



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**CAUSE NO. 533 OF 2016**

**DANIEL OCHIEKU ACHOCHI.....CLAIMANT**

**VERSUS**

**DYNAPLAST LIMITED ..... RESPONDENT**

**JUDGMENT**

**Pleadings**

1. The Claimant commenced this matter against the Respondent by his statement of claim dated 18<sup>th</sup> March 2016, and filed herein on the 6<sup>th</sup> April 2016. Contemporaneously with the filing of the statement of claim he filed a witness statement and documents that he intended to rely on in support of his case.
2. In the memorandum of claim the Claimant sought for a couple of reliefs, thus;
  - a) A declaration that the termination of the claimant's employment by the Respondent was illegal, unjustified and contrary to the law.
  - b) Three months' salary in lieu of notice i.e. Kshs. 13,200 multiplied by three, therefore Kshs. 39,600.
  - c) Salary dues since the increment date i.e. 1<sup>st</sup> May 2015 to the employment termination.
  - d) General damages for unlawful and illegal termination of the Claimant's employment.
  - e) Interest on (b) (c) (d) and (e).
  - f) Any other relief that the Honourable Court may deem fit to grant.
3. The Respondent entered appearance to the summons on the 12<sup>th</sup> July 2017 and filed a memorandum of response on the 28<sup>th</sup> July 2017. The Respondent denied the averments in the Claimant's memorandum of claim, and his entitlement to the reliefs sought.
4. On the 6<sup>th</sup> December 2016, when the matter came up for mention for directions before Justice Abuodha, the Court directed that the matter could proceed as an undefended cause. On the 8<sup>th</sup> February 2018, in presence of both counsel for the Claimant and the Respondent, the Court directed that a hearing date be picked in the registry.
5. On the 17<sup>th</sup> June 2021, a date for hearing of the matter, 21<sup>st</sup> September 2021 was picked by the parties before the Deputy Registrar. On this date, the Court was not satisfied that service of court process had been effected on the Respondent's counsel, prompting the Court to adjourn the matter to the 5<sup>th</sup> October 2021, when the matter proceeded. The Court took the Claimant's evidence and subsequently deeming the Respondent's case closed as counsel for it indicated that he was not able to call any witness as to her the Respondent went under.

**The Claimant's case**

6. The Claimant moved this Court to adopt the contents of his witness statement as his evidence in chief, and admit his documents as exhibits. The Court adopted and proceeded in that manner.
7. The Claimant stated that at all material times, he was an employee of the Respondent. That he came into the employment of the Respondent in the year 2007 as a machine operator, with a starting salary of Kshs. 11,700 as can be discerned from the pay slip, exhibit 1.

8. He contended that following his good performance, on 1<sup>st</sup> May 2015, he got a salary increment to Kshs. 13,200.
9. He further contended that on 3<sup>rd</sup> July 2015, he reported for duty as usual and continued working, but later in the day the company manager approached him telling him that the sales for the company products had nose-dived making it a challenge for the company to keep him as an employee. Paying salaries was going to be a challenge. The manager indicated to him that there couldn't be any work for him, thereby terminating his employment.
10. The Claimant and other employees who were also affected, demanded for salary arrears that had been pending from the date of the salary increment, 1<sup>st</sup> May 2015, leave payments and three months in lieu of notices but the Respondent refused to pay them.
11. The Claimant asserted that the termination was unfair as it was not preceded by any notice and premised on any justifiable cause.
12. That the termination was unfair, illegal, unreasonable and unjustifiable.

### **The Respondent's case**

13. As I have indicated hereinabove, despite entering appearance and filing a response to the Claimant's memorandum of claim, the Respondent did not present any evidence on its pleadings. This Court has stated before that in such a situation, the pleading remains such a pleading, a mere statement. Pleadings can never be a substitute for evidence. However, the fact that a party has not led evidence on his pleadings does not in any manner lessen the burden of the other party to prove that which the law obligates him to prove.

14. In *CMC Aviation Limited vs Cruise Air Limited (1) [1978] 103*, Madam J. stated;

***“Pleadings contain averments of those concerned until they are proved or disapproved, or there is admission of them or any of them by parties they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence.”***

15. And in *Lydia Moraa Obara vs Tusker Mattresses Limited [2021]* this Court held;

***“21. As indicated hereinabove, the Respondent filed a response to the claim but as a result of the default in attendance of Court, did not lead evidence towards establishing that which it had pleaded. Pleadings will never be a substitute for evidence. Section 3 of the Evidence Act Cap 80 Laws of Kenya defines evidence as:***

***“Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigations is proved or disapproved and without prejudice to the foregoing generally includes statements by the accused persons, admissions and observation by the Court in its judicial capacity.”***

16. This Court shall treat the respondent's pleadings as such a pleading, without more.

### **Issues for determination**

17. The following broad issues emerge as the issues for determination in this matter;
  - a) Whether the termination of the Claimant's employment was procedurally fair.
  - b) Whether the termination of the Claimant's employment was substantively fair.
  - c) What remedies are available if any to the Claimant in the circumstances of this matter.
  - d) Who should bear the costs of this suit?

### **Whether the termination of the Claimant's employment was procedurally fair**

18. Section 45 of the Employment Act commands that no employer shall terminate the employment of an employee unfairly. Section 45 (2) (c) gives the reason why an employer contemplating terminating an employee's employment or summarily dismissing an employee must engage a fair process, a default in engaging such a process will render the termination or summary dismissal unfair. The employee shall get entitled to one or more of those reliefs provided for under section 49 of the Act, as a consequence.

19. Section 41 of the Employment Act provides an answer as to what fair procedure entails;

***“1. Subject to section 42 (2), an employer shall, before terminating the employment of an employee, on grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employer 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.”***

20. It is clear therefore that once an employer conceives an intention of terminating an employee’s employment or summarily dismissing an employee shall;

- a) Clearly indicate this intention to the employee, and the reasons forming basis of the intention, and the intended action.
- b) Express to the employee that he has a right to be accompanied by a colleague (where the employee is not a member of a union) or a shop steward (where the employee is a member of a union), and allow it to happen, when the employer shall be explaining the grounds to the employee and receiving representations on the grounds from the employee.
- c) Accord the employee and or his colleague an opportunity to make representations on those grounds.
- d) Make a reasoned determination, which must take into account the representations by the employee and or his colleague.

21. The Claimant contended that this did not happen in the instant matter. Him and others were terminated abruptly, without being heard on the ground(s) that the employer was citing as the basis for bringing their employment into a halt. There is no evidence that was placed before this Court to controvert the Claimant’s, that fair procedure as envisioned in section 41 of the Employment Act was not followed.

22. By reason of the premises hereinabove, I find that the termination was not procedurally fair.

**Whether the termination was substantively fair.**

23. Section 43 of the Employment Act, 2007, enjoins the employer to prove the reason or reasons for the termination in claims arising out of termination. Where an employer defaults in discharging his obligation, then the termination shall be deemed unfair in terms of section 45 of the Act. In sum therefore, the termination gets deemed as one that was without a valid and fair reason(s).

24. In the circumstances mentioned hereinabove, the Respondent did not place any evidence before this Court. Evidence demonstrating the reason(s) for the termination is absent therefore. Evidence geared towards establishing the validity and fairness of the reasons that might have been for the termination too.

25. In this circumstance the only logical conclusion that flows is that the termination was not substantively fair.

**Of the reliefs**

**(a) Salary in lieu of notice**

26. Under this head the Claimant pleads for an award of three (3) months salary in lieu of notice, therefore Kshs. 39,600. What is not difficult to discern here is the fact that the termination occurred without notice.

27. Section 35 of the Act, provides;

***“Termination Notice.” It states;***

***“1. Contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be –***

***a) Where the contract is to pay wages daily a contract terminated by either party at the close of any day without notice.***

***b) Where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or***

***c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.”***

28. Section 36 of the Act stipulates;

***“Either of the parties to a contract of service to which section 35 (5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been claimed by the other party, or paid by him as the case may be in respect of the period notice required to be given under the corresponding provisions of the section.”***

29. For purposes of this matter, the statutory notice period is as set out in section 35 (c) of the Act, and the entitlement for a payment of salary in lieu of notice sets in courtesy of section 36. By reason of this the Claimant in the circumstances of his case, can only be entitled to a one month’s salary in lieu of notice. Under this head, he is hereby awarded Kshs. 13,200.

**(b) Eight years service pay**

30. Service pay is normally awardable under section 35 (5) of the Act which provides;

***“An employee whose contract of service has been terminated under subsection 1 (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.”***

31. Imperative to state that the section does not provide for the rate of computation, like section 40 (g) of the Act, which provides a lower ceiling of 15 days pay for each year completed of service.

32. Article 27 (c) of the Constitution provides for a right to equal protection and benefit of the law. Invoking this provision, I would apply the 15 days envisioned in section 40 (g) of the Employment Act. Service pay under section 35 (5) and severance pay under section 40 (g) of the Act are both separation pays. There cannot be any serious justification for employment of different computation rates in arriving at the separation pays.

33. In the upshot, I will award earnings of 15 days per each year completed. This shall translate to Kshs. 46,800. The Court sees no justification to employ one month rate as suggested by the Claimant.

**(c) Salary dues since the increment date i.e. 1<sup>st</sup> May 2015 to time of termination.**

34. To the Court, this prayer is too vague. There cannot be any justification for the grant of the same, under the circumstances of this matter. The Claimant has in fact not placed before the Court any evidence that would suggest his entitlement to this. An award is therefore declined.

**Compensation**

35. The Claimant seeks for an award of damages for the unfair and unlawful termination. I am inclined to award him a compensatory relief pursuant to the provisions of section 49 (1) (c) of the employment Act, 2007, considering the circumstances of the termination. I award him a 5 month's gross salary. I have also considered the length of period the Claimant worked for the Respondent.

**Costs**

36. It is trite law that costs follow the event. The event here being a successful litigation, the costs should be in favour of the Claimant.

37. In the upshot, Judgment is hereby entered for the Claimant in the following terms:

- a) **One month's salary in lieu of notice Kshs. 13,200.**
- b) **Service pay Kshs. 46,800.**
- c) **Compensation under section 49 (1) (c) of the Employment Act, 2007 Kshs. 66,000.**
- d) **Costs of this suit.**
- e) **Interest on (a) (b) and (c) above at Court rates from date of filing suit till full payment.**
- f) **A declaration that the termination of the Claimant's employment was both procedurally and substantively unfair.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2021**

**OCHARO KEBIRA**

**JUDGE**

**DELIVERED IN PRESENCE OF;**

**MS. MUTURI FOR THE CLAIMANT.**

**MS. NYAONCHA FOR THE RESPONDENT.**