



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1509 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**DONALD WAMBUA MUTISYA.....CLAIMANT**

**VERSUS**

**KENYA STATIONERS LIMITED (KENSTA GROUP).....RESPONDENT**

**JUDGMENT**

The Claimant was employed by the Respondent in 2008. He served until 1<sup>st</sup> October 2010 when his employment was terminated. At the time of termination, his salary was Kshs.20,480.32. Aggrieved by the termination, the Claimant instituted this suit, seeking the following reliefs-

a. Terminal dues calculated as hereunder-

- |                                    |                |
|------------------------------------|----------------|
| i. Salary in lieu of notices of    | Kshs.17,000.00 |
| ii. Service for 2 years of         | Kshs.17,000.00 |
| iii. Salary for October 2010 of    | Kshs.17,000.00 |
| iv. House allowance for 2 years of | Kshs. 5,100.00 |

b. An order compelling the Respondent to pay the Claimant his terminal dues and benefits.

c. General damages for mental torture, stress and anguish as a result of loss of employment.

d. Costs of suit and interest on (a) and (b) above at commercial rates.

It is the Claimant's case that he served the Respondent for 2 years before his employment was unlawfully terminated on the allegation that some stolen zinc scrap blocks belonging to Insteel Kenya Limited were found loaded on a lorry assigned to him as driver. He was suspended in order for investigations to be carried out and was also charged in Makadara Law Court in Criminal Case 3743 of 2010, tried and acquitted under section 215 of the Criminal Procedure Code.

The Claimant avers that after his acquittal, he pleaded with the Respondent to reinstate him but the Respondent refused. It is his position that he is entitled salary for days worked up until his employment was terminated, leave for 2 years, service for 2 years worked, house allowance, overtime and contributions to the NSSF and NHIF which has been withheld by the Respondent.

During examination in chief, the Claimant testified that he was not at fault since there was a person loading the lorry, his work being to drive the lorry.

He stated that he was advised to report back to work once he was done with the criminal case. That when he went to his place of work, he received a cheque but did not understand what the payment was. He maintained that he was not paid his terminal dues.

He stated that in addition to the prayers in paragraph 11 of his claim, he was seeking house allowance and compensation for unfair termination. He stated that due process was not followed in the termination of his employment as his union was not involved in the process.

During cross examination, he maintained that he was not aware that there were zinc blocks in the lorry. He stated that there were no zinc blocks in his lorry and that the items in his lorry were as per the delivery note. It was also his testimony that the criminal court found that

there had not been any zinc blocks in the lorry. He admitted that Insteel and the Respondent were not the same company and that it was the former that made a complaint to the police. He admitted that there was a letter annexed to the cheque that was issued to him but it did not have a breakdown.

It was the Claimant's evidence that he was issued with a cheque of Kshs.32,000.00.

The Respondent filed its response on 6<sup>th</sup> March 2015 contending that on 1<sup>st</sup> October 2010, the Claimant and one Alphonse Ngaira were instructed to have the Respondent's lorry loaded at the warehouse located at the premises of Insteel Company Limited. Before the Claimant left, some stolen zinc scrap blocks belonging to Insteel Company Limited were discovered in his lorry.

When inquiries were made, the Claimant stated that he had no knowledge how the blocks got into his lorry. Consequently, the management felt that the Claimant was negligent in his duties, and, his employment was terminated.

That the incident caused it a great deal of embarrassment and Insteel company lost confidence in the company. The respondent did not participate in the criminal proceedings against the Claimant. The Respondent contends that the termination of the Claimant's employment was lawful and fair, and the Claimant is not entitled to any of the reliefs sought.

The Respondent did not call any witness.

### **Submissions by the Parties**

The Claimant submits that the Respondent has not adduced the cheque to prove that the Claimant was indeed paid as such they should pay the Claimant's terminal benefits.

On the other hand, the Respondent submits that the Claimant was given the opportunity to be heard before his services were terminated. Further, that the Respondent complied with sections 41, 43, 44 and 45 of the Employment Act. It is submitted that the procedure followed in terminating the Claimant's services was fair and the termination on account of theft was a valid and fair reason. The Respondent relies on the case of *Kenya Plantation & Agricultural Workers Union -V- Delmonte (K) Limited [2019] eKLR*.

The Respondent submits that the Claimant is not entitled to any of the reliefs sought as he admitted receiving a cheque of Kshs.33,118.00. The Respondent further submits that the claim for compensation for mental torture, stress and anguish are based on tort which have not been proved or particularized.

### **Analysis and Determination**

I have considered the pleadings filed by the parties, their evidence

and the written submissions filed. The following are the issues for determination by the Court –

- a. Whether the Claimant's employment was lawfully terminated.
- b. Whether the Claimant is entitled to the reliefs sought.

### **Termination of Employment**

#### **i. Due Process**

Under section 41 of the Employment Act, where an employer is intending to fire an employee on the grounds of gross misconduct, they are required to give the employee an opportunity requires an opportunity to make their representations and thereafter explain to them the reason for terminating their employment. All this should be done in the presence of a colleague of the employee's choice or a shop floor union representative.

It was the Claimant's testimony that he was not given the opportunity to defend himself. The Respondent did not adduce evidence to prove that indeed the Claimant was given the opportunity to make his case.

#### **ii. Reason**

Vide the letter of 6<sup>th</sup> October 2010, the Claimant was informed that his employment was terminated for being negligent in carrying out his duties having been implicated in the theft of the stolen zinc scrap blocks. The Respondent has submitted that the Claimant was terminated because the stolen zinc blocks were found in his lorry, an incident which caused it embarrassment and strained relations with Insteel Kenya Limited. In the Respondent's letter to the Claimant's Advocates, it stated that-

*“Please note that your clients were not terminated because they had a case at Makadara Law Courts as stated in your letter... The company however based its decisions to terminate Alphonse and Donald services on the fact that they negligently carried out their duties and failed to exercise due diligence thus being implicated in an issue that made the company doubt their integrity and lose faith in their ability to be trusted to take care of the millions of shillings worth of property that was entrusted in their care.”*

Indeed, the Claimant admitted that the criminal proceedings were instituted on account of Insteel and not the Respondent. Section 43 of the Employment Act reads as follows-

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

Further, **Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 16 (1B)** paragraph 642 reads as follows-

**In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must take a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts.**

In view of the foregoing, the Respondent's reason for terminating the Claimant's employment was justified. This notwithstanding, I find that the termination of the Claimant's employment was unlawful and unfair due to the Respondent's failure to adhere to the provisions of section 41 of the Employment Act, which are mandatory as was held by this Court in the case of *Mary Chemweno vs. Kenya Pipeline Company Limited* [2014] eKLR.

### **Reliefs Sought**

I find that the Claimant is not entitled to service pay and salary for

the month of October as the same was paid to him. During his cross examination, he admitted to receiving a cheque of Kshs.32,000.00. Further, from the Respondent's letter of 12<sup>th</sup> October 2010, it is clear that the payment was for service pay for 2 years worked, 16 days leave pay and salary for the days worked.

The Claimant is also not entitled to the claim of house allowance as his pay slip for September 2010 annexed to his bundle of documents indicate that he was paid a house allowance of Kshs.3,500.00.

The claim for salary in lieu of notice succeeds. Pursuant to clause 17 of the Claimant's Employment contract annexed to the Respondent's bundle of documents, the Claimant is entitled to the issuance of 1 months' notice or payment in lieu of notice.

Taking into account the circumstances under which the claimant's employment was terminated, I do not think he deserves any compensation. I thus decline to award him any.

I thus enter judgment for the claimant against the respondent for notice pay only in the sum of **Kshs.17,000**. The said sum is subject to interest at court rates from date of judgment.

Each party shall bear its costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JANUARY 2020**

**MAUREEN ONYANGO**

**JUDGE**