



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC NO. 285 OF 2018

JACKSON MUTISYA KETHI.....CLAIMANT

VERSUS

NJORO CANNING FACTORY(K) LTD.....RESPONDENT

JUDGMENT

1. The claimant sued the respondent for unlawful termination, payment of his terminal benefits and to be issue with a certificate of costs.
2. The claimant was employed by the Respondent on 1st December, 2016 as the Human Resource, Accounts and Administration Manager earning a Basic salary of Kshs. 91,525 together with House allowance of Kshs. 16,474 per month.
3. He stated that he worked for the Respondent diligently till 22nd May, 2018 when he was verbally terminated from employment without prior Notice or cause given.
4. Upon his termination he was not paid for the 22 days worked, terminal benefits neither was he issued with a certificate of service.
5. The claimant felt that his right under Articles 28 and 41 of the Constitution were violate and that the Respondent failed to observe the provisions of the Employment law in terminating his services.
6. The claimant thus prayed for judgment against the Respondent for Orders;-
 - a) **A declaration that the claimant is entitled to payment of his terminal dues as pleaded**
 - b) **An order that the Respondent pay the claimant his terminal benefits and compensatory damages totaling to Kshs 1,764,000.**
 - c) **Interest in (b) above from the date of filing this suit until payment in full**
 - d) **Certificate of service**
 - e) **Costs of this suit and interest thereon.**
7. The Respondent entered appearance on 21st January, 2019 and filed a response to claim on the 15th February, 2019 admitting that it employed the Claimant on 1st December, 2016 however that his salary was a consolidated sum of Kshs. 90,000/ inclusive of house allowance.
8. It is stated that the claimant was relieved of his duties as the work load had considerably reduced in his department and the Respondent resulted to reducing its work force which included the claimant herein. That they then issued the claimant with a termination letter dated 22nd May, 2018.
9. The Respondent admitted that the termination was not preceded by a notice but took refuge in the employment letter dated 28th November, 2016 at clause 5 which provided for termination by either party with a notice of one month or a month salary in lieu of Notice and maintains that it choose to give the claimant one month salary in lieu of notice but that the claimant refused to accept the said money.
10. The Respondent maintained that the termination was in order and that they followed the law while dismissing the claimant from employment.

11. The claimant filed a response to the Respondents defence on the 29th May, 2019 reiterating his claim and maintaining that he was never issued with any termination letter rather that his employment was verbally communicated to him also that he was not given any dues or that there was any communication of payment of any dues therefrom.

Hearing

12. During hearing the claimant testified as CW-1 and adopted his witness statement dated 20.12.2018 which basically reiterated his claim and also produced the document filed on even date. In addition, he stated that he only took leave a couple of times in December during Christmas time.

13. Upon cross examination, he testified that he was in charge of Accounts, Administration and Human Resource at the Respondent. That he worked for about 2 years before the termination. He admitted that clause 5 of the employment Contract provided for termination clause and each party could terminate the contract by issuing one-month notice or pay a month salary in lieu of Notice. With regards to Saturdays being his leave days negotiated, he stated that he agreed with the Respondent during recruitment that he will not be working on Saturday as it was his worship day and that was never converted to leave days.

14. On further cross examination, he testified he admitted having received a termination letter but that the same was forwarded to him later after his dismissal and maintained that he was not given a single cent as terminal dues neither was the same mentioned by the Respondent on his termination. Also that there was no gratuity clause in his contract.

15. On re-examination he testified that he claimed gratuity on the basis that their CBA provided for gratuity for senior management staff.

16. The Respondent called one witness, **Mercy Lagat**, who is the Respondent's Human Resource manager as RW-1. RW-1 adopted her witness statement dated 21.9.2021 and stated further that when the claimant was employed by the Respondent he agreed to take his leave days on Saturdays because it was mandatory for the Respondent's employees to work on Saturday from 8am to 1pm. She also testified that the claimant was not entitled to gratuity having worked for the Respondent for only 2 years since gratuity was payable to staff who had worked for at least 5 years.

17. On cross examination she testified that the basis of the Claimant's dismissal was concealment of some information to the management which he was issued warning letters which were not filed in Court. Further that there was redundancy in the Respondent and the claimant was one of the employees affected by the redundancy. She admitted that a new Manage called Julius Lunani was employed to replace the claimant who later was fired and she took up that position.

18. On further cross examination, she testified that the issue of converting Saturday to leave days was never reduced to writing.

Claimants Submissions.

19. The claimant submitted from the onset that for termination to pass the fairness test it must be shown that there was substantive justification and procedural fairness. He supported his argument by citing the case of **Walter Ogal Anuro Vs Teachers Service Commission [2013] eklr.**

20. It then submitted that the Respondent in its response to claim alleged to have terminated the claimant's services on the basis of redundancy pursuant to reduced work however, that the claimant was soon after replaced by Julius Lunani discrediting the redundancy basis of termination. Further that the Respondent witness gave a different reason for termination as concealment of information as regard accounts and performance of employees from the top management this the reasons are contradictory. Accordingly, it was submitted that the reason for terminating the claimant employment was contrary to section 43 of the employment Act and therefore unfair as per the meaning of section 45 of the Act.

21. With regard to procedural fairness, it was submitted that if indeed the claimant was termination pursuant to reduce work then the Respondent was mandated under section 40 of the Employment Act to follow the procedure therein in declaring an employee redundant. Also that if the basis of termination was for misconduct as alleged by the Respondent's witness then the Respondent ought to have subjected the employee to provisions of section 41 of the Employment Act. The failure to do both made the termination unfair.

22. The Claimant then submitted that the dismissal failed the fairness test the claimant ought to be compensated for the said unfair termination and urged this Court to allow the claim as prayed.

Respondent's Submissions.

23. At this stage, the Respondent submitted that the reason for dismissing the claimant from employment was the fact that the claimant had undesirable Conduct constitution working in secrecy and in wanton breach of code of Ethics by concealing relevant information as regards accounts and performance of employees from management, despite being warned severally.

24. Accordingly, that the claimant action amounts to gross misconduct and his termination was lawful as the claimant followed the expressed way of termination under clause 5 of the claimant's contract of employment dated 28th November, 2016. Subsequently that they offered the claimant the salary in lieu of notice and pay for the 22 days worked however the claimant rejected the same.

25. The Respondent maintained that it followed the provisions of section 41 of the Employment Act in dismissing the claimant in that it summoned the claimant in their offices and explained to him reasons for the termination. In this they cited the case of **Justus Mukulu Muasya V Wells Fargo Limited [2018] eklr.**

26. The Respondent then submitted that the claimant does not deserve the Orders sought and prayed for the claim to be dismissed with costs save for payment of salary in lieu of Notice and the 22 days worked amounting to Kshs. 187,200/.
27. I have examined evidence and submissions of the parties herein. The claimant has averred that he was terminated without notice and without due process.
28. He avers that he was given a verbal termination and issued a dismissal letter later.
29. The respondents never exhibited the termination letter dated 22/5/2018 they claimed was issued to the claimant.
30. It is therefore not clear under which circumstances the claimant was terminated and for what reason.
31. Section 41 of the Employment Act 2007 states as follows;

“41. Notification and hearing before termination on grounds of misconduct

(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”.

32. It matters not that the employment contract provides that termination may be effected upon issuance of a notice period. That notwithstanding, due process must be followed.
33. In the case of the claimant, the respondent decided to verbally terminate the services of the claimant without due process on account that the contract provided for after notice which notice they also didn't give to the claimant.
34. It is therefore my finding that the termination of the claimant was unfair and unjustified.
35. Having found the claimant's termination unfair and unjustified, I find that the claimant is entitled to the following remedies:-

1. 1 month salary in lieu of notice = 108,000/=

2. 22 days salary for 22 days worked in May 2018 = $22/30 \times 108,000/=$

= 79,200/=

3. 10 months' salary as compensation for unlawful and unfair termination

= $10 \times 108,000/=$

= 1,010,800/=

GRAND TOTAL = 1,198,000/=

Less statutory deduction

4. The respondent will issue claimant with a certificate of service.

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

DATED AND DELIVERED IN OPEN COURT THIS 2ND DAY OF DECEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mutonyi for Claimant – present

Mwangi for Respondent – present

Court Assistant – Fred