



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO 492 OF 2017

STEVEN OMONDI OWINO.....CLAIMANT

VS

MEGA GARMENT INDUSTRIES KENYA (EPZ) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Steven Omondi Owino against his former employer, Mega Garment Industries Kenya (EPZ) Limited. The claim is documented by a Memorandum of Claim dated 21st June 2017 and filed in court on the same date.
2. The Respondent filed a Response on 3rd October 2017, which was later amended on 14th June 2018. The Claimant responded to the Amended Response on 31st July 2018.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Duncan Kavita and Administrator, Geoffrey Sadi Chimega.

The Claimant’s Case

4. The Claimant pleads that he was employed by the Respondent as a Supervisor in the Production Department from 2nd January 2014 until 7th April 2017, when his employment was terminated.
5. At the time of leaving employment, the Claimant earned a monthly basic salary of Kshs. 16,000 plus a house allowance of Kshs. 4,000.
6. The Claimant claims that the termination of his employment was without lawful cause and that the Respondent did not observe due procedure in effecting the termination. He therefore claims the following:

- a. One month’s pay in lieu of notice.....Kshs. 16,000
- b. Wages for days worked in April (16,000/30 x7 days).....3,733
- c. Leave pay for 3 years (24 days x 3 years x 533).....38,376
- d. 12 months’ salary in compensation.....192,000
- e. Service pay (16,000/30 x 15x4 years).....31,980
- f. Public holidays worked.....29,052
- g. Normal overtime.....268,304
- h. Costs plus interest

The Respondent's Case

7. In its Response as amended on 14th June 2018, the Respondent admits having employed the Claimant on 4th January 2014, as a Production Officer.
8. The Respondent states that in April 2016, the Claimant absented himself from work, without any reason, upon which he was issued with a notice requiring him to report for duty by 15th April 2016 at 7.30 am, or give a written or oral communication to the management, failing which he would stand dismissed.
9. The Respondent further states that the Claimant did not adhere to the foregoing requirements and was therefore dismissed and his final dues computed and paid.
10. The Respondent goes on to state that by a new contract dated 13th July 2016, the Claimant was retained as a Production Supervisor.
11. On 18th August 2016, the Claimant was issued with a warning letter on account of poor performance.
12. The Respondent avers that in breach of Clause xi(iii) of his contract dated 13th July 2016, the Claimant attended a political rally on 6th April 2017 and thereby besmirched the Company's name.
13. The Respondent adds that on 7th April 2017, the Claimant wrote an apology letter, but the Company upheld the provisions of the contract of employment.
14. The Respondent maintains that the Claimant was paid all his dues.

Findings and Determination

15. There are two (2) issues for determination in this case:
 - a. Whether the termination of the Claimant's employment was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Termination

16. The Claimant's employment was terminated by letter dated 7th April 2017 stating:

"RE: TERMINATION

It is my painful duty to inform you of the management's decision to terminate your services from the date of this letter. As a supervisor and middle management staff you are entrusted to stand (sic) for the good of the company and make improvements where necessary to all parties affiliated to the company.

You have previously warned (sic) verbally to stop damaging the image of the company outside but to no avail.

This is a company which abides by the rule of law and there is no injustice of poor practice been exercised (sic) in the company.

You cannot urinate on your own food and go ahead and eat the same.

It is on record that yesterday after work, you attended another meeting outside and spoke very negative (sic) about the company.

It's your constitutional right to attend any legalized meeting or gathering but just as hate speech which is illegal, you are not supposed to go and make utterances which meant (sic) to damage to (sic) image of the company.

The company is not a political arena and neutral (sic) to all political events, parties or personalities.

You have bleached (sic) the below clauses under no. XI which are part of your appointment terms and very much within your knowledge.

XI. Exclusivity of this contract

- i. You will not, without the written consent of the company, take up any employment directly or indirectly on a part time basis or act as agent or servant or in any other capacity that competes with the interest of the company.**
- ii. All matters pertaining to the affairs of the company are strictly confidential and may not be imparted to any third**

party or to person outside the company without authority of the Management.

iii. Any information that is divulged to any third party without the company's consent will render you subject to instant dismissal.

In the meantime, your full and final dues i.e

- Wages for days worked (April 2017)
- One Month Pay in lieu of notice
- Earned but un-utilized leave days Will be computed and paid on or before 22/4/2017.

If you feel aggrieved by this decision, you are free to appeal on the same in writing within seven days from the date of this letter.

Yours Faithfully

For: MEGA GARMENT INDUSTRIES (EPZ) LTD

(signed)

HUMAN RESOURCE MANAGER"

17. According to this letter and further evidence adduced in court, the Claimant's employment was terminated because he attended a political rally at which he made disparaging remarks against the Respondent Company.

18. It is not in dispute that the Claimant attended a political rally on 6th April 2017. Indeed, the Claimant himself admits as much. The question is whether, by attending and participating in the rally, the Claimant breached the terms and conditions of his employment with the Respondent.

19. The termination letter accuses the Claimant of violating the confidentiality clause of his contract of employment. By definition, a confidentiality clause prohibits an employee or former employee from disclosing confidential information acquired in the course of employment.

20. In its decision in *SBI International Holdings AG (Kenya) v Amos Hadar [2015] eKLR* this Court held that for information to be classified as confidential, it must be specific not general and must have some proprietary value. The Court further held that a confidentiality clause cannot be used to conceal illegal activity by the employer.

21. The Court was not told the exact words uttered by the Claimant at the political rally. This would have been a crucial piece of evidence in determining whether the Respondent had a valid reason for terminating the Claimant's employment, within the requirements of Section 43 of the Employment Act.

22. From the evidence on record, it would appear that the issue was not that the Claimant attended the political rally but the words he is reported to have uttered at the rally. The Respondent's Human Resource Manager, Duncan Kavita confirmed this in his testimony before the Court.

23. In Kavita's words it was the Claimant's right to attend a political forum but the problem was that he used negative words against the Company. Kavita told the Court that the Claimant's mistake was reported by other employees who attended the rally with him. He added that the said employees wrote statements on 7th April 2017. The employees were not called as witnesses and their statements were not availed to the Court.

24. In the circumstances, the Court could not tell whether by his utterances, the Claimant breached the confidentiality clause in his employment agreement or whether he offended his employer in any way. The Claimant's apology dated 7th April 2017 does not negate this fact.

25. I therefore find and hold that the Respondent failed to establish a valid reason for terminating the Claimant's employment as required under Section 43 of the Employment Act.

26. The next question for determination is whether in effecting the termination, the Respondent complied with the mandatory procedural fairness requirements of Section 41 of the Employment Act.

27. The Claimant states that he was not given an opportunity to defend himself, prior to the termination of his employment. On its part, the Respondent states that the Claimant was allowed an opportunity to be heard. The Respondent's assertion was however not supported by any documentary evidence.

28. The Court therefore holds that the Respondent did not comply with the procedural fairness dictates of Section 41 of the Employment Act.

29. Overall, the Court finds and holds that the termination of the Claimant's employment was substantively and procedurally unfair and he is

entitled to compensation.

Remedies

30. I therefore award the Claimant three (3) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service, coupled with the Respondent's unlawful conduct in effecting the termination.

31. The Claimant claims one month's salary in notice pay but from the evidence on record, he was paid Kshs. 16,000 being his basic salary in notice pay. As a consequence, the only order I will make on this limb is for payment of Kshs. 4,000 being his monthly house allowance, as notice pay shortfall.

32. According to the Terminal Dues Payment Advice dated 10th April 2017, the Claimant was also paid salary for days worked in the month of April 2017 plus accrued leave pay. These claims are therefore without basis and are disallowed.

33. Having been a contributing member of the National Social Security Fund (NSSF) the Claimant is not entitled to service pay.

34. The claim for public holidays and normal overtime were not proved and are dismissed.

35. In the end, I enter judgment in favour of the Claimant in the following terms:

a. 3 months' salary in compensation.....Kshs. 60,000

b. Notice pay shortfall.....4,000

Total.....64,000

36. This amount will attract interest at court rates from the date of judgment until payment in full.

37. The Claimant will have the costs of the case.

38. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF MAY 2020

LINNET NDOLO

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 15th March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties 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, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

LINNET NDOLO

JUDGE

Appearance:

Mrs. Kyalo for the Claimant

Miss Onyango for the Respondent