



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 1016 OF 2016**

**JOSHUA MWIKA INDUSA.....CLAIMANT**

**-VERSUS-**

**CONNECT EXPERIENTIAL LIMITED .....1ST RESPONDENT**

**ANN KIBINGA .....2ND RESPONDENT**

**JUDGMENT**

1. This claim is for the following reliefs:-

- (a) Declaration that the termination of the Claimant's employment by the Respondent on 1.2.2016 was unfair and unlawful.
- (b) Terminal benefits and compensation for unfair termination amounting to Kshs. 853,997.99.
- (c) Costs and interest

2. The facts of the case are that the claimant was employed by the 1<sup>st</sup> Respondent as an Office Cleaner/Messenger on 2.6.2006. His starting salary was Kshs. 10,000 but later it was increased gradually to Kshs. 18,000 per month. His working time was between 7 a.m. and 5 p.m. but he was not paid for the overtime worked. He also never went for annual leave for the 9 years worked. Finally, he contended that he was dismissed for no valid reason and without being given any hearing.

3. The 1<sup>st</sup> Respondent admitted that it employed the Claimant as alleged but denied the alleged unfair termination of his contract. It contended that the Claimant was dismissed for gross misconduct and that it invited him for a hearing but he declined. It denied the reliefs sought and averred that they are not warranted.

4. The dispute was referred for mediation and a partial agreement was reached save his claim for one month salary in lieu of notice, accrued leave for 9 years overtime worked for 4050 hours and compensation for 12 months salary for unfair termination. The suit proceeded to hearing in respect of the said outstanding issues and thereafter both parties filed written submissions.

**CLAIMANTS CASE**

5. The Claimant testified as CW1. He reiterated the facts of the case summarised above and prayed for the above reliefs. He further stated that the 2<sup>nd</sup> Respondent sent to him a text message on 3.1.2016 suspending him from work until 11.1.2016; that on 11.1.2016, she sent another text message telling him to see her on 18.1.2016 at 2 p.m.; that when he went to the office that day as directed he did not find her and the guards told him that she had left earlier; and finally on 24.1.2016 he received an SMS from 2<sup>nd</sup> respondent telling him that she will notify him when she would see him.

6. On 1.2.2016 he decided to go to the office after failing to receive any communication, after being kept waiting at the reception for a while he was served with a termination letter indicating his terminal dues as Kshs. 57,000. No reason was cited for the termination and he was compelled to sign the letter in order to get the money which he needed for his child's school fees. ,

7. On cross-examination he confirmed that the 2<sup>nd</sup> Respondent was a director of the 1<sup>st</sup> Respondent. He admitted that he was not working on Sundays and that he was going away for Christmas holiday from 22<sup>nd</sup> December to 3<sup>rd</sup> January every year. He contended that he was working as Office Messenger for the 1<sup>st</sup> Respondent and Domestic Worker in the 2<sup>nd</sup> Respondent's home. He denied that he was cleaning the office at 8.00 a.m.

8. He admitted that the boss asked him whether he was taking alcohol from his house for 3 years and he denied and thereafter he was

suspended. He denied that he was invited to a disciplinary hearing by the letter dated 18.1.2016 and contended that he was never served with the same.

## **DEFENCE CASE**

9. Serah Cheruto is the 1<sup>st</sup> Respondent's Assistant Project HR Officer and she testified as RW1. She told the court that the Claimant joined the 1<sup>st</sup> Respondent in 2006 under 2 years fixed contracts which were renewed consecutively. She further stated that the Claimant's services were lawfully terminated for gross misconduct of being intoxicated while on duty. She further stated that the Claimant was suspended to pave the way for investigation and thereafter he was invited for hearing on 24.1.2016 vide the letter dated 18.1.2016 but he declined to attend and he was dismissed vide the letter dated 1.2.2016. Finally she contended that the Claimant was treated fairly and was even paid a token of Kshs. 57,000 despite him having been dismissed for gross misconduct. She therefore prayed for the suit to be dismissed with costs.

10. On cross-examination, she admitted that on 2016, she was the Administration/HR Manager of the Respondent. She contended that the Claimant was given a written contract for years dated 7.8.2013 and his place of work was to be designated by the employer. The contract stated the working time as between 7 a .m. to 5 p.m. daily but Sunday was off duty.

11. She admitted that the Claimant was on duty from 3<sup>rd</sup> to 10<sup>th</sup> January 2016 because the suspension letter was written on 11.1.2016. He admitted that the Claimant was served with the suspension by hand but he refused to receive it. She further admitted that the claimant was never served with the investigations report. She contended that the Claimant was served with show cause letter dated 18.1.2016 but again he refused to sign the same. He admitted that the Claimant was not involved in the investigation on the alleged misconduct. Finally, she admitted that the dismissal letter did not cite any reason for the termination but it contained sum of terminal dues payable to the Claimant. She admitted that the termination letter was not dated but the Claimant signed it on 1.2.2016.

## **Claimant's submissions**

12. The claimant submitted that his summary dismissal was unfair because there was no valid reason to justify the same and also because a fair procedure was not followed as required under section 45 and 41 of the Employment Act. He contended that the termination letter did not cite any reason for the dismissal but just stated that his alleged failure to attend disciplinary hearing was interpreted to be an admission of guilt and proceeded to dismiss him for unspecified gross misconduct.

13. He further urged that the respondent did not produce any evidence to prove that he stole his property and attended work while intoxicated. He denied service of the letters dated 11.1.2016 and 18.1.2016 which accused him of stealing from the employer and attending work while intoxicated and maintained there was no prove of the alleged misconduct He relied on **Bamburi Cement Limited v William Kilonzi [2016] eKLR** where the court of Appeal held that the dismissal of the employee was wrongful because the employer failed to discharge its burden of justifying the reason for the summary dismissal.

14. The claimant further submitted that the respondent did not accord him any fair hearing before the dismissal as required under section 41 of the Act. He contended that he was neither served with the investigations report nor the show cause letter dated 18.1.2016 and denied being privy to the discussions referenced in the termination letter. He relied on **Alphonse Machanga Mwachanya v Operation 680 limited [2013] eKLR**, where the court held that before dismissing an employee for a cause, the employer must have a valid reason and accord the employee a fair hearing in the presence of another employee as required under section 41 of the Act.

15. As regards the reliefs sought, the claimant submitted that he is entitled to the one month salary in lieu of notice being Kshs. 18,000 because his contract provided for 30 days notice period before termination. He further contended that he was entitled to 21 days leave every year but he only used to go for 10 days every year and as such he accrued 99 days during the 9 years of service equalling to Kshs. 59,400.

16. He further submitted that he is entitled to overtime pay for the extra hours worked being one hour daily save on Sundays, because he used to work from 7.00 am to 5.00pm. He calculated the overtime as 5 hours per week, 20 hours per month and 2500 hours for the 125 months worked. He multiplied the said 2500 hours by Kshs. 75 per hour being normal hourly rate by 1.5 times equalling to kshs. 281,250. He claimed a further 4 hours every Saturday x 125 months equalling to 620 hours x Kshs 75 x 2 equalling to Kshs. 93,000. In total he claimed Kshs. 374,250 as overtime pay.

17. Finally, he prayed for the maximum 12 months' salary as compensation for the unfair termination.

## **Respondent's submissions**

18. The respondents submitted that the 2<sup>nd</sup> respondent is wrongly enjoined in these proceedings because she is not the employer of the claimant but only a director of the 1<sup>st</sup> respondent, the real employer. They maintained that all the claims in this suit ought to be directed at the 1<sup>st</sup> respondent. They relied on **Victor Mabachi & another v Nurturn Bates Ltd [2013] eKLR** where the court held that a company, as a body corporate is separate independent entity from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.

19. The respondents further submitted that the termination of the claimant's employment contract was lawful because it was done on the basis of a valid reason and after following a fair procedure. They contended that after suspecting that the claimant was attending work while intoxicated, he was suspended for 7 days to pave the way for investigations into the issue; that the investigations yielded reasonable proof of the claimant's misdeeds and he was summoned for a hearing on 24.1.2016 vide the letter dated 18.1.2016; that the claimant declined to honour the summons and he was summarily dismissed.

20. The respondent maintained that they treated the claimant fairly and prayed for the suit to be dismissed with costs. They relied on **Kenya**

**Commercial Food and Allied Workers Union v Meru North Farmers SACCO Limited [2014] eKLR and Jackson Butiya v Eastern Produce Cause 335 of 2011** where the court held that where an employee squanders the internal grievance handling mechanisms provided by the employer cannot come to court for compensation for unfair termination.

21. As regards the reliefs sought, the respondents submitted that the claims are baseless. They committed that the claimant was summarily dismissed and as such he is not entitled to salary in lieu of notice. They further termed the claim for 21 days leave per year for 9 years as absurd. They contended that the claimant could not have lived in the 1<sup>st</sup> respondent's premises from 2006 to 2016 without going anywhere.

22. They further denied the claim for overtime contending that the claimant was working only 48 hours per week as opposed to the statutory 52 hours. They urged the court to disregard the calculations of overtime hours made in the submissions because it did not form part of the evidence which could be tested by cross-examination.

23. In conclusion, they submitted that the claimant has not proved unfair termination of his employment and prayed for the suit to be dismissed with costs.

#### **Issues for determination and analysis**

24. Having carefully considered the evidence and submissions by both parties, the issues for determination are:

- (a) Whether the summary dismissal of the claimant was unfair and unlawful.
- (b) Whether the claimant is entitled to the claim for reliefs sought.

#### **Whether the dismissal was unfair and unlawful**

25. It is now well settled in our jurisprudence that in any legal proceedings by which an employee impugns termination of his contract of service, the employer has the legal burden of proving validity of the reason for the termination and the fairness of the procedure followed. The basis of the foregoing jurisprudence is Section 45 of the Employment Act which makes the following provisions regarding unfair termination of employment—

- (1) No employer shall terminate the employment of an employee unfairly.*
- (2) A termination of employment by an employer is unfair if the employer fails to prove—*
  - (a) that the reason for the termination is valid;*
  - (b) that the reason for the termination is a fair reason—*
    - (i) related to the employee's conduct, capacity or compatibility; or*
    - (ii) based on the operational requirements of the employer; and*
  - (c) that the employment was terminated in accordance with fair procedure.*

#### **Was the reason herein valid?**

26. The termination letter never cited any reason for the termination other than stating that the failure by the claimant to attend hearing on 24.1.2016 was deemed as an admission of guilt and therefore a decision had been made to dismiss him summarily for gross misconduct. Assuming that the alleged misconduct was the one charged vide the letter dated 18.1.2016, the question that arises is whether the claimant was served with the said letter and whether the said charge had been established before the dismissal herein.

27. Starting with the issue of service of the letter dated 18.1.2016, Rw1 who authored the letter did not prove that she is the one who served the claimant with the letter or whether she was present when the alleged service was done by another person. One would have expected Rw1 to produce documentary evidence as proof of service like a Hand Deliver Book or a copy of the letter duly signed by the claimant acknowledging service of the show cause letter. Alternatively, Rw1 should have confirmed under oath that she served the letter or witnessed the service being done by another person.

28. The foregoing loophole in the defence case corroborates the claimant's case that he was never served with the said show cause letter but only received short text messages from the 2<sup>nd</sup> respondent summoning him to the office to see her only to find her absent. It follows therefore that without service of the letter dated 18.1.2016 on the claimant, the alleged admission of guilt of gross misconduct was without proper basis. Consequently, I find that the respondent has failed to prove that the alleged misconduct existed as at the time the decision to dismiss the claimant was made as required under section 43(2) of the Employment Act.

#### **Was fair procedure followed?**

29. Section 41 of the Employment Act provides

*“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”*

30. I have already made a finding of fact herein above that the respondent did not prove service of the show cause letter dated 18.1.2016 which incidentally was the one summoning the claimant to a disciplinary hearing. It follows that the respondent did not prove that she invited the claimant to a hearing and he declined. Consequently, I hold that the employer has also failed to discharge the burden of proving that the termination of the claimant’s contract of service was done in accordance with a fair procedure as required under section 41 and 45 of the Employment Act.

31. Having found that the respondent has failed to justify the dismissal of the claimant by a valid and fair reason, and further having failed to prove that a fair procedure was followed, it is clear to me that the claimant has established on a balance of probability that he lost employment through unfair termination within the meaning of section 45 of the Employment Act.

**Whether the reliefs sought should be granted.**

32. As earlier noted, the claim was partially settled through mediation save for the declaratory orders sought, salary in lieu of notice, compensation for unfair termination, accrued leave and overtime pay.

33. In view of the finding that the respondent did not prove a valid reason for the dismissal and that a fair procedure was followed, I make declaration that the termination of the claimant’s contract of employment was unfair and unlawful. Flowing from the foregoing declaration, I find that the claimant is entitled to salary in lieu of notice plus compensation for the unfair termination by dint of section 49(1) of the Employment Act. Based on Clause 7 of his Contract, I award him one month’s salary in lieu of notice being Kshs. 18,000. Again considering his long service of over 9 years, and the fact that the respondent did not prove the alleged misconduct against him, I award to him 8 months’ salary compensation for the unfair termination equalling to Kshs. 144,000.

34. The claim for accrued leave of 21 days for 9 years has not been rebutted by leave records by the employer who, under the law, is the custodian of all the employment records. However, during cross examination, the claimant admitted that he used to go for Christmas holiday from 22<sup>nd</sup> December to 3<sup>rd</sup> January every year. Again in his written submissions, he admitted that he used to take 10 days leave during the said period and therefore claimed for the net balance of 11 leave day per year for 9 years equalling to 99 days. I therefore allow the said claim for accrued leave for the 99 days/ 26 x Kshs. 18,000 equalling Kshs. 59,400.

35. The claim for over time is exaggerated because the claimant has not factored the days he was away on leave. I therefore find that the claim is lacking material particulars and evidence to substantiate and it is dismissed.

**Conclusion and disposition**

36. I have found that the termination of the claimant’s contract of service herein was unfair and unlawful. I have also found that the claimant is entitled to the reliefs sought save for overtime pay. Consequently, I enter judgment for the claimant against the 1<sup>st</sup> respondent in the following terms:

Notice	Kshs 18,000
Compensation	Kshs. 144,000
Leave	<u>Kshs. 59,400</u>
<b>Total</b>	<b><u>Kshs. 221,400</u></b>

37. The said award is in addition to the amount paid after the termination plus the Mediation award. The award herein is also subject to statutory deductions but in addition to costs plus interest at court rates from the date of this judgment.

**Dated and delivered at Nairobi this 23rd November, 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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the**

parties having waived compliance with Rule28(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