



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1150 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**PAUL MUMO KITAVI.....CLAIMANT**

*VERSUS*

**ACME CONTAINERS LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant in his Memorandum of Claim dated and filed on 2<sup>nd</sup> July 2015, alleges wrongful and unlawful termination of his services and failure by the Respondent to pay full terminal benefits owing to the Claimant. The Claimant seeks for the following remedies:

- i. Payment of Kshs.409,000/= as terminal benefits.
- ii. Detailed Certificate of Service.
- iii. Costs of this Claim plus interest.
- iv. General damages for unlawful termination.

The Respondent filed its Memorandum of Defence to the Claimant's Claim dated 9<sup>th</sup> March, 2016 and filed in Court on 10<sup>th</sup> March 2016, in which the unlawful termination of the Claimant's employment is denied in toto. The Respondent states there is a pending suit between the Claimant and the Respondent being CMCC No. 46 of 2015.

The Respondent contends that the Claim is false, misleading, misadvised and is an abuse of the court process.

It is further contended that the Claimant's Memorandum of Claim has no basis and that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim. The respondent urges the Court to dismiss the claim with costs.

On 10<sup>th</sup> May 2017, the Claimant (CW1) testified on his behalf. In his testimony, he stated that he was employed by the Respondent on or about the year 2010 as a machine operator. Further that he worked for the Respondent for a total period of 5 years and that he was not issued with a letter of appointment.

It was his evidence that he worked diligently and to the satisfaction of the Respondent. He was earning a monthly salary of 12,800/=.

He further testified that he was unlawfully terminated on 3<sup>rd</sup> March 2015, that he was neither given any notice prior to his termination nor issued with a letter of termination. CW1 averred that he was not accorded any hearing prior to his termination.

CW1 testified that he was injured while at work and filed the case CMCC No. 46 of 2015 which is in respect to compensation for the accident as he was injured while on official duty. He contends that the termination was due to his decision to file the suit for compensation.

CW1 testified that he was not paid any terminal dues at the time of termination of his services. He urged the Court to allow his Claim as drawn.

On cross examination CW1 stated that he was employed by the Respondent in the year 2009 but could not remember the month of his

employment. Further, that he was employed as a machine operator and that he attended training at the National Youth Service and was issued with a certificate.

On further cross examination CW1 averred that he had reported to his supervisor that the machine he was working on was not properly functioning prior to his injury but no repairs were done on the machine.

CW1 confirmed that he was a member of NSSF. He also confirmed that the Respondent had a clocking machine that workers used to clock once they arrived at work. He testified that he neither went on leave nor was he paid in lieu of such leave.

On Re-examination CW1 confirmed that he earned a monthly salary of Kshs12,800 that was paid to his bank account. He further stated that he did not receive any extra payment for any overtime worked.

The Respondent's case was heard on 16<sup>th</sup> May 2018 RW1, **Cosmas Ochieng Otieno**, the Human Resource Officer testified on behalf of the Respondent.

It was his evidence that the Claimant absconded duty and failed to execute a fresh contract with the respondent company as the contract on record was for September 2014. It was his further testimony that there is no record of separation between the claimant and the respondent.

RW1 further testified that the duration of notice pay for the company is one month. He testified that the Claimant was not paid in lieu of notice as he absconded duty and failed to execute a fresh contract as from January 2015.

RW1 testified that the Claimant was duly paid overtime prior to his absconding duty.

RW1 stated that the Claimant had used the machine that caused his injury repeatedly and never complained of any fault. He denied that the separation with the Claimant was in any way related to the Claimant's injury.

RW1 urged the Court to dismiss the instant Claim with costs to the Respondent.

On cross examination RW1 stated that he was not under the Respondent's employment on 3<sup>rd</sup> March 2015. He confirmed that he did not produce in court for inspection by the Court any employment records held by the Respondent.

RW1 confirmed that he had no record of any Notice to Show Cause issued to the Claimant. He further stated that the Claimant was paid service pay at the end of every year of service. However, he had no documentation in Court to support the evidence.

RW1 confirmed that in his witness statement at paragraph 8 he stated that the Claimant was assessed and his performance was below average. He contended that the Claimant absconded duty and was not terminated on account of poor performance.

The parties filed and exchanged written submissions.

### **Claimant's Submissions**

In the written submissions the Claimant reiterated the contents of the Memorandum of Claim and CW1's oral evidence in Court.

The Claimant submitted that the termination of his employment was unlawful and was in complete disregard to the provisions of Section 41 of the Employment Act.

It was further submitted that the Respondent's witness, who admitted having not been under the Respondent's employment at the time of the Claimant's termination failed to produce any employment records for the Claimant whom he admitted was an employee of the Respondent whose personal file he had perused.

The Claimant further submitted that no records were produced to support the allegation that he absconded duty, that no Notice to Show Cause was produced by the Respondent in proof that the Claimant had been cited for misconduct. The Claimant further submitted that this is clearly an after-thought meant to cover the unlawful act by the Respondent.

The Claimant averred that it is the sole obligation of an employer to keep employment records and avail them in Court when needed, that none were availed to support the allegations of the Respondent and as such the evidence by RW1 amounts to hearsay evidence and has no evidentiary value. The Claimant relied on the authority of **HCCC 146 of 2012 at Mombasa Alphonse Maghanga Mwachanya Versus Operation 680 Limited**. He prayed that his Claim be allowed as drawn.

### **Respondent's Submissions**

The Respondent submitted that the Claim for compensation does not arise as the Claimant has failed to prove that the termination was unfair as per the provisions of Section 47(5) of the Employment Act.

It is further submitted that the Claimant's act of absconding duty without permission entitled the employer to summarily dismiss him as provided for under Section 44(4) of the Employment Act. The Respondent relied on the case of **Andrew Ogola Makomene Versus Agro Industries Tools Limited (2017) eKLR**.

The Respondent submitted that the instant claim be dismissed with costs to the Respondent.

## **Determination**

Having considered the facts of this cause, evidence, submissions and authorities cited by the parties hereto, 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

The Claimants submitted that the Respondent's action to terminate his services was unfair as it contravened the provisions of Section 45 of the Employment Act which provides that an employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure.

The Respondent on the other hand submitted that the Claimant absconded duties without notice. However, the Respondent failed to show that it had attempted to contact the Claimant through his last known address and telephone contact to no avail. The Respondent witness further admitted on cross examination to not having any record of any Notice to Show Cause issued to the Claimant for allegedly absconding duty.

The Respondent submitted that it was entitled to summarily dismiss the Claimant as provided under Section 44(4) of the Employment Act after the Claimant failed to report to duty after he was involved in a work related injury on 3<sup>rd</sup> March 2012 and only resumed on 5<sup>th</sup> March 2015. However in the witness statement, RW1 states that the claimant executed yearly contracts on 1<sup>st</sup> September 2010, 1<sup>st</sup> October 2011, 1<sup>st</sup> October 2013 and 30<sup>th</sup> September 2014.

The statutory burden of proof for a person complaining of unfair termination of employment or wrongful dismissal is found in section 47(5) of the Employment Act. The section provide that

**For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

An employee therefore has the burden of proving that an unfair termination of employment has occurred.

The respondent having stated that there were clocking machine records which were not produced, the court is inclined to believe that the claimant's employment was terminated when he served the respondent with summons for his injury claim on 3<sup>rd</sup> March 2015.

Section 10(7) of the Act provide that the burden of proof shifts to an employer where he fails to avail employment records like in the instant case.

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.”*

Further in the case of Francis Mbugua Boro –Vs- **Smartchip Dynamics Ltd (2017) eKLR** it was held:

*“...It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 AND Missing that essential ingredient and a hearing the court reaches the conclusion that the summary dismissal of the claimant was procedurally unfair.”*

Similarly in the case of **David Njoroge Muiru -Vs- Elsa Limited (2014) eKLR** it was held that:

*“It is obvious that the claimant was not given notice of misconduct or a hearing before the termination. The court finds that the dismissal was unfair under Section 41 of the Employment Act 2007. The reason for removal has not been shown to have been established to exist at the time of termination.”*

In this case both substantive justification and fair procedure were lacking. The ground for termination was that the claimant filed suit for compensation arising from injuries he sustained while in employment.

Section 46(h) lists this as one of the grounds that should not attract disciplinary penalty. Section 8 of the Occupational Safety and Health Act also forbids the dismissal or other adverse treatment of an employee on grounds of filing a complaint for injury.

Sections 8(1) of Occupational Safety and Health Act provides as follows –

## 8. Discrimination against employee, etc.

**(1) An occupier shall not dismiss an employee, injure the employee or discriminate against or disadvantage an employee in respect of the employee's employment, or alter the employee's position to the detriment of the employee by reason only that the employee—**

- (a) makes a complaint about a matter which the employee considers is not safe or is a risk to his health;**
- (b) is a member of a safety and health committee established pursuant to this Act; or**
- (c) exercises any of his functions as a member of the safety and health committee.**

### Remedies

The Claimant claims for the following:

- i. Payment of Kshs.409,000/= as terminal benefits.
- ii. Detailed Certificate of Service.
- iii. Costs of this Claim plus interest.
- iv. General damages for unlawful termination.

### Prayer i)

Terminal dues allegedly owed to the Claimant comprises of the following :

#### **a) 3 month's salary in lieu of notice of (Kshs.12,800\*5)**

Under this head the Claimant is only entitled to one month's salary in lieu of notice as per the provision of Section 35 of the Employment Act in the sum of Kshs.12,800.

#### **b) Service Pay**

On the claim for service pay under **Section 35(6)(d)** of the Employment Act, 2007 the Claimant is not entitled to the same as he admits in evidence that he was a member of the National Social Security Fund and that the Respondent made statutory deductions on his salary.

#### **c) General damages for unlawful termination equivalent to 12 months' pay**

Having found the Claimant's termination was unfair he is entitled to compensation for unfair termination. Taking into account the fact that the termination was due to his filing suit which under Section 8(1) of Occupational Safety and Health Act and Section 46 of the Employment Act, was unfair and unlawful, I award the claimant maximum compensation of Kshs.129,600.

#### **d) Overtime (Kshs.12,800 \*5)**

The claimant testified that he reported to at 5 pm and signed out at 9 am every day. This evidence was not rebutted by the respondent who had the records in the form of clocking machine printouts. In view of the fact that overtime is a continuous way I will award the claimant on 12 months overtime at the rate of 8 hours per day at 1.5 rate per hour. The claimant prayed for Kshs.64,000 which I award him although the correct rate would be a much higher figure.

#### **e) Unpaid leave (Kshs.12,800\*5)**

The Claimant in his pleadings, evidence and submissions stated that during the period he was employed by the Respondent Company he never went on leave, and that the Claim is payable under Section 28 of the Employment Act.

Further, the Respondent failed to produce any documentary evidence to rebut this assertion. I award him, annual leave at 21 days per annum for 5 years being 105 days which translates to Kshs.51,692.30

### Prayer ii)

The Claimant is also entitled to be issued with a Certificate of Service as provided for under Section 51 of the Employment Act, 2007.

### Prayer iii)

The respondent shall pay the claimant's costs and the decretal sum shall attract interest at court rates from the date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF FEBRUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**