



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 659 OF 2018

FELIX MBOLONZI KIKO.....CLAIMANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Claimant filed a Statement of Claim dated 20th April 2018 alleging that his employment was terminated unfairly and wrongfully by the Respondent vide the letter dated 26.1.2015. Therefore, he prayed that judgment be entered as against the Respondent for:

- a) A declaration that the Respondent's decision to terminate the Claimant's employment was procedurally unfair and substantively unjustified.*
- b) Service pay for all years worked.*
- c) Damages equivalent of 12 month's salary due to unfair termination.*
- d) Costs of the suit; and*
- e) Any other relief that this Honourable Court may deem fit and just to grant.*

2. The respondent did not enter appearance after being served with the summons and as such the suit proceeded *ex parte* by formal proof on 12.2.2020. The claimant testified as Cw1 and thereafter filed written submissions.

3. In brief, the claimant's case is that he was employed as a Clerical Officer II at the Attorney General's Chambers on 9.4.2008 and later he was posted to the Office of the respondent to do special duties of ICT; that he worked there until October 2014 when he was arrested detained at Kilimani Police Station in connection with a Hard Disc which disappeared on 21.9.2014; that although he was released without any charges being preferred against him, he was suspended and thereafter received a dismissal letter dated 26.1.2015; that in his view the dismissal was unfair because the alleged gross misconduct was not true and he was not accorded any hearing before the dismissal; finally he contended that he appealed against the dismissal but the same was never heard. Consequently, he prayed for the reliefs sought in the suit.

4. In his submissions, he maintained that the reason for the dismissal was not valid and the failure to accord him a prior hearing as required by the Employment Act and the Fair Administrative Actions Act rendered the dismissal unfair within the meaning of section 45 of the Employment Act. He placed reliance on **Beatrice Nyambune Mosiria v Judicial Service Commission [2019] eKLR, Kenfreight (E.A) Ltd v Benson K. Nguti [2017] eKLR, Geoffery Gikonyo Mathu v intex Construction Company Ltd [2017] eKLR and Shankar Saklani v DHL Global Forwarding (K) Limited [2012] eKLR** where this court and the Court Appeal were in agreement that for termination of an employee's contract of serve to pass the test of fairness, the employer must prove that it was grounded on a valid reason(s) and that a fair procedure was followed.

5. The issues for determination arising from the pleadings, evidence and submissions are: -

- (a) Whether the dismissal of the claimant from his employment was unfair.
- (b) Whether the claimant is entitled to the reliefs sought.

Whether the dismissal was unfair.

6. Section 45(2) of the Employment Act provides that termination of an employee's contract of service is unfair if the employer fails to

prove that the termination was grounded on a valid and fair reason (s) relating to the employees conduct, capacity and compatibility or based on the employer's operational requirements; and that a fair procedure was followed. In this case, the respondent did not controvert the claimant's case by pleadings and evidence. Therefore, I find that the evidence by the claimant that he was dismissed from service for no valid reason and without being heard has not been rebutted and as such the dismissal was unfair within the meaning of section 45 of the Employment Act.

7. I gather support from **Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

8. Again in **Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR** Onyango J held that: -

“What constitutes fair termination is a matter that is now well settled by the wealth of Jurisprudence of this court and the Court of Appeal. There are two elements that must be satisfied by the employer, fair procedure and valid reason.”

9. Also, in **Beatrice Nyambune Mosiria v Judicial Service Commission [2019] eKLR**, where the court held that: -

“In employment matters, the employer has to prove both valid reason and fair procedure.”

10. Finally, in **Stanslaus Onchari v Creative Consolidated Systems Ltd [2020] eKLR**, where the respondent failed to file defence, Radido J held that: -

“14. According to the Claimant, the opportunity to be heard and because he was not paid his dues.

15. The Court has considered the Claimant's unchallenged testimony as well as a copy of the termination letter.

16.

17. Section 35(1)(c) of the Employment Act, 2007 requires an employer to give written notice of termination of employment at least 28 days in advance (or pay in lieu of notice). The Respondent did not give adequate notice nor tender pay in lieu of notice.

18. Further, sections 40, 41, 43 and 45 of the Employment Act, 2007 contemplate the giving of reasons before termination of employment. The notice to the Claimant did not give any reasons.

19. The Court, in the circumstances, finds that the termination of the Claimant's employment was both procedurally and substantively unfair.

Whether the claimant is entitled to the reliefs sought.

11. Having concluded that respondent has failed to prove that the Claimant's dismissal from employment was grounded on a valid and fair reason and that fair procedure was followed, I make declaration that dismissal was unfair and unjustified. Further, I find that he is entitled to compensation for the unfair termination under **Section 49(1) of the Employment Act** as prayed. Considerin the Claimant's service of 6 years, I award him 6 months' salary as compensation for the unfair termination of his contract of service.

12. I further award him service pay at the rate of 15 days' pay for every completed year of service equalling to 3 months' pay.

13. In conclusion I enter judgment for the claimant as against the respondent in the following terms: -

Compensation	kshs 28,323 x 6	kshs. 169,938
Service pay	kshs. 19,323 /2 x 6	<u>Kshs. 57,969</u>
Total		<u>kshs. 227,907</u>

The above award is subject to statutory deductions but in addition to costs plus interests at court rates from the date hereof.

Dated and delivered at Nairobi this 24th day of September, 2020.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE