



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1695 OF 2015

FREDRICK KASAI.....CLAIMANT

v

S.K. NDEGWA t/a

HENRY SMITH & WILSON

CERTIFIED PUBLIC ACCOUNTANTS.....RESPONDENT

JUDGMENT

1. On 8 May 2014, S.K. Ndegwa as Managing Partner of Henry Smith & Wilson, Certified Public Accountants (Respondent) offered Fredrick Kasai (Claimant) employment as an Audit Senior.
2. The relationship hit turbulence and on 29 May 2015, the Respondent notified the Claimant of his summary dismissal. The reason given for the decision was persistent late reporting to work.
3. The Claimant was aggrieved and he instituted these proceedings against the Respondent on September 2015 alleging breach of contract, unlawful termination of employment and non-payment of dues and accrued rights.
4. The Respondent filed a *Defence* on 16 October 2015 contending that the suit was bad in law and that the dismissal was fair. Breach of contract was also denied.
5. The Claimant filed a *Reply to the Defence* on 2 November 2015 and the Cause was heard on 3 February 2020. The Claimant and the Respondent testified.
- 6. The Claimant filed his submissions on 20 February 2020 while the Respondent's submissions were filed on**
7. The Court has considered the pleadings, evidence and the submissions and adopted the Issues as set out in the Claimant's submissions (Court could not deliver the Judgment as earlier scheduled due to the COVID19 pandemic).

Competency of the suit

8. The Respondent challenged the competency of the Cause on the ground that that Henry Smith & Wilson, Certified Public Accountants had 9 partners and therefore it was not legally competent to sue him individually.
9. The Court does not find merit in the objection raised by the Respondent because under section 2 of the Employment Act, 2007, an employer is defined to include *an agent, manager or factor*.
10. The definition of the *employer* in the Act, in the view of the Court has removed employment disputes from the strict legal principles familiar under the company law.
11. Under Order 30 of the Civil Procedure Rules, a suit may be instituted in the name of the partners, and service may be effected upon any of the partners.
12. And if the Court were wrong in the conclusion, it is of the view that the failure to list the name of all the partners was an irregularity capable of being cured and should not be used to defeat the action.

Unfair termination of employment

13. Summary dismissal in this jurisdiction is governed by sections 41(2) and 44 of the Employment Act, 2007.

14. Pursuant to section 41(2) of the Act, an oral hearing is mandatory in cases of summary dismissal.

15. Even without disputing that the Claimant had a history of reporting to work late, the Respondent was under an obligation to afford the Claimant an opportunity to make representations before taking the decision to dismiss (him) on 29 May 2015.

16. The Respondent did not disclose whether the Claimant was afforded such an opportunity, when, where and who was present during such a session.

17. From the state of the record, the Court finds that the summary dismissal of the Claimant was tainted for lack of a hearing as envisaged by law.

Compensation

18. The Claimant served the Respondent for about 1-year and in consideration of the length of service, the Court is of the view that the equivalent of 1-month salary as compensation would be fair.

Salary in lieu of notice

19. The Claimant was not heard. He was not given 1-month written notice as contemplated by section 35(1)(c) as read with section 36 of the Employment Act, 2007 and the Court will allow the head of claim for 1-month salary in lieu of notice.

Breach of contract

20. The Claimant contended that his salary of Kshs 55,000/- did not include house allowance.

21. The first obligation of an employer under section 31 of the Employment Act, 2007 is to provide accommodation to the employee, and in default, a housing allowance.

22. And if the salary is consolidated to include house allowance, the contract should expressly state so.

23. The Claimant's contract indicated that the salary was gross.

24. The Claimant did not disclose whether he queried the Respondent to explain during the tenure of employment what gross salary meant.

25. The Court finds that the Claimant's salary included house allowance.

Certificate of Service

26. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant.

Conclusion and Orders

27. From the foregoing, the Court finds and declares that the summary dismissal of the Claimant was unfair and awards him

(a) Compensation	Kshs 55,000/-
------------------	---------------

(b) Salary in lieu of notice	Kshs 55,000/-
------------------------------	---------------

TOTAL	Kshs 110,000/-
--------------	-----------------------

28. Respondent to issue certificate of service within 21 days.

29. Claimant to have costs.

Dated, signed and delivered through email in Nairobi on this 5th day of May 2020.

Radido Stephen

Judge

Appearances

For Claimant

Mr. Thuku instructed by S.N. Thuku & Associates

For Respondent

Mr. Wandaka instructed by Kinuthia Wandaka & Co. Advocates

Court Assistant

Judy Maina