



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO.60 OF 2018

TOM OBONYO.....CLAIMANT

VERSUS

TEX PRO LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 22nd February, 2018 on even date through the firm of Imbwaga, Yogo and Partners Advocates, claiming unfair termination and to be compensated for the alleged unfair termination.
2. The summary of the claimant's case is that he was employed by the Respondent on or about 1st June, 2017 as a textile designer which work he performed diligently till 5th June, 2017 when he was summarily dismissed. At the time of dismissal, the claimant was earning a salary of Kshs. 22,000 per month.
3. The claimant stated that he was subjected to a sham, speedy and flawed hearing of sorts before he was terminated without payment of his terminal dues contrary to the contract of employment and the CBA between the Respondent and Tailors and Textile Workers Union (TTWU) which required that an employee can be terminated after being issued with at least three warning letters.
4. It is stated that the claimant throughout his employment never went for any leave and was only compensated for the said leave by payment of Kshs 10,500 on account of leave.
5. The claimant stated that he was not paid any house allowance as provided for under the law. Also that he was not paid gratuity for the 24 years worked when the CBA provided for payment of gratuity.
6. Its alleged that the claimant was served with a Notice to Show cause, however that the disciplinary hearing was a sham and the termination thereafter was unfair and illegal.
7. The claimant therefore prays for judgment against the Respondent for Orders that; -
 - a) **A declaration that the claimant's dismissal was unlawful, unjust and discriminative and the same amounts to unfair dismissal.**
 - b) **Compensation for the unfair dismissal.**
 - c) **An Order compelling the Respondent to settle the outstanding benefits as outlined at paragraph 25 above.**
 - d) **Cost of suit and interest thereof at court rate.**
 - e) **Any other relief that this Court may deem fit to grant.**
8. The Respondent entered Appearance on the 21st March, 2018 and filed its response to the claim on the 29th June, 2018 admitting having employed the claimant and alleged that the claimant enjoyed all his leave days in every December of every year save for December, 2016 which he was however compensated for and erroneously paid up to and including 15th January, 2017. Further that he was paid his salary for January 2017 in full.

9. The Respondent then realized the anomaly and sought to recover the monies paid to the claimant for the 15 days in January. The claimant became adamant and as a result the claimant started neglecting his duties and at times absented himself from his place of work.

10. The Respondent then issued him with a warning letter on the 16th March, 2017 for absenting himself from work without permission on the 8th March, 2017 and for working for only 5 hours on 6th March, 2017 and 9th March, 2017 without any lawful excuse. Another warning letter was served upon the claimant on the 17th March, 2017.

11. The Respondent then issued the claimant with a show cause letter dated 7th April, 2017 on the basis of absenteeism. In response to the show cause the claimant failed to give reason for absenting himself from work and instead questioned the deduction of his salary.

12. The disciplinary hearing was scheduled for 26th April, 2017 however it was adjourned twice for same reason that the claimant failed to attend hearing with a colleague/employee of his choice.

13. The disciplinary hearing was abandoned and the claimant was served with another show cause letter on account of lateness and assaulting the director and a disciplinary hearing was scheduled for 5th June, 2017. This time the claimant attended the hearing still without a co-worker and requested to exit the company and to be paid his dues for the years worked.

14. On the reliefs sought the Respondent stated that the claimant was paid a consolidated salary thus not entitled to house allowance. Also that he utilized all his leave days. On the underpayment, the respondent stated that the claimant was paid over and above what the statutory regulation provides for since as a tailor he was considered as a machine attendant.

15. The Respondent further stated that there is no CBA let alone recognition agreement between it and the Claimant's alleged trade Union, therefore the Gratuity allegedly payable as per the CBA is not justified.

16. The Respondent stated that the claimant left its employ on his own volition and was never sacked as alleged therefore the prayers sought are without any justification.

Hearing.

17. The claimant, **Tom Obonyo-CW-1** testified that he was employed by the Respondent in the year 1993 as a tailor earning a monthly salary of Kshs. 22,000 and adopted his witness statement that reiterated the contents of the claim.

18. On cross examination, he testified that he was paid his January salary in full. However, his February pay was slashed on allegation that the Respondent was recovering excess monies paid to him. He testified that he tried to follow up on how he was paid in excess and in return the director send him away and he lost his job.

19. The Respondent called one witness, **Baiju Patel RW-1**, the Respondent managing director, who adopted his witness statement filed on 27.5.2021.

20. On cross examination, he testified that the Respondent paid the claimant a salary of Kshs. 15,000 per month and not Kshs 22,000/- as alleged in his pleadings. He testified that the claimant took his annual leave in December,2016 which leave run till 15th January, 2017. Since the claimant worked for half of the month of January, he was to be paid half salary, however he was paid full salary having been paid his December salary in full as well while he was on leave. He testified further that upon realization of the anomaly the Respondent rectified the mistake and deducted the claimant's February salary to recover the excess monies paid to him. However the claimant did not take that well and the issue escalated and became a disciplinary issue since the claimant began absenting himself from work.

