



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 339 OF 2014

JARED OOKO ASINGO.....CLAIMANT

VERSUS

METAL CROWNS LTDRESPONDENT

J U D G E M E N T

1. The Claimant pleaded that he was employed by the respondent on 28th February, 2011 as Quality Control Supervisor at a salary of kshs. 106,274/= per month.
2. According to the Claimant, the respondent's director Mr. Gurdip driven by pure racism launched a vigorous and scathing process to terminate the Claimant's service. According to the Claimant, the respondent's director claimed he was related to a Senior Manager in the respondent company a allegation which was not true and further that the said director finally got his way through the human resource manager who did not have time to investigate the claims.
3. According to the Claimant he was subjected to pressure to sign a discharge certificate in order to carry wrongly and unlawfully calculated terminal benefits.
4. According to the Claimant he had never been warned of wanting performance in writing or otherwise nor was he given opportunity to correct and improve on any alleged non-performance.
5. The respondent on its part pleaded that the termination was done fairly and within the law. The respondent further denied the allegations of racism and contended that the same were malicious, scandalous and were made in bad faith.
6. The respondent denied the Claimant was put under pressure to sign a discharge voucher. The respondent contended that the Claimant signed the said certificate voluntarily.
7. The respondent further pleaded that the Claimant was frequently warned of unsatisfactory performance but failed to improve thus making the respondent to terminate his service.
8. The parties herein consented to dispense with oral hearing and put in written submission.
9. Mr. Omondi for the Claimant submitted among others that there was no evidence of any investigation into the reasons for termination, no evidence of continued poor performance and evidence of consideration for alternative remedies in place of termination.
10. Mr. Omondi further submitted that the respondent failed to prove of there was a fair reason for the termination of the Claimant's service. Further that no fair procedure was followed before terminating the Claimant's service. There was no fair hearing and that the Claimant was not given a chance to tell his side before the dismissal was done. According to the Counsel, every employer must keep records of the employees wanting performance and in the case of the Claimant, not a single record was available to justify the respondent's reason for termination.
11. Further the Claimant was not accorded period for improvement. There was no evidence of meetings, memos, emails, notice to show cause to the Claimant and warning concerning his performance.
12. The respondent's counsel on the other hand submitted that the services of the Claimant could not be said to have been terminated wrongfully as there was valid reason for the termination. The termination letter dated 22nd August, 2011 clearly demonstrated the reason for the termination of employment.

13. In the letter the Claimant was terminated after the management found that there were flaws in the recruitment of the Claimant and unsatisfactory performance. The flaws after extensive consultation went contrary to the laid down policies in recruitment of staff in the respondent company.

14. Further the underperformance in the managerial position the Claimant held was not good for the respondent. There was therefore justifiable and valid reason for termination to law.

15. Counsel further submitted that the Claimant was fully paid his terminal benefits as was evidenced by the letter dated 22nd August,2011 and the Claimant by signing the discharge certificate on 26th August,2011.

16. The Claimant herein was appointed on 28th February,2011. The probation period was for three months with a notice of termination or one month or pay in lieu during the period. By simple arithmetic the probation period would end around end of May,2011.

17. This was past the first probation period. Under the Employment Act, probation period is extendable with the consent of the employee. Although the respondent alleges the reason for the termination was due to among others his poor performance, no evidence or material was laid before the Court to show that the issue of his performance was raised with him at any time before he was terminated.

18. Further the respondent referred to flaws in the Claimant's appointment process but did not disclose the nature of these flaws either to the Claimant or the Court. There was nothing on record to show the Claimant was issued with a show cause letter or called upon to respond to the allegations of his nonperformance or the alleged flaws in his appointment.

19. The Court is therefore persuaded that the Claimant did not have the benefit of the procedural fairness accorded to employees under section 41(2) and 45 of the Employment Act. The Court thus finds and holds that the termination of the Claimant's employment was unfair.

20. On the issue of the terminal benefits paid and the signing of the discharge certificate this cannot be a bar to the Claimant revisiting the issue of procedural fairness of his termination and seeking appropriate compensation as he has done. The Employment Act at Section 3(b) provides that the provisions of the Act constitute minimum terms of a contract of employment and any agreement to provide lesser terms shall be to that extent be void. That implies any arrangement that would prevent an employee terminated in a manner he or she considers unfair from seeking redress under the Act would be contrary to this Act hence void.

21. For reasons stated above, and the Court having found that the termination of the Claimant's service was unfair the Court hereby awards him six months' salary as compensation for unfair termination of service. That is to say Kshs. 637,644/=. This will be in addition to the terminal dues already paid to the Claimant. This award shall be subject to taxes and statutory deductions but will attract interest at court rates from date of judgement until payment in full. The Claimant shall further have the costs of the suit.

22. It is so ordered.

Dated at Nairobi this 13th day of March, 2020

Abuodha Jorum Nelson

Judge

Delivered this 13th day of March, 2020

Byram Ongaya

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.