



**REPUBLIC OF KENYA**

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

**CAUSE NO. 162 OF 2014**

*(Before Hon. Justice Mathews N. Nduma)*

**GEOFFREY CHELOTI MAKHANU.....CLAIMANT**

**VERSUS**

**H. YOUNG & CO. LIMITED.....RESPONDENT**

**JUDGMENT**

1. The suit was filed by the claimant on 10<sup>th</sup> July 2014, praying for a declaration that the claimant's dismissal from his employment was unlawful and unfair and payment of terminal benefits set out under paragraph 7 of the statement of claim including:-

- a. Unpaid salary for September Kshs. 28,471.
- b. Three months' notice pay Ksh. 85,413.
- c. Service pay Kshs. 28,471
- d. Compensation of 12 months' salary
- e. Interest and costs.

2. CW1, the claimant testified that he was employed by the respondent as a foreman on 25<sup>th</sup> May 2011 and worked continuously until 21<sup>st</sup> September 2012 when the respondent dismissed him summarily from employment.

3. The events leading to the dismissal was that on 20<sup>th</sup> September 2012, whilst construction was ongoing at Webuye – Malaba road, a caterpillar grader got stuck and the claimant called the supervisor to bring a shovel to remove the caterpillar. The shovel came and began pulling the grader out.

4. At that time, a superintendent came and complained about the manner the grader was being pulled. The operator of the grader was sacked on the spot and the claimant was dismissed the following day. The letter of termination dated 21<sup>st</sup> September 2012 was produced as an exhibit. The letter was one sentence which read:

“ This is to notify you that you have been terminated from employment with effect from 21<sup>st</sup> September 2012.”

5. The claimant testified that he was not given notice of termination nor was he paid lieu in of notice. He claims three months salary in lieu of notice.

6. CW1 testified that he was not given a hearing before the dismissal and was not paid terminal benefits including salary for September 2012, Payment in lieu of leave days not taken for the period he worked and service gratuity.

7. The claimant prays for compensation for the unlawful and unfair dismissal and payment of costs and interests.

8. The claimant relied on the exhibits attached to the statement of claim including written witness statement dated 9/7/2014, Work identity card, and pay slip for the month of August 2012 which showed his gross pay to be 28,471. The claimant was also paid overtime as and when worked as the pay slip shows. The respondent paid for NSSF and NHIF and other statutory dues including union dues and Sacco contributions.

9. The claimant prays for the suit to be allowed as prayed.

### **Defence**

10. The Respondent filed a memorandum of defence on 13<sup>th</sup> August 2014 and RW1 Eunice Nganga the Human Resource Manager testified for the defendant. She adopted a written statement dated 8/3/2019 as her evidence in chief. RW1 also produced exhibits '1 to 5 ' in support of the defence case.

11. RW1 testified that the claimant worked at the Webuye – Malaba project as a foreman and his employment was terminated for failure to follow instructions.

12. That the project manager gave the claimant opportunity to explain himself before his employment was terminated. That the pay slip for October 2012 shows that the claimant received September salary in full. That the claimant was also paid in lieu of one month notice. That the claimant had no pending leave days and was paid gratuity for the one year served.

13. Under cross examination, RW1 stated that the claimant failed to obey the immediate supervisor. That he had no warning. RW1 was not present when the incident happened. RW1 stated that the hearing was not recorded and had no recorded statements from the claimant or his immediate supervisor.

14. RW1 prayed that the suit be dismissed with costs.

### **Determination**

15. The issues for determination are:-

- a. Whether the termination of the claimant was for a valid reason and if the respondent followed a fair procedure.
- b. Whether the claimant is entitled to the reliefs sought.

16. Both parties filed final submissions. The Court has considered the evidence adduced by CW1 vis avis that adduced by RW1 and has come to the following conclusion of fact and law:-

17. The claimant is alleged to have disobeyed instructions of his supervisor on 20<sup>th</sup> September 2012 and was terminated from employment on 21<sup>st</sup> September 2012. The Respondent did not issue notice to show cause to the claimant and did not provide the claimant adequate opportunity to defend himself before the termination dated 21<sup>st</sup> September 2012.

18. The respondent did not give the reason for the sudden termination without any prior warning or notice of termination. RW1 did not provide any prove, documentary or otherwise that any due procedure took place.

19. It is the Court's considered decision that the claimant has proved on a balance of probabilities that the termination of his employment violated sections 41, 43 and 45 of the employment Act no. 11 of 2007 in that there was no valid reason proved to justify the termination and a fair procedure was not followed by the respondent all factors taken into consideration.

20. The court considered in arriving at this decision the case of **Ken Freight (E.A) Limited –VS - Benson K. Nguli (2019) eKLR** in which the Supreme Court upheld the court of appeal decision and stated thus:

21. " *Had the appellant complied with the requirements of sections 41 and 45 of the Employment Act, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure the dismissal was found to be unfair which we agree.*"

22. The claimant is entitled to compensation in terms of section 49 (1) (c) and (4) of the Employment Act 2007.

23. RW1 demonstrated by production of the pay slip for October 2012 that the claimant was paid terminal benefits upon termination including:-

- i. Salary for the month of September in lieu of notice
- ii. Service gratuity in the sum of Kshs. 13,688 for one year served.

24. RW1 demonstrated that the claimant was not owed any leave days and was not was not paid in lieu of leave.

25. The letter of employment produced by RW1 dated 6/6/2011 did not provide for notice of termination and so the one month salary in lieu of notice paid by the respondent sufficed. The claims by the claimant set out in the memorandum of claim in respect of unpaid salary for September 2012, one month salary in lieu of notice payment in lieu of leave not taken and service gratuity lack merit and are dismissed.

### **Compensation**

26. The claimant had served the respondent for only one year. The Court has found that the termination was unlawful and unfair. The claimant did not contribute to the termination. The claimant was paid full benefits upon termination. The claimant was not compensated for the loss of his job. The claimant did not get certificate of service. The claimant lost good prospects of career development as a foreman since he had not reached retirement age having been born on 9/10/1968 as per the letter of employment.

27. Considering all the circumstances of the case, the Court grants the claimant three (3) month's salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs. 85,413.

28. This is the situation in the present age.

29. In the final analysis Judgment is entered in favour of the claimant against the respondent as follows:-

- a. Kshs. 85,413 being three (3) months' salary in compensation for the unlawful and unfair termination of employment.
- b. Interest at courts rates from date of Judgment till payment in full.
- c. Costs of the suit.

**Judgment Dated, Signed and delivered at Nairobi this 28<sup>th</sup> day of May, 2020**

**Mathews N. Nduma**

**Judge**

**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 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. 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 has 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 18 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.

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Muyundo for claimant

M/s Wanjiku Muriu for Respondent

Chrispo : Court Clerk