



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MAURICE OMONDI RAKIRA ..... CLAIMANT

-VERSUS-

LOAD TRAILERS EAST AFRICA LIMITED.....RESPONDENT

CAUSE NO. 788 OF 2017

JUDGMENT

**Introduction**

1. At all material times with effect April 2016, the Claimant was in the employment of the Respondent as a machine operator, earning a salary of Kshs. 17,200. On the 12<sup>th</sup> December 2013, his employment came to a halt at the prompting of the Respondent's managing Director one Jack. Contending that the termination of his employment suffered from lack of validity and fairness in reason, and procedural fairness, the Claimant instituted this claim seeking a galaxy of reliefs against the Respondent.

2. On the 21<sup>ST</sup> July 2016 the Court certified this cause to proceed for hearing as an undefended cause. The Respondent having failed to enter appearance and file a response to the Claimant's memorandum of claim.

3. In an attempt to get back to track, the Respondent filed an application dated 11<sup>th</sup> May 2020, wherein it sought *inter alia*, that the Court be pleased to set aside the orders issued on 21<sup>st</sup> July 2016 directing the matter to proceed for hearing as an undefended cause, and consequently grant leave to the Respondent to file its memorandum of response out of time.

4. Any hope that the Respondent could defend the cause was thwarted by this holding by Justice Nduma, thus;

***“25. It is the finding of the Court that enlarging time to file defence more than five (5) years down the line will be prejudicial to the Claimant / Respondent who has gone to every extent to notify the indolent Applicant in this matter, but the Applicant has inordinately slept on its right. The threshold established by the Court to Appeal for the Court to exercise its discretion in favour of an applicant seeking enlargement of time in James Kanyiita Nderitu & Another -vs- Marios Philotas Ghikas & Another [2016] eKLR has not been met by the Applicant in present case. The Applicant has not demonstrated an excusable mistake, inadvertence, accident or error. This is a clear case of blatant disregard of the Court Process so as to deliberately delay conclusion of this matter.”***

in the ruling on the said application.

5. The matter therefore had to proceed as a formal proof.

**The Claimant's case**

6. The Claimant's case is contained in the statement of claim, his witness statement, the documents that he filed herein, and the brief oral testimony that he made in Court on the day the matter came up for hearing. Imperative to state that his witness statement was adopted as his evidence in chief and the documents admitted in evidence as his exhibits.

7. The Claimant stated that at all material times to this matter he was an employee of the respondent as a machine operator. His said employment commenced in April 2006, and his salary was Kshs. 17,200 monthly.

8. He stated that on the 9<sup>th</sup> December, 2013 he sought for sick leave from the Accounts manager, one Mr. Jack who was charged with the responsibility to consider and grant the same. The request for the leave was occasioned by the fact that the Claimant's wife was sick, and the Claimant wanted a time off to go to take care of her. The request was granted.

9. The Claimant further stated that on or about the 12<sup>th</sup> December 2013, while at home attending to his sick wife, he was called by the managing Director who informed him that his services were no longer required and that he should not bother reporting back to work.

10. The Claimant contended that he was not accorded a hearing or reasons for his dismissal. He asserted that the manner in which he was dismissed amounted to an unfair labour practice on the part of the Respondent and an affront on the provisions of the Employment Act, 2007 and the principles of natural justice.

11. Cross examined by counsel for the Respondent, the Claimant reiterated that he was employed in April 2006. That the written contract of employment he had, got burnt in 2007. He confirmed that however, among the documents he presented to Court was a contract dated 13<sup>th</sup> November, 2013.

12. He further stated under cross examination, that the contract provided for termination via a written notice. He further stated that leave was to be applied for formally.

13. The claimant stated that he orally applied for the leave and that the grant of the same was equally oral. He went ahead to state that his last day of work was on the 7/12/2012 which was on a Saturday and the termination came in on 9<sup>th</sup> December 2013, a Monday.

14. The Claimant denied the suggestion that he absconded duty.

15. Currently he is working elsewhere, having gotten employed in 2014. He acceded to the suggestion by counsel for the Respondent that his November salary was fully paid.

