



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2231 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

AMALGAMATED UNION OF KENYA METAL WORKERS....CLAIMANT

VERSUS

SOUTH END MOTORS LIMITED.....RESPONDENT

JUDGMENT

The claimant herein is a trade union registered under Section 14 of the Labour Relations Act to represent employees in the sectors set out in the membership clause of its constitution which includes employees engaged in the motor industry. The claimant has a recognition agreement with the Respondent and had a valid collective bargaining agreement with the Respondent at the time material to this suit. This suit is filed on behalf of the claimant's member Martin Wangila Ndalila, the grievant.

In the memorandum of claim dated 6th November 2017 filed by the claimant, the issue in dispute is the unprocedural and unfair termination of the employment of Martin Wangila Ndalila.

It is the claimant's case that the grievant was employed by the Respondent as a mechanic on 4th March 1993 at a starting salary of Kshs.2,800. The grievant later trained as a driver and was redeployed as a mechanic cum driver and assigned to be a personal driver to the Respondent's company Chairman, Mr. Evans Luseno. The claimant's salary rose over time by virtue of the CBA negotiations to Kshs.18,700 (basic) and Kshs.5,000 (house allowance) as at April 2017.

It is the claimant's case that on 7th April 2017, the grievant was called to the Administrative Office and ordered out of the premises. He was ordered never to return to the Respondent's premises. He was not issued with a letter of termination and the reason for the dismissal was never disclosed to him, even when he sought the same. He was also not paid any terminal benefits.

The claimant reported the matter to the Cabinet Secretary, Ministry of Labour pursuant to Section 62 of the Labour Relations Act and a Conciliator was appointed. The Conciliator was however unable to resolve the dispute and issued a certificate to that effect as provided under Section 69 of the Labour Relations Act to enable the dispute to be escalated to this court.

In the Memorandum of claim, the claimant avers that the termination was contrary to Articles 41(1) and 50(2)(a), (b), (c), (j) and (k) of the Constitution of Kenya and Sections 41 and 42 of the Employment Act. That the Respondent also contravened clauses 5, 6, 16 and 26 of the parties CBA. That the Respondent further disobeyed the summons by the Conciliator attend conciliation meetings in violation of the provisions of the Labour Institutions Act.

The claimant prays for reliefs as follows –

- a. That, the Court finds the actions of the Respondent against the grievant in terminating the services of the grievant without a letter and reason for the action taken a bad labour practice contrary to Articles 41 and 50 of the Constitution of Kenya 2010.
- b. That the Court do find the actions of the Respondent in refusing to participate in the conciliation meetings as convened by the conciliator a blatant undermining the authority of an appointed officer within the meaning of the Labour Institutions Act 2007.
- c. That, the Court do order unconditional reinstatement of the grievant.
- d. That, if in the opinion of the Court, reinstatement is practically not possible, then the Court do Order payment of Terminal dues as

tabulated.

e. That, the court do order cost of this suit in favour of the Claimant.

The claimant has tabulated the terminal benefits and compensation for the grievant as follows –

1. 3 months' Notice of termination

23,982 x 3 months..... 71,946

2. Service gratuity 18,982 x 15 days x 24 years..... 262,828

26 days

3. 6 last days worked in April, 18,982 x 6 days..... 4,380

26 days

4. One year annual leave..... 18,982

5. Leave traveling allowance..... 6,000

6. Underpayment (23,982 – 21,740) x 3 months..... 6,726

7. Baggage allowance..... 5,000

8. Unrefunded 21,000/= spent in advance for

refund later..... 21,000

9. Unremitted NSSF.....10,080

10. 12 months' salary compensation for unprocedural and

unfair loss of employment 19,982 x 12 months... 287,784

Total..... 694,726

The claimant filed a witness statement of the grievant together with the claim in which the grievant reiterates the averments in the memorandum of claim.

The Grievant further states that he served the company faithfully, diligently and effectively for 24 years and that to date he has no idea why his employment was terminated abruptly without being given an opportunity to defend himself.

The Respondent was served with summons, a copy of which is filed in court endorsed with the rubber stamp of the Respondent on 10th November 2016 and signed by one by Kennedy Luseno. A certificate of service to that effect was filed in court on 29th November 2018. The Respondent however never entered appearance or file a defence to the memorandum of claim.

The Respondent was invited for pre-trial mention on 29th April 2019 which invitation letter it endorsed on 7th February 2019 as per copy on the court record but again failed to attend court on the pre-trial date. By letter dated 30th March and 3rd April 2019, the Respondent denied ever being served with summons and sought copies of pleadings which were supplied via email correspondence from the claimant on 1st and 3rd April 2019 respectively. The Respondent still did not file any defence.

The judgment notice was also served upon the Respondent on 22nd July 2020 together with a copy of the Claimant's written submissions but again the Respondent did nothing.

The claim was disposed of by way of written submissions in view of the fact that it is undefended and the facts therefore not contested.

In the submissions dated 17th July 2020, the claimant reiterates the facts and submissions as set out in the claim and in the grievant's witness statement.

Determination

I have considered the pleadings and submissions. As stated above there is no response to the claim and the facts are thus not contested. The claimant has attached a copy of the grievant's letter of appointment as proof of the employment relationship between the grievant and the Respondent. It has further attached a copy of the CBA for the period of two years commencing January 2017 as proof of the terms of service for the grievant.

The claimant relied on the case of **Daniel Kiplagat Kipkeibut v SMEP Deposit Taking Micro Finance Limited Kericho Cause No. 213 of 2015** and **Abisalom Ajusa Magomere v Kenya Nut Company Limited (2014) eKLR**. Both cases were decided in favour of the claimant and compensation awarded for unfair termination of the employment.

Based on the uncontested facts of this case the verbal termination of the grievant's employment violated Sections 41 and 43 of the Employment Act and was therefore unfair within the meaning of Section 45 of the Act.

Having found the termination unfair, the grievant is entitled to pay in lieu of notice. Clause 16 of the CBA provides for termination of service as follows –

“16. TERMINATION OF SERVICE

After completion of probationary period, notice of termination of employment may be given by either party to the other in writing in accordance with the length of service of employee with the employer, thus:

- i. a) From completion of probationary period, to 5 years – 1 month's notice or salary in lieu of notice.
- b) From 5 year but under 15 years' service - 2 months' notice or salary in lieu of notice
- c) From 15 years onwards - 3 months' notice or salary in lieu of notice.
- ii. An employee so terminated shall be eligible for gratuity at 15 days basic salary for each completed year of service.

The claimant is thus entitled to 3 months' salary in lieu of notice at **Kshs.71,946** based on the grievant's consolidated salary, having worked for more than 15 years.

The grievant is further entitled to gratuity at 15 days basic salary for each year worked being 24 years at **Kshs.262,828**.

He is entitled to pay for 6 days worked at **Kshs.4,380**. He is also entitled to one year's annual leave at 26 days as provided in Clause 5 of the CBA being **Kshs.18,982** and leave travelling allowance of **Kshs.3,000** as per clause 6 of CBA.

The claimant has not demonstrated that the grievant was underpaid. The claim for underpayments is therefore rejected.

The claimant is awarded baggage allowance at **Kshs.5,000** as provided in clause 26 of the CBA.

The claim for unrefunded Kshs.21,000 spent in advance for refund later has not been explained or proved and is therefore declined. The prayer for unremitted NSSF is also not proved and is dismissed as the claimant did not prove deduction of the same or produce a statement from NSSF to prove non-remittance.

In view of the grievant's length of service and unexplained reasons for termination, the abruptness of the termination without a chance to defend himself, I award him maximum compensation of 12 months' salary in the sum of **Kshs.287,784.00**.

I award the claimant costs of **Kshs.50,000** on account of reasonable expense and disbursements.

The prayer for reinstatement is incapable of being granted taking into account the circumstances under which the grievant's employment was terminated and the fact that more than 3 years have lapsed since the termination. The Employment and Labour Relations Court Act provides for reinstatement only within 3 years from the date of termination of employment while Section 49(4) of the Employment Act provides for reinstatement only in exceptional circumstances which the claimant has not demonstrated.

In conclusion, judgment is entered for the claimant on behalf of the grievant against the Respondent as follows –

- 1. 3 months' salary in lieu notice..... 71,946.00
- 2. Service gratuity..... 262,828.00
- 3. 6 days worked in April 2017..... 4,380.00
- 4. Pay in lieu of leave not taken..... 18,982.00
- 5. Leave traveling allowance..... 3,000.00

6. Baggage allowance..... 5,000.00

7. 12 months' salary as compensation..... 287,784.00

Total Award is..... 653,920.00

Claimant's costs of the suit have been assessed at **Kshs.50,000.00**. Interest on the decretal sum shall accrue at court rates from date of judgment till payment in full

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF DECEMBER 2020

MAUREEN ONYANGO

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 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They 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, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE