



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1235 OF 2015

EMILIO KIRIMI NJERU.....CLAIMANT

v

NEW BAKERS LIMITED.....RESPONDENT

JUDGMENT

1. Emilio Kirimi Njeru (Claimant) instituted legal proceedings against New Bakers Ltd (Respondent) on 15 July 2015 and he stated the Issue in Dispute as Wrongful dismissal of the Claimant: Emilio Kirimi Njeru from his employment and refusal to pay him his terminal dues.
2. Upon service, the Respondent entered appearance through Githinji Mwangi & Associates Advocates on 30 July 2015. A *Response to Statement of Claim* was filed on 7 August 2015.
3. When the Cause came up for hearing on 19 February 2018, Mr. Githinji for the Respondent sought an adjournment on the ground that the Respondent's Managing Director was out of jurisdiction and therefore there was no one to give him appropriate instructions.
4. The Court directed Mr. Githinji to file/serve a formal application before 23 February 2018.
5. On 23 February 2018, the said firm filed an application seeking leave to cease acting for the Respondent but the said application was not prosecuted nor served.
6. On 20 March 2018, the Claimant fixed the Cause for hearing on 3 December 2018, and on the scheduled hearing date, the Court allowed the hearing to proceed because there was an affidavit of service on record attesting to service of a hearing notice on 15 June 2018 upon the advocate on record.
7. The Claimant gave sworn testimony and filed his submissions on 20 December 2018. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

8. The Claimant filed a letter dated 5 June 2015 which suggest that he was asked to make representations in regard to allegations on an order from Southern Sun and that he failed to make written representations.
9. The summary dismissal letter also suggest that the Claimant failed to make any representations.
10. The Court is therefore unable to find that the process leading to the dismissal was tainted with procedural unfairness.

Substantive fairness

11. The Respondent failed to attend Court to discharge the burden imposed on it as the employer by sections 43 and 45 of the Employment Act, 2007.
12. The Court therefore concludes that the reasons for the summary dismissal of the Claimant were not valid and fair.

Pay in lieu of notice

13. Clause 4 of the contract of employment provided for 3 months' notice or pay in lieu of notice and because no notice was given, the Court finds that the Claimant is entitled to 3 months' pay in lieu of notice.

Compensation

14. The Claimant served the Respondent for about 4 years and in consideration of the length of service, the Court is of the view that the equivalent of 4 months gross wages as compensation would be fair (gross wage for April 2012 was Kshs 27,000/-).

Wages for June 2015

15. The Claimant sought Kshs 8,307/- on account of wages up to date of separation. The Court finds that he is entitled to the same as of right.

Leave

16. The letter informing the Claimant of his dismissal indicated that he had 7 outstanding leave days.

17. The Claimant computed the outstanding leave days for 2014 as equivalent to Kshs 21,807/- and because the same was not questioned, and in consideration of section 10(3) of the Employment Act, 2007, the Court will allow the head of claim.

Overtime

18. Although the Claimant testified that he used to work night shift from 8.00pm to 6.00am, thus working 2 hours overtime per day, he did not disclose the contractually agreed hours or the prescribed/gazetted minimum hours beyond which he would be entitled to overtime pay.

19. The head of claim was not proved.

Service gratuity

20. If by service *gratuity* the Claimant meant *service pay* within the context of section 35(5) of the Employment Act, 2007, he would not be entitled to the same because he was contributing to the *National Social Security Fund*.

21. If there was a contractual basis for service gratuity, the same was not disclosed in Court.

Certificate of Service

22. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 10 days.

Conclusion and Orders

23. The Court finds and holds that the summary dismissal of the Claimant was unfair and awards him

(a) Pay in lieu of notice	Kshs 70,434/-
(b) Compensation	Kshs 108,000/-
(c) Wages for June 2014	Kshs 8,307/-
(d) Leave	Kshs 21,807/-
TOTAL	Kshs 208,548/-

24. Certificate of Service to be issued.

25. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 8th day of February 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Nyabena instructed by Nyabena Nyakundi & Co. Advocates

For Respondent Githinji Mwangi & Associates Advocates

Court Assistant Lindsey