16. In his evidence under re-examination, the Claimant stated that he was dismissed on the 12<sup>th</sup> December 2013. He got the new job after that termination.

### **The Claimant's submissions**

17. The Claimant's counsel identified three issues as the issues he considers emerging for determination in this matter, thus;

- (i) Was fair procedure applied before dismissing the Claimant?
- (ii) Were the issues substantively and factually proved to cause for dismissal?
- (iii) Is the Claimant entitled to the prayers sought?

18. Submitting on whether fair procedure was applied before the dismissal, counsel stated that under section 45 of the Employment Act, 2007, the employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure.

19. That assuming the Claimant was liable for gross-misconduct, he still ought to have been subjected to a fair disciplinary process. Reliance was placed on Justice Wasilwa's holding in *Justine Onwoyo Among'a vs= Mount Kenya University [2016] eKLR*, to buttress this. Too, the holding in the case of *Walter Ogal Anuro vs= Teachers Service Commission [2013] eKLR*, where the Court held;

***“For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”***

20. On substantive validity of the reasons for termination, counsel submitted that there was no substantive justification for the reasons leading to the dismissal. Further that the Respondent having failed to present its case, the evidence tendered by the Claimant remained uncontroverted. The case of *Stanley Mwangi Gachungu & Another vs= Barclays Bank of Kenya Limited [2019] eKLR* was cited in fortification of this.

### **Of the reliefs sought**

#### **(i) Notice**

21. It was submitted that notice having not been given or a payment made in lieu thereof, the Claimant is entitled to a one month's salary in lieu of notice under section 36 of the Act.

#### **(ii) Untaken / unpaid leave**

22. On the Claimant's evidence that he never proceeded for leave throughout his time with the Respondent, counsel submits that this Court should find that compensation is awardable under section 28 of the Employment Act.

#### **(iii) Service / gratuity pay**

23. It is submitted that since the Claimant was not a member of the National Social Security Fund (NSSF), or any of those schemes set out in

section 35 (6) of the Act, he is entitled to service pay pursuant to the provisions of section 35 (5) of the Act.

**(iv) Compensation**

24. It was further submitted that following the unfair termination, this Court should award the Claimant a compensatory relief of 12 (twelve) months' gross salary. The Court is urged to consider the inhumane manner in which the Claimant was terminated. Reliance is put on the case of *Justine Onwoya Among'a vs= Mount Kenya University [2016] eKLR*.

**The Respondent's submissions**

25. The Respondent filed written submissions in which it has identified three issues as the issues for determination in this matter.

- (i) Whether the Claimant herein applied for leave to attend to his sick wife?
- (ii) Whether the Claimant was dismissed by the Respondent.
- (iii) Whether the Claimant is entitled to the orders sought.

26. The Court notes that the Respondent has made submissions on factual matters that did not come up in the evidence of the Claimant. Absent of any testimony by a Respondent's witness, to consider the submission on those factual issues would amount to accepting its testimony through the back door. I am not prepared to do that. So, the Respondent's submission that the Claimant absconded from duty does not flow from any evidence on record. The submission that he abandoned his work, too.

27. The submission largely dwells on the abandonment of duty. I find the submissions not relevant and unhelpful therefore.

**Determination**

28. I find the following broad issues, the issues that I should make a determination on, thus;

- a) Whether there was termination of the Claimant's employment.
- b) If the answer to (a) above is in the affirmative, was the termination procedurally fair?
- c) Whether the termination was substantively fair.
- d) What reliefs are available to the Claimant if any?
- e) Who should bear costs of this suit?

**Of whether the Claimant's employment was terminated**

29. The Claimant proffered evidence, on how his employment was terminated. The account was not controverted in any manner. In the case of *Rebeka Nyangolo vs= Prashant Raval [2021] eKLR*, the Court held that in order to be held that there was a termination of an employee's employment, there must be an overt act by the employer pointing towards a termination. The Claimant stated that the managing Director called him and told him not to get back to work. This was an overt act. In the upshot the answer to this issue is in the affirmative.

