



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.323 OF 2019

LUKA MUVINGA MUTEMI CLAIMANT

VERSUS

SAI RAJ LIMITEDRESPONDENT

JUDGEMENT

On 1st August, 2018 the respondent employed the claimant as a production supervisor where he worked until 21st November, 2018.

The claim is that employment was terminated unfairly since the claimant had a two years contract and was not allowed to serve the entire term. That on 21st December, 2018 the human resource manager issued notice terminating employment without giving any reasons which was wrongful and unlawful.

The claimant was earning ksh.85,000 per month and had 19 months of his contract which he had hoped to serve and is seeking for the payment of his terminal dues;

- a) 19 months' salary term contract Kh.1,615,000;
- b) Notice pay Ksh.85,000;
- c) Transport allowance at ksh.15,816 per month all Ksh.300,000;
- d) House allowances at 12,750 all ksh.242, 250.

The claimant testified that he was employed under a two years contract starting on 1st August, 2018 but on 21st December, 2018 the human resource manager called him and said the respondent was facing challenges and he would be issued with a new contract. When they closed for Christmas, in January, 2019 they found the gates close. The human resource manager said he had to interview the claimant afresh and directed him to go home and await communication. He was never called.

The claimant testified that he instructed his advocates to write to the respondent to know his work status and in response the respondent stated that termination of employment was lawful and the claimant had been lazy and warning had been issued. This was not true and no evidence has been submitted in this regard and the claims made should issue with costs.

The claimant called Martin Esakina Papa as his witness and an expert in forensic signature analyst and who testified that he received instructions from the claimant's advocate to analyse signatures and letters submitted by the respondent with regard to disciplinary hearing and upon analysis his opinion is that these were not signed by the claimant.

In response, the respondent's case is that the claimant was employed as a production supervisor until 22nd December, 2018 when his employment was lawfully terminated for good cause. His position required utmost trust and responsibility but he was of gross negligence of his duties and unprofessional activities to the detriment of the respondent's operations in breach of his employment contract.

The claimant failed to perform his duties properly and had been warned severally and warned of consequences that is his performance did not change it would lead to termination of employment.

The claimant was issued with notice and his employment terminated lawfully and his case should be dismissed.

The respondent called Morris Otieno a supervisor and who testified that he worked in the spray department while the claimant was a supervisor in the body building under the fabrication department his peer. The claimant miscondacted himself leading to termination of

employment. his work was poor and he noted this since the claimant had to supervise body building which then went to his department for spraying and he noted he had done poor work forcing one client to complaint and the claimant was sent to Mombasa to re-do the work causing the respondent great expense.

Mr Otieno also testified that the claimant was issued with verbal and written warnings but he failed to take heed leading to termination of employment. He was then paid his final dues.

At the close of the hearing both parties filed written submissions.

Determination

The claimant's case is that his employment was terminated unfairly and without due process. The letter attached by the respondents that he apologised for poor work is a fabrication and he never wrote such letters. He called a document analyst as his witness to confirm he ever wrote such letter.

The respondent's case is that the claimant poorly performed his duties, he was negligent and this led to loss and termination of employment was for good cause and lawful.

Due process of the law requires that before an employee is dismissed from his employment, the employer should require the employee to show cause and then notice should issue and allow the employee to defend his employment. This is the essence of section 41 of the Employment Act, 2007 which is couched in mandatory terms that an employer should notify and hear any representations an employee may wish to make whenever termination of employment is contemplated by the employer and is entitled to have a representative present.

In the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2013] eKLR** the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.

Section 41 of the Employment Act, 2007 provides 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.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make [Emphasis Added]

The Court of Appeal in **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** held:

There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.

The claim that the claimant was lazy, negligence, caused loss to the respondent or that he was of gross misconduct is left bare and without evidence.

The letters allegedly written by the claimant admitting to misconduct, which is contested, the document looked at with a naked eye and without the expert document analyst who a huge contract with a document written in the hand of the claimant, the Verifying Affidavit in support of the Memorandum of Claim. The signatures thereof is at great variance with the document presented by the respondent.

Even in a case where the claimant wrote such letter, which is not the case here, in employment and labour relations, where an employee is said to be negligent, of poor work performance, he due process requires that the employer should issue notice be issued and the employee given a hearing at the shop floor.

There is no evidence that the claimant was taken through the due process and procedures contemplated under section 41 of the Employment Act, 2007. Employment terminated unlawfully and such is unfair pursuant to the provisions of section 45 of the Employment Act, 2007.

The claimant is seeking for payment of the 19 months contract term not served. He has however not addressed any mitigating factors as to why he has not secured new employment. On the finding that employment terminated unfairly, compensation is due pursuant to the provisions of section 49 of the Act and payment of two (2) months is hereby found appropriate.

The claimant was earning ksh.85, 000 per months and compensations awarded at Ksh.170, 000.

There is no evidence to support any notice having issued to the claimant before employment terminated. Section 35 of the Act requires notice

for one month or payment in lieu thereof. The claimant is awarded ksh.85, 000 in notice pay.

The claim for transport and house allowance, are not benefits under the contract of employment. Though paid under the payment statement, employment terminated on 22nd December, 2018 together with the attendant benefits.

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

(a) Compensation Ksh.170,000;

(b) Notice pay Ksh.85,000;

(c) Dues at (a) and (b) shall be paid within 60 days after which time these shall be paid with interests until paid in full; and

(d) Costs of the suit.

DELIVERED IN COURT AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

.....and.....