21. On further cross examination he told the court that the claimant was not paid any terminal dues since he was suspended from work and not terminated.

Claimants submissions.

22. The claimant submitted on two issues; whether he was unfairly terminated and whether he is entitled to the reliefs sought.

23. On the first issue the claimant submitted that, the disciplinary hearing conducted on the 5th June, 2017 was a sham for the reason that he was not served with the charges prior to the meeting neither was he given an opportunity to file a defence to the disciplinary charges. He thus argued that the procedure followed by the Respondent did not meet the threshold of section 41 of the Employment Act.

24. It was submitted that his termination did not meet both the substantive justification and procedural fairness contemplated under the act and reinforced in **Walter Ogal Anuro V Teachers Service Commission [2013] eKLR**.

25. The Claimant then submitted that as much as the Respondent alleged that he absconded duty and left on his volition, it is imperative upon the Respondent to demonstrate to this Court the steps he took to contact the employee. In this he cited the case of **Simon Mbithi Mbane V Inter Security Services Limited [2018] eKLR**.

26. Accordingly, it was submitted that the Respondent has no furnished this Court with any evidence to affirm their ground that he absconded Duty therefore their defense must fall and his Claim be allowed as prayed.

Respondent's Submissions

27. The Respondent on the other hand submitted that the issue arose in December, 2016 when the claimant took his annual leave and was to report back mid of January. However, the Respondent erroneously paid the claimant his December salary up to 15th January, 2017 and further paid him his January salary in full which anomaly the Respondent tried to correct by informing the claimant and later deducted the monies which had been paid in excess.

28. That this issue made the claimant abscond duty and at times reported to work late. The issue became a subject of the disciplinary hearing held on 5th June, 2017 where the claimant requested to be paid his terminal dues and later left the Respondent employment without any communication.

29. It was then submitted that the claimant left the Respondent employ and was not terminated as alleged. The Respondent argued that the claimant was tasked under section 47 (5) of the Employment Act to furnish this Court with evidence that he was terminated unfairly, while the Respondent was tasked with justifying the grounds for the termination. In this they submitted that the Respondent has produced minutes before this court showing that the claimant requested to be paid his terminal dues, which minutes were signed by the claimant.

30. According it was submitted that the claimant failed to prove his case on a balance of probability and prayed that the claim be dismissed.

31. I have examined all the evidence and submissions of the parties herein. The claimant's contention is that he was terminated by the respondent after a flawed disciplinary process. The respondents on their part contend that the claimant absconded duty and was not dismissed. The respondents aver that the claimant was overpaid his January 2017 pay since he was paid for leave and also proceeded on leave.

32. The attempt to recover the overpayment led to disagreement with the claimant and he refused to receive the cash which was deposited with the Labour Office.

33. The claimant intimated that he was denied his February 2017 salary on a presumed overpayment of January 2017 salary.

34. As contended by the claimant there was some disagreement on pay and this seems to have escalated further and the claimant was later subjected to some disciplinary hearing.

35. The RW1 who alleged that the claimant was overpaid did not submit any documents to prove the overpayment. The respondents aver that after this the claimant refused to work well and reported to work late or skipped work all together. Again evidence of the late reporting and absenteeism was not established by the respondent.

36. The RW1 in evidence stated that the claimant was only suspended after this and not terminated. However the statement recorded by the RW1 indicated that he absconded duty. This is a contradiction in terms of what really transpired.

37. If indeed the claimant absconded duty, there is no indication that he was subjected to any disciplinary hearing for absconding duty.

38. There is indication that the parties had reported the dispute to the Labour Office and there is also no indication that the claimant was summoned to the labour office for absconding duty.

39. It is my finding that the issue of absconding duty is not established at all. The respondents even indicate that the claimant himself requested to be paid his dues for years worked and to exit the company. This also is not supported by evidence.

40. The conclusion, on this is that the respondents are breathing both cold and hot and I therefore find that the claimant was terminated by the respondent without valid reasons and without being subjected to any fair hearing.

41. In terms of Section 45 (1) of the Employment Act 2007, the claimant was unfairly terminated and I declare so.

42. In terms of remedies sought, I find that the claimant is entitled to payment of the following;

1. 1 month salary in lieu of notice 22,000/=

2. House allowance for 3 years at 15% of salary the rest of the claim being time barred

= $15/100 \times 22,000 \times 36 = 118,800/=$

3. Compensation for unfair termination for 6 months

= $6 \times 22,000 = 132,000/=$

TOTAL payable = 382,800/=

Less statutory deduction

4. The respondent will pay cost of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 16TH DAY OF NOVEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for parties

Court Assistant - Fred