terminated the employment of the claimant on the grounds that *he is not performing his duties as required by the company.*

Termination of employment on account of the employee not performing his duties properly is addressed under section 41 of the Employment Act, 2007. Subsection 41(1) requires that;

(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.

A poor performing employee must be issued with notice and allowed to give his defence. In **Kusow Billow Issack v Ministry of Interior and Coordination of National Government & 3 others [2021] eKLR** the court held that where the due process outlined under section 41 of the Employment Act, 2007 is not followed, the subsequent termination of employment is unlawful. And in **National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR** the Court of Appeal held that

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.

In this regard, where the claimant's employment terminated through a summary process without being given notice, a hearing or invited to attend in the presence of a fellow employee, that was wrongful and unlawful and contrary to the provisions of section 41 and 45 of the Employment Act, 2007.

The 1st respondent's case is also that they outsourced labour to the 2nd respondent who were responsible for the human resource. Such matter is left bare.

No agreement is attached to this effect and even in a case where such outsourcing was done, the employment of the claimant was with the 1st respondent as the principal employer. Any changes to the employment particulars ought to have been communicated to the claimant in writing and his consent obtained. Such is contrary to the provisions of section 10(5) of the Employment Act, 2007;

5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

Any change to the employment particulars should be communicated in writing and the employees allowed to read the same in a language he can understand pursuant to section 13(1) of the Employment Act;

(1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change. more fundamentally, an employer who changes the particulars of employment is bound by the provisions of section 13(6) and (7) and are required to inform the employee before such change is effected. The employee must make a conscious and informed decision in accepting or rejecting the change and the possible consequences thereof.

(6) Where, after an employer has given to an employee a statement under section 10 either—

(a) the name of the employer is changed without any change in the identity of the employer; or

(b) the identity of the employer is changed in circumstances in which the continuity of the employee's period of employment is not broken, and subsection (7) applies in relation to the change, the person who is the employer immediately after the change is not required to give to the employee a statement under section 12 but the change shall be treated as a change within subsection (1).

(7) Subsection (6) applies in relation to a change if it does not involve any change in any of the matters, other than the names of the parties, particulars of which are required by sections 10 and 11 to be included or referred to in the statement under subsection (1). in this case, there is no evidence that the 1st respondent made any effort to comply with the mandatory provisions of section 41, 35, section 10 of 13 of the Employment Act, 2007. The court finds employment terminated unfairly and the claimant is entitled to notice pay and compensation under section 35 and 49 of the Act. the employer remained the 1st respondent at all material times and who is hereby liable. the claimant was earning Ksh.21, 000 per month and a compensation of 3 months wages is found appropriate all at Ksh.63, 000.

Notice pay is awarded at one month's wage all at Ksh.21, 000.

The claimant is seeking leave pay for one year and based on the payable basic pay the claim for 14, 700 is found appropriate pursuant to the provisions of section 28 of the Employment Act.

The award of costs is discretionary and in this case the claim for costs is found with good foundation.

Accordingly judgement is hereby entered for the claimant against the 1st respondent in the following terms;

- a) compensation Ksh.63,000;
- b) notice pay Ksh.21,000;
- c) leave pay Ksh.14,700;
- d) dues above shall be paid within 30 days after which interests shall accrue from the date due and until paid in full; and
- e) costs of the suit.

DELIVERED IN COURT AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2021.

M. MBARU

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: OKODOI

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and

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