



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 700 OF 2010

(Before Hon. Lady Justice Maureen Onyango)

RODGERS ATUULO AMBASU.....CLAIMANT

VERSUS

BUDGET PAYLESS CAR HIRE AND TOURS LIMITED.....RESPONDENT

JUDGMENT

The Claim herein is filed by Rodgers Atuulo Ambasu alleging wrongful termination of his employment and non-payment of terminal dues by the Respondent. In his Memorandum of Claim dated 15th June 2010 and the Supplementary Memorandum of Claim dated and filed in Court on 11th October, 2011 he seeks the following reliefs:

1. Respondent to pay the Claimant gratuity *service), notice and leave as quantified below:

- (i)..... Gratuity (service) at the rate of 19 days’ pay tear worked
 $14,678/30 = 489 \times 19 = 9,296 \times 2$ 18,592
- (ii)..... Payment in lieu of notice (one month salary) 14, 678
- (iii)..... Payment in lieu of leave (not granted in 2 years,
two months’ salary 29,356
- (iv) Unpaid dues – 17 days worked and not paid in the
month of August, 2009..... **8,313**

Total Kshs.70,939/=

- 2. Respondent to pay the Claimant reasonable compensation for the illegal and unlawful termination of employment as this Honourable Court may determine.
- 3. Respondent to pay costs of this suit with interest.
- 4. Any other order and/or relief that this Honourable Court may deem just and expedient to grant.

The Respondent filed the Respondent’s Memorandum of Reply dated 15th September, 2010 and filed in Court on the 17th September, 2010 in which it admits that the Claimant was its employee in the position of Mechanic with effect from 1st August 2008.

It is further admitted that the Claimant was terminated from the Respondent’s employment but it is contended that the termination was on the grounds of negligence of duty and poor performance of his work.

The Respondent further admitted in its Reply to the Memorandum that it is ready to pay the Claimant the following terminal dues:

- a).. One Month's salary in lieu of notice..... Kshs.12,590
 - b).. 17 days worked in August, 2008..... Kshs.7,134
 - c).. House Allowance..... Kshs.2,088
 - d).. 29.5 days earned leave Kshs.12,422
- Less taxes
- e) Certificate of Service.

Parties proceeded by way of written submissions as per the consent of the Parties on 19th September, 2018. Both parties also adopted the affidavit by the Claimant, who was unable to attend Court due to ill health, and a witness statement by the Defendant's witness as part of the evidence.

The Claimant in his affidavit sworn on 12th June 2013 and filed in Court on 13th June, 2013, reiterated the averments in his Memorandum of Claim and Supplementary Memorandum of Claim. He further stated that he was employed by the Respondent Company to the position of Mechanic with effect from 1st January, 2008 earning a gross monthly salary of Kshs.14, 678/=.

The Claimant averred that during the period of his employment he executed all his duties professionally, diligently and with care and that no complaints on the Motor Vehicles assigned to the Claimant.

The Claimant further stated that the appendixes marked 4, 5 and 6 in the Reply to the Memorandum of Claim (Warning Letters) were never served on him and that the signature appearing thereto is not his.

Further that the Claimant was never invited for any disciplinary hearing to explain the poor performance and that he did not work on Sundays as alleged in the said annexures.

The Claimant contends that his termination was therefore illegal and unlawful as it did not comply with his employment contract executed as between the Claimant and the Respondent herein. Further that he is entitled to the prayers sought in his Memorandum of Claim.

Jai Radia, Managing Director of the Respondent Company stated in his witness statement filed in Court on 24th September, 2018, that the Respondent Company sometime in June 2008 resolved to re-organise its business through outsourcing the repair and maintenance of the Company vehicles.

Further that the Claimant was among employees that were affected by the decision. The Respondent proceeded to issue one Month's notice as per the provisions of Section 40 (1) of the Employment Act, 2007.

Mr. Radia witness further stated that on 1st August 2008, when the redundancy was to take effect, the Respondent Company had a change of heart and in-fact extended the Claimant's contract and the redundancy letters were declared null and void.

It was his evidence that the Claimant was later terminated on 17th August 2009 as a result of poor performance following instances of under-performance and subsequent warnings issued by the Respondent.

It was further his evidence the Claimant was invited for a meeting on 17th August 2009 to allow the Claimant explain why his performance had deteriorated over the last few months. The Claimant was thereafter issued with a show cause letter which he did not respond to.

He averred that on the same day at around 3:45 pm another meeting was convened in the presence of the Workshop Manager and the Human Resource Manager however, the Claimant still failed to respond to the show cause letter.

Further that it was on this basis that the Respondent resorted to terminate the services of the Claimant and expressed willingness to pay his terminal dues as itemised in the termination letter.

Mr. Radia urged the Court to dismiss the Claim with Costs.

Claimant's Submissions

In the written submissions the Claimant reiterated the contents of the Memorandum of Claim and his Affidavit duly adopted by the Court as the Claimant's evidence.

The Claimant submitted that the Respondent failed to give neither notice or a hearing to the Claimant prior to termination of his services contrary to the provisions of Section 41 of the Employment Act, 2007.

It is further submitted that the termination was contrary to Sections 41(1), 42(1), 44(3) and (4) and Section 45 of the Employment Act, 2007.

The Claimant relied on the Authority of **Industrial Court of Kenya at Nairobi Cause Number 192 of 2013 Moses Kaunda Moro –Vs- CMC Motors Group Limited (2013) eKLR** where it was held

“...the Court finds the termination of the employment unfair for want of both substantive justification and procedural fairness and awards him the equivalent of twelve (12) months’ salary in compensation. He is also entitled to one month’s salary in lieu of notice.”