**Whether the termination was procedurally fair**

30. Section 45 of the employment, 2007, dictates that no employer shall terminate the employment of an employee unfairly. Section 45 (2) (c), provides the foundation for insistence on engagement of a fair procedure, if a termination of employment were to be considered fair. – *Lydia Morga Obara vs= Tusker Mattresses Limited [2021] eKLR*.

31. The answer as to what fair procedure is, is found in the provisions of section 41 of the Employment Act. The procedure stipulated therein is mandatory and any non-adherence to the same will always render a termination or summary dismissal procedurally unfair.

32. Information, a hearing and consideration are the three vital components of fair procedure. The employee must be informed clearly of the grounds that the employer intends to lay basis on in the contemplated action – termination of employment or summary dismissal, against the employee. The employee must be given an opportunity to make representations on those grounds. A decision to terminate should be in nature a considered one. This makes it imperative that the employer considers the representation(s) before taking action. This did not happen in the instant matter. The conclusion flowing from this, therefore being that the termination was not procedurally fair.

**Whether the termination was substantively fair**

33. Section 43 of the Act, places upon the employer an obligation to prove the reasons for termination of a contract of service. Section 45 places upon the employer a further obligation to demonstrate that the termination of the contract of employment or dismissal was upon a valid and fair reason. The Respondent did not put any evidence before this Court. It cannot be said to have discharged the burden under these provisions. The only inescapable conclusion being therefore that the termination was substantively unfair.

## **Of the reliefs**

34. In the circumstances of this matter the Claimant's claim for one month's salary in lieu of notice is not farfetched. Section 36 of the Employment Act sanctions this. Under this head the Claimant is awarded Kshs. 17,200.

35. The Claimant seeks for payment in lieu of untaken/unpaid leave for the years 2008, 2010, 2011, 2012 and 2013. The claim herein was filed on the 12<sup>th</sup> May 2015. In making an award under this head, the provisions of section 90 of the Employment Act should be taken into account. It could definitely forbid any award that shall be for the period outside the three years immediately before the 15<sup>th</sup> May 2015. Therefore if an award has to be made, then it should be for the period 14<sup>th</sup> May 2012 to the 15<sup>th</sup> May 2015. By reason of this premise and considering that the termination is alleged to have occurred on the 12<sup>th</sup> December 2013, I find that the relevant period of consideration as being one and half years. I consequently award the Claimant Kshs. 25,800.

36. **Service pay** – I have carefully analyzed the Claimant's pleadings, the evidence placed before me, but come across nothing that suggests that the Claimant was alleging that the Respondent was deducting the Claimant's salary for NSSF dues but without remitting the deducted sum to the relevant entity. I do not therefore agree with the Claimant's submissions that though the Respondent was making the statutory deduction he was not doing remittances. The Claimant has not sued for any sum deducted but not remitted. Nothing would have been easier than availing a statement of account on the contributions to demonstrate that which the Claimant is alleging.

37. The pay slips produced by the Claimant shows the deductions. For purposes of section 35 (5) and 35 (6) of the Act, the Claimant was a member of NSSF and therefore not entitled to service pay. I decline to award the relief consequently.

38. Having found that the termination was both procedurally and substantively unfair, I hold that the Claimant is entitled to the compensatory relief envisioned under section 49 (1) (c). Considering the manner in which the termination occurred, which would easily pass for unfair labour practices and the length of time the Claimant was in the service of the respondent, an award of 5 month's gross salary will serve justice. Therefore, Kshs. 86,000.

39. Lastly, as costs follow the event, costs of the claim herein shall be in favour of the Claimant.

40. In the upshot, I enter Judgment for the claimant in the following terms;

- (i) One month's salary in lieu of notice, Kshs. 17,200;
- (ii) Unpaid leave Ksh.s. 25,800;
- (iii) Compensation pursuant to section 49 (1) (c) Kshs. 86,000;
- (iv) Costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2021**

**OCHARO KEBIRA**

**JUDGE**

Delivered in presence of;

Mr. Kariuki for the Claimant.

Ms. Adhiambo for the Respondent.