



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 40 OF 2017

STEPHEN OSINO.....CLAIMANT

VERSUS

EASTERN UNITY INVESTMENT LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant initiated the suit herein vide a memorandum of claim filed on 11th January, 2017 and through which he avers that he was unceremoniously terminated on 23rd November, 2016 by the respondent. He seeks several reliefs from court, including compensatory damages for wrongful termination, one month's salary in lieu of notice and unpaid leave days.
2. The respondent entered appearance and filed a response in answer to the memorandum of claim through which it denied the averments set out in the claim. In general, it denied any involvement in the claimant's exit from employment.
3. The matter came up for hearing on 6th October, 2021 and the respondent was absent from court. The claimant through his Advocate produced an Affidavit of Service sworn by one Mr. Mark Okinda on 4th October, 2021, wherein he deponed that he had effected service of the day's hearing notice upon the respondent. Annexed to the Affidavit of service was a copy of the hearing notice which bore the receiving stamp of the Advocate on record for the respondent.
4. The Court being satisfied with the return of service and in terms of Rule 22 of this Court's Rules, directed that the matter proceeds, the respondent's absence notwithstanding.
5. At the outset, the claimant sought to rely on his witness statement and asked the court to adopt the same as part of his evidence in chief. He also produced the bundle of documents filed together with his claim as exhibits before court.
6. As per the claimant's testimony, he was employed by the respondent as a plant electrician sometimes in 2015 on a salary of Kshs 30,000/=. It was his testimony that on 23rd November, 2016, he was informed together with 4 of his colleagues that his services were no longer required and to that end, they were issued with certificates of service. The claimant alleges that the respondent did not furnish him with the reasons for his dismissal and was not compensated appropriately. He told court that at the time of his dismissal, he was earning a salary in the sum of Kshs 32,700/=. He concluded his testimony by urging the court to allow his claim as prayed.

Submissions

7. The claimant filed written submissions through which it urged the court to find that his termination was unfair as the respondent had failed to discharge its burden under section 45(2) of the Employment Act by justifying the reasons for his dismissal. On this issue, it relied on the case of **CMC Aviation Ltd vs Captain Mohamed Noor, Civil Appeal No. 199 of 2003**.
8. The claimant further submitted that since he was not accorded a hearing prior to his dismissal, the same amounted to unfair termination. To this end, it cited the case of **Anthony Mkala Chitavi vs Malindi Water and Sewerage Co. eKLR (2013)**.

Analysis and determination

9. From the pleadings on record as well as the evidence placed before court, the issues falling for the court's determination are;

a) Whether the claimant's termination unfair and unlawful?

b) Is the claimant entitled to the reliefs sought?

Was the claimant's termination unfair and unlawful?

10. The claimant has alleged that his termination was unfair. In the circumstances, it is necessary to consider the facts and circumstances appertaining this case *vis a vis* the relevant provisions of the Employment Act.

11. **Section 43(1)** of the Employment Act (Act), places the burden of proving reasons for termination on an employer and failure to do so, renders such termination as unfair. In addition, **section 45 (2)** of the Act, qualifies a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.

12. The aforesaid legal provision is what constitutes substantive justification. This is also the first limb towards proving that a termination was fair.

13. Under **section 45 (2) (c)** of the Act, an employer is required to prove that it complied with the requirements of fair process in terminating the services of an employee. **Section 41(1)** of the Act elaborates what entails fair procedure. In this regard, it requires an employer to notify an employee of the intended termination. As such, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative. This second limb is what constitutes fair process.

14. The upshot of the foregoing is that, an employer must justify that there was reason to terminate the services of an employee and that such termination was undertaken in line with fair procedure.

15. In this case, the reasons for the claimant's termination are not known at all as he was not issued with a termination letter. Instead, he was issued with what appeared to be a certificate of service. It is therefore not clear why the claimant was terminated from employment.

16. In its defence, the respondent has proffered 2 instances that may have resulted in his exit from its employment. In the first instance, it averred at paragraph 6 that the claimant resigned from employment while at paragraph 7, it alleges that the claimant absconded duty. It is therefore not clear from the respondent's end how the claimant left employment. Either way, it did not attach any form of evidence, for instance a letter of resignation from the claimant or the attendance/clock in register to prove his absence from work. In the circumstances, the respondent therefore failed to discharge its burden as required under the law, by proving that there was reason to terminate the claimant's employment.

17. Moreover, there is no evidence that the claimant was notified of any reasons to warrant his termination. Likewise, there is no evidence to suggest that the claimant was given an opportunity to tender his defence against the accusations levelled against him, if any.

18. Over and above, the respondent did not tender any evidence to rebut the assertions by the claimant. Coupled with the foregoing, the respondent did not participate in the hearing hence did not tender oral evidence to refute the assertions by the claimant.

19. In light of the foregoing, there is a probability that there were no reasons at all, to justify the claimant's termination and no disciplinary hearing or such related process was undertaken. Simply put, the termination of the claimant did not meet the legal threshold set out under the Act.

20. In summation, I wish to reiterate and adopt the holding of the Court of Appeal in the case of **Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR** thus;

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”

21. The upshot of the foregoing is that the claimant's termination has one resultant effect, that is, the same was unfair and unlawful as it fell below the legal parameters stipulated under sections 43(1) and 45(2) of the Employment Act.

Available Reliefs

22. Having found that the claimant’s termination was unfair and unlawful, I will award him five (5) month’s gross salary as compensatory damages. This award is informed by the length of the employment relationship and the fact the respondent did not advance any reasons whatsoever, for the claimant’s termination and did not comply with the requirements of fair procedure in so doing.

23. I further award the claimant one (1) month’s salary in lieu of notice.

24. As regards, the claim for leave, I will decline to make any award as no evidence for instance, unapproved leave application, was produced by the claimant to justify the entitlement.

Orders

25. Accordingly, I enter Judgment in favour of the claimant against the respondent as follows;

- (a) **Compensatory damages in the sum of Kshs 163,500/= which sum is equivalent to 4 months gross salary.**
- (b) **One month’s salary in lieu of notice being Kshs 32,700/=.**
- (c) **The total award is Kshs 196,200/=.**
- (d) **The claimant shall also have the costs of the suit.**
- (e) **Interest on the amount in (c) at court rates from the date of Judgement till payment in full.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Julius Juma

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 15th March 2020 and subsequent directions of 21st 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