The Claimant further relied on the case of **Industrial Court of Kenya at Nairobi Cause Number 449 of 2013 Onesmus Omwenga Maroko – Vs- Cooperative Bank of Kenya Limited (2014) eKLR**.

The Claimant urged the Court to enter judgment in his favour as per the admission made by the Respondent on paragraph 21 of the Respondent’s witness statement signed by Mr. Jai Radia as well as in the Reply to the Memorandum.

The Claimant urged the Court to allow the Claim as drawn.

Respondent’s Submissions

The Respondent submitted that the Claimant’s termination was on grounds of poor performance which was evidenced by the letter marked appendix “3” dated 17th August, 2009. Further, that the respondent has shown that the reasons for termination were valid and fair procedure was followed as evidenced by appendix 4, 5 and 6 of the Reply to the Memorandum of Claim.

The Respondent relied on the case of **Employment and Labour Relations Court at Mombasa Cause No. 244 of 2016 Naman Muriuki –Vs- P.N Mashru Limited**.

It is further submitted that on the issue of compensation, that the Respondent in its letter dated 17th August, 2009 offered the Claimant a total of Kshs.34,234 further that the Claimant is willing to issue a certificate of service.

The Respondent has further submitted that the Claimant is not entitled to gratuity as section 35 (6) of the Employment Act, 2007 provides an exemption where service pay does not apply. It is submitted that the Claimant had enrolled into the National Social Security Fund and was contributing Kshs.200 per month thus he is not entitled to gratuity.

Determination

Having considered the pleadings, evidence, submissions and authorities cited by the parties the following are the issues for determination:

1. Whether the termination of the Claimant’s employment was valid both procedurally and substantively
2. Whether the Claimant is entitled to the reliefs sought
3. Who bears the costs of the suit

Fair Termination

The Law

The law relating to fair termination is contained in Section 41, 43 and 45 (2) of the Employment Act.

Section 41 of the Employment Act provides for the procedure for termination while section 43 of the Employment Act provides that the employer must prove valid reason.

Despite the fact that the Claimant was issued with a show cause letter, according to evidence on record he was not allowed the chance to defend himself at a proper hearing conducted by the Respondent as provided for under the Employment Act.

It is stated at paragraph 17 to 19 of the witness statement signed by Mr. Jai Radia that:

“On 17th August, 2009 the management of the company summoned the Claimant to a meeting in order to make inquiries and allow the Claimant explain as to why his performance had deteriorated over the last few months;

He was later given a show cause letter demanding an explanation why disciplinary action should not be taken against him, which letter was to be submitted at 3 pm on the same day. The Claimant however refused to show cause;

At around 3:45 pm, another meeting was convened. This time in the presence of the workshop manager and the human resources manager.”

The Claimant on the other had denied having been served with the show cause letter and that the signature appearing thereon is in-fact not his.

From the foregoing I opine that the notice given was too short for the Claimant to respond to the show cause letter in the event the same was issued. I rely on the authority of **Mumias Sugar Company Limited versus Kenya Union of Sugarcane Plantation Workers (2017) eKLR** where the Court held that:

“There is no provision in the manual for response to a show cause notice within 48 hours which in any event the court views as too short to enable an employee consult and respond to a show cause notice. Failure to respond to a show cause notice can therefore not form the basis for termination of employment.”

Further despite the fact that the Respondent’s witness indicated in paragraph 19 of his statement that the Claimant was invited for a meeting in the presence of the workshop manager and the human resource manager no evidence of notice for such meeting was availed to the Court. The Respondent’s witness did not also avail any minutes of any such meeting that purportedly took place.

In the case of **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.”

Fairness cannot be equated to one being issued with a show cause letter only. The Respondent ought to have conducted a proper disciplinary hearing that is properly documented in form of minutes to allow the both parties to air the grievances conclusively.

From the foregoing I opine that the termination of the Claimant’s services was unfair for the reason that he was not taken through the disciplinary process as set out in Section 41 of the Employment Act, 2007. The Claimant is therefore entitled to compensation for unfair termination. I rely on the case of **Industrial Court of Kenya At Nairobi Cause Number 192 of 2013 Moses Kaunda Moro –Vs- CMC Motors Group Limited (2013) eKLR** where it was held

“...the Court finds the termination of the employment unfair for want of both substantive justification and procedural fairness and awards him the equivalent of twelve (12) months’ salary in compensation. He is also entitled to one month’s salary in lieu of notice.”

It is my finding that the termination was invalid both procedurally and substantively.

Remedies

The claimant prayed for gratuity/service pay. Under Section 35(6)(d) of the Employment Act, 2007 the Claimant is not entitled to the same as payslips produced in Court indicate that the Claimant was a member of the National Social Security Fund and deductions were made of Kshs.200 per month and remitted to the fund. The claimant has further not proved that his terms of employment provided for gratuity as a benefit.

The claim for gratuity therefore fails.

The claimant further prayed for pay in lieu of notice which he is entitled to under Section 49(1) of the Act having been terminated unfairly. He is further entitled to pay in lieu of 35 days annual leave in the sum of Kshs.19,759. He is further entitled to salary up to the date of termination being 17 days salary in the sum of Kshs.9,597.15 and a certificate of service.

Judgment is therefore entered for the claimant against the respondent as follows –

- i)-- Salary for 17 days worked in August 2009----- Kshs.9,597.15
 - ii)- Pay in lieu of notice----- Kshs.14,678
 - iii) Leave 35 days----- Kshs.19,759
- Total Kshs.44,034.15**
- iv) Certificate of service.

In view of the fact that the respondent admitted owing the claimant the salary, pay in lieu of notice and pay in lieu leave but did not pay the same, interest thereof shall accrue from date of filing of suit.

The respondent shall further pay the claimant’s costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE