



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 2030 OF 2016**

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS UNION.....CLAIMANT**

**VERSUS**

**VISHNU ENTERPRISES .....RESPONDENT**

**JUDGEMENT**

1. The claim arises out of a dispute between the grievant and the respondent. The claimant union filed the instant suit on behalf of the grievant, Mr. Andrew Maluta, who it claims is its member. It is alleged in the claim that the grievant was employed as a driver, with effect from 26<sup>th</sup> November, 2014 on a monthly salary was Kshs 25,000/=.
2. The grievant stated that he was verbally terminated on 18<sup>th</sup> December, 2015. That on the material day, at about 2:00 pm, the motor vehicle registration number KBV 648Z, which he was assigned to drive, developed mechanical problems and when he notified the respondent through one Mr. Vinot Harai, he was ordered to go and repair the vehicle.
3. That he was not given further direction in that regard and specifically, where to take the motor vehicle for repairs. That when he sought for further clarification on the issue, Mr. Vinot Harai demanded that he hands over the keys to the motor vehicle and verbally ordered him out of respondent's premises.
4. The grievant averred that he was later paid his dues by the respondent on 24<sup>th</sup> December, 2015, whereafter he was told that his services were no longer required. He stated that all the other dues including house allowance and unpaid leave remained outstanding.
5. He averred that he referred the matter for conciliation at the Ministry of Labour, Social Security and Services, through the claimant union. That the conciliator recommended that the respondent pays his dues totaling **Kshs 39,423.00**, which figure he disputed as he alleges it was exclusive of house allowance.
6. That nonetheless, the respondent refused to comply with the conciliator's recommendation hence the instant claim through which the grievant seeks various reliefs including reinstatement, payment of salary in lieu of notice, payment of accrued leave days, unpaid house allowance, compensatory damages for unlawful termination and costs of the suit.
7. The respondent entered appearance on 28<sup>th</sup> July, 2016 through the firm of K.K Nyakundi & Co. Advocates. It later filed a memorandum of response in answer to the claim wherein it denies all the averments stipulated in the memorandum of claim. It denied terminating the services of the grievant and prayed that the suit be dismissed with costs. It is noteworthy that the response by the respondent comprises total denials with no further and better particulars addressing the dispute at hand. The respondent did not file any witness statements nor bundle of documents in support of its defence.
8. The matter came up for hearing on 11<sup>th</sup> August, 2021 and the respondent was absent from Court. The claimant union sought to rely on its pleadings and opted not to call any witness to render oral testimony.
9. The court directed the claimant to file an Affidavit of Service to confirm that it effected service of the day's hearing notice upon the respondent. Consequently, the matter was scheduled for mention on 13<sup>th</sup> August, 2021 to confirm filing of the Affidavit of Service.
10. The claimant union filed an Affidavit of service sworn on 29<sup>th</sup> July, 2021 by Diffinah Moithaga Nyamwange, wherein she deponed that she effected service of the hearing notice of 11<sup>th</sup> August, 2021 electronically, on the respondent's Advocates through the address, kenkia15@yahoo.com. It is worth noting that the respondent provided the said email address in its Memorandum of Appearance and Response.

11. The claimant union further filed an Affidavit of Service dated 11<sup>th</sup> August, 2021 sworn by the said Diffinah Moithaga Nyamwange through which she deponed that she effected service of the mention notice of 13<sup>th</sup> August, 2021 upon the respondent's Advocates.

12. On 13<sup>th</sup> August, 2021, the matter came up for mention and upon the court being satisfied with the return of service, directed that the claimant to file its submissions within 14 days thereof.

13. The claimant filed its submissions dated 31<sup>st</sup> August, 2021 and attached thereon a copy of an Affidavit of Service indicating that it had served the said submissions upon the respondent on 10<sup>th</sup> September, 2021 via the email address, [kenkia15@yahoo.com](mailto:kenkia15@yahoo.com).

#### **Submissions**

14. The claimant filed written submissions through which it submitted that the grievant's employment was terminated unlawfully and unfairly contrary to the provisions of sections 42 (1) and 45 of the Employment Act. The respondent did not tender any submissions for consideration by court.

#### **Analysis and determination**

15. Having considered the pleadings on record, and the claimant's submissions, the issues for determination can be distilled as follows;

**i. Whether the grievant and the respondent had an existing employment relationship?**

**ii. If the answer to (i) is in the affirmative, was the grievant's termination wrongful and unlawful?**

**iii. Is the grievant entitled to the reliefs sought?**

#### **Whether the grievant an employee of the respondent?**

16. I have found it imperative to address this issue given that the respondent has disputed the employment relationship through its memorandum of response dated 19<sup>th</sup> September, 2016.

17. The claimant at paragraph 1.2 and 2.0 has averred that he was employed by the respondent. As stated above, the respondent has disputed this fact vide paragraph 2 and 3 of its response.

18. Section 2 of the Employment Act defines an "Employee" to mean **a person employed for wages or a salary and includes an apprentice and indentured learner.**

19. Section 2 of the Act proceeds to define an employer as **any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.**

20. The grievant has not produced any letter of appointment to justify his engagement with the respondent. Nonetheless, there is a letter from the advocate representing the respondent marked as Appendix 4 and which states as follows;

*"That the said Andrew Muluta was given notice on 18/12/15 and proceeded for his leave upto 18/1/16. When he reported back, he was paid all his outstanding dues and our client does not owe him any amounts. Note that the employee had only worked for one (1) year and the other demands do not apply."*

21. Though not provided for in explicit terms, the above letter implies that there was an employer- employee relationship between the parties. Indeed, the letter refers to the grievant as an "employee". This is besides referring to terms such as "notice" and "leave", which are commonly used in respect of an employment relationship. In any case, the spirit of the letter connotes an existing employment relationship. It is therefore apparent that there was an existing employment relationship between the parties.

22. That issue having been settled, I will now proceed to consider whether the grievant's termination was unfair and unlawful.

#### **Whether the grievant's termination wrongful and unlawful**

23. In order to determine whether an employee's termination is unfair and unlawful, an employer must prove that there were reasons to terminate the employee and that is so doing, it complied with the requirements of fair hearing also known as, procedural fairness.

24. The prove for reasons is stipulated under **section 43(1)** of the Employment Act (Act). **Section 45 (2)** of the Act goes further to provide that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid and fair and related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.

25. There is more. Sub-sections 4 and 5 of section 45 stipulates the circumstances under which the termination would be unfair and also the factors to be considered. On its part, section 46 stipulates the matters that do not constitute fair reasons for dismissal.

26. In the instant case, the respondent merely denied all the averments contained in the claim and did not proffer any reason or justification whatsoever, for the grievant's termination. Besides, there was no appearance in court hence there was no oral testimony that was rendered in court to prove or even suggest that it may have had reasons to terminate the services of the grievant.

27. In the case of **Chairman Board of Directors (National Water Conservation and Pipeline Corporation) v Meshack M. Saboke & 2 others, Nairobi Civil Appeal No. 241 of 2015**, the Court of Appeal found as follows;

**“.....termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair. Section 43 of the Employment Act deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45. The reason for termination of contract is the matter that the employer at the time of termination of the contract, genuinely believed to exist and which caused the employer to terminate the services of the employee...”**

28. In this case, no reason at all was advanced by the respondent to justify termination of the grievant's services. In absence of such reasons, I find that the respondent has not discharged its burden under the law.

29. As regards the second limb which is procedural fairness, the respondent was required to comply with the provisions of **section 45 (2) (c)** read together with **section 41** of the Act. This entailed notifying the grievant of the reasons it was considering terminating his services. In that case, it ought to have communicated such reasons in a language the grievant understands and in the presence of another employee or a shop floor union representative.

30. There was no indication or even suggestion by the respondent that this process was ever undertaken. Subsequently, it can only be presumed that there was none. To that end, I find that the grievant was not accorded procedural fairness prior to his termination.

31. The totality of the foregoing is that the respondent has failed to prove that there were reasons to terminate the grievant's employment and that it did not accord him fair hearing prior to effecting the said termination. The resultant termination was therefore unfair and unlawful in terms of section 43 (1) read together with section 45(2) of the Act.

## **Reliefs**

### **Reinstatement**

32. **Section 12 (3) of the Employment and Labour Relations Court Act** clothes this court with jurisdiction to order reinstatement of a dismissed employee. This power is not absolute and is limited to 3 years from the time of dismissal. In this case, the grievant was terminated on 18<sup>th</sup> December, 2015. It is now close to 6 years since then hence this remedy is no longer available to the grievant by effluxion of time.

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

33. Section 44(2) of the Employment Act, prohibits an employer from summarily dismissing an employee without notice or with less notice. On the other hand, section 35 (1) (c) of the Act provides for a mandatory one month notice where an employee is on a monthly salary as the grievant herein. Subsequently, the court finds that the grievant is entitled to one month's salary in lieu of notice on account of the unlawful termination.

### **Accrued Annual leave**

34. The grievant has prayed for compensation of accrued annual leave in the sum of Kshs 20,192.30/=. No proof was tendered to substantiate this claim for instance, unapproved leave application forms and in absence thereof, this prayer is denied.

### **House Allowance**

35. The grievant has prayed for payment of house allowance in the sum of Kshs 45,000/= to cover the entire duration he was employed by the respondent. The claimant averred that he was earning a gross monthly salary of Kshs 25,000/=. In the case of **Samson Omechi Ongera v Tusker Mattresses Limited [2018] eKLR**, the court found that **“Gross monthly pay comprises of basic pay together with house allowance but does not include other work dependent allowances such as bonus or car allowance and overtime.”** The court arrived at a similar finding in the case of **Joseph Sani Orina vs Hiproba Business solution (E.A) Limited**.

36. The court arrives at a similar finding and finds that the claimant's salary was inclusive of house allowance, hence the prayer in that respect is denied.

### **Compensatory damages**

37. The claim seeks maximum compensatory damages in the sum of Kshs 345,000/= which has been pegged at Kshs 28,750/=. Having found that the grievant's dismissal was unfair, I will award compensatory damages equivalent to two (2) months' gross salary. This award has been informed by the length of the employment relationship which lasted for about 1 year or so.

## **Conclusion**

38. In the final analysis, I enter judgment in favour of the claimant, hence the grievant will be entitled to:

a) 2 months' salary in compensation.....Kshs 50,000.00

b) 1 month's salary in lieu of notice.....Kshs 25,000.00

**Total.....Kshs 75,000.00**

39. The award will be subject to interest at court rates from the date of judgment until payment in full.

40. The respondent shall also bear the costs of this claim.

**DATED, SIGNED and DELIVERED at NAIROBI this 19<sup>th</sup> day of November, 2021.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For Claimant Ms. Macharia

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**