



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2193 OF 2017

DANIEL OMWENGA.....CLAIMANT

VERSUS

GENERAL PLASTICS LIMITED.....RESPONDENT

JUDGMENT

1. Daniel Omwenga (Claimant) instituted these legal proceedings against General Plastics Ltd (Respondent) on 3 November 2017 and he stated the Issue in Dispute as Unlawful, unfair and wrongful termination of Daniel Omwenga by the Respondent.
2. According to an affidavit of service filed in Court on 31 January 2018, a Secretary of the Respondent accepted and acknowledged service by signing and stamping on a copy of the Notice of Summons on 14 November 2017.
3. Despite acknowledging service, the Respondent did not enter an Appearance or file a Response, and on 19 December 2018, the Court directed that the Cause proceeds to formal proof (undefended Cause).
4. Pursuant to further Court order, the Claimant filed an affidavit of evidence sworn on 10 July 2020, and submissions.
5. The Court has considered the Memorandum of Claim, the affidavit and submissions.

Unfair termination of employment

Procedural fairness

6. The Claimant was offered employment as a machine operator by the Respondent through a letter dated 2 January 1999.
7. On or around 31 October 2015, the Respondent issued a *show-cause notice* to the Claimant, and the Claimant responded on 2 November 2015.
8. The Respondent, after considering the response notified the Claimant of his summary dismissal through a letter dated 9 November 2015.
9. The letter states that apart from the *show-cause* and response, the Respondent's Human Resource Manager had an oral meeting with the Claimant in the presence of a Shop Steward.
10. On the basis of the documentation, the Court is satisfied that the disciplinary process carried out by the Respondent met the test outlined in section 41 of the Employment Act, 2007. The process was procedurally fair.

Substantive fairness

11. Under section 43 and 45(1) of the Employment Act, 2007, an employer has the burden of proving the reasons for terminating the services of an employee when there is a legal challenge.
12. The Respondent did not participate in the proceedings to discharge the burden.
13. The Court also notes that after the dismissal, Shop Stewards wrote to the Respondent challenging the validity and fairness of the reasons given for the dismissal of the Claimant.
14. On the state of the record, the Court can only conclude that the termination of the Claimant's employment was not for valid and/or fair

reasons.

Compensation and pay in lieu of notice

15. The Claimant was earning Kshs 22,898/27 as of October 2015. He had served the Respondent for about 16 years and in light of the length of service, the Court is of the view that the equivalent of 12 months' gross salary as compensation would be fair.

16. On notice, the contract provided for 1-month notice or pay in lieu thereof.

17. The Court will allow the equivalent of 1-month salary in lieu of notice.

Breach of contract/statute

Pro-rata levy of Kshs 6,873/30

18. The Claimant did not provide any evidential basis for this head of the claim and relief is declined.

Annual leave

19. On account of annual leave, the Claimant sought Kshs 12,224/60 but did not disclose or provide any evidence of the period/year in respect of the untaken leave. Relief is declined.

Gratuity/benefits

20. The Claimant prayed for gratuity/benefits totalling Kshs 285,275/-.

21. If by gratuity/benefits the Claimant meant *service pay* as provided for under section 35(5) & (6) of the Employment Act, 2007, he would not qualify for the same as the copy of payslip he filed in Court show that he was a member/contributor to the National Social Security Fund.

22. In case there was any other contractual or legal foundation to this head of the claim, such a basis was not disclosed or proved. The head of the claim is rejected.

Leave travelling allowance/Baggage allowance

23. Similarly, the Claimant did not lay any contractual, legal or evidential basis for these heads of the claim and relief is declined.

Conclusion and Orders

24. The Court finds and declares that the summary dismissal of the Claimant was unfair and awards him

(a) Compensation	Kshs 274,779/-
(b) Salary in lieu of notice	Kshs 16,547/-
TOTAL	Kshs 291,326/-

25. Claimant to have costs on half scale.

Delivered through Microsoft teams, dated and signed in Nairobi on this 25th day of September 2020.

Radido Stephen

Judge

Appearances

For Claimant	Solonka & Co Advocates
Respondent	did not participate
Court Assistant	Judy Maina