



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 407 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**KENYA BUILDING, CONSTRUCTION, TIMBER**

**AND FURNITURE INDUSTRIES EMPLOYEES UNION.....CLAIMANT**

**VERSUS**

**AQUA PLUMBING LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant filed suit on behalf of its member one John Ayoti Ananda seeking damages for unlawful dismissal arising out of an employment relationship with the Respondent.

The Claimant avers that the Grievant was employed by the Respondent in 1998 as a plumber and worked as such until 21<sup>st</sup> August 2012 when his services were terminated without cause. The claimant contends that he had not received any reprimand prior to the date of termination.

That the Claimant immediately took up the matter with a view to try amicable settlement with the Respondent albeit in vain and as a result reported the matter to the Minister for conciliation leading to a conciliator J. M. Kiraguri being appointed as conciliator. The conciliator scheduled a meeting for the 27<sup>th</sup> September 2012 which the Respondent failed to attend.

Another meeting was called for the 20<sup>th</sup> November 2012 which the Respondent failed to attend again. A last meeting was scheduled for 22<sup>nd</sup> January 2013, which meeting the Respondent still did not attend and as a result the conciliator issued a certificate of disagreement.

In the Memorandum of Claim dated 9<sup>th</sup> March 2015, the Claimant seeks terminal dues comprise of service gratuity, unpaid pro rata leave, payment in lieu of notice and tools allowance. The claimant also seeks a declaration that the termination of the grievant was unlawful and compensation.

The Respondent in the memorandum of response avers that the purported CBA is not applicable in this case since it was not member of the Kenya Association of Building and Civil Engineering Contractors a division of F.K.E at the time the claimant was dismissed. That the Respondent's membership of the Association was terminated before the Registration of the Collective Bargaining Agreement in question by the Court.

That the Applicable law at the time of the dismissal of the Grievant was the Building Order Legal Notice No. 98 of 2004 which was in force then.

The respondent denies that the Grievant was dismissed without considering the applicable law as the Grievant had been issued with 3 written warning letters and the issue discussed with the Grievant's representatives a Mr. Marube and a Kinywa where the details and circumstances which led to the action were communicated.

That the dismissal was based on fair grounds as the Claimant had been issued with 3 warning letters for failing to exercise caution and care when performing his duties and not taking his work seriously.

The respondent states that it is willing to pay unpaid prorata leave of 7 months at Kshs.10,710 in full settlement of the Claim. It prays for the Claim to be dismissed with costs.

## **Evidence**

The Respondent despite being served with a hearing notice did not attend Court when the matter came up for hearing and the same proceeded in their absence.

At the hearing, the grievant testified that on 21<sup>st</sup> August he went to work at Westlands and upon arrival he was told to report to the office in Ngara Aqua Plaza. At the office he was informed that work at Delta Plaza had reduced and he was sent home to rest. That there were 3 plumbers and that he was the only one sent home.

He avers that he was not given any other reason. He was not given any warning letter and neither was he involved in any disciplinary hearing. That he was never provided with tools for the work, was not paid terminal dues or issued with a certificate of service. He prayed for service pay, notice pay, tool allowance and damages for unfair dismissal.

## **Submissions**

The Claimant submits that the Grievant was unfairly terminated as he did not receive prior notice as stipulated in the Collective Bargaining Agreement applicable between the parties or under the Employment Act. The Claimant urges the Court to allow the Claim.

## **Determination**

The issues for determination are the following –

1. Whether the Respondent is bound by terms of the CBA of 20.6.2011
2. Whether there termination was unlawful
3. Whether the Claimant is entitled to the remedies sought

The Respondent pleaded that it was not a member of the Kenya Association of Building and Civil Engineering Contractors who were parties to the CBA with the claimant and therefore are not bound by the CBA. That it had left the membership of the Association before the registration of the CBA relied upon by the claimant. No evidence of this was produced in Court and in the absence of such then the CBA of 20<sup>th</sup> June 2011 is applicable. Furthermore, Section 59(2) and 3 of the Labour Relations Act provides that –

**(2) A collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employers' association.**

**(3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.**

On the issue whether the termination was unfair, Section 41 of the Employment Act provides for fair procedure while section 43 provides for proof of reason for termination as follows:-

### **41. Notification and hearing before termination on grounds of misconduct**

**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.**

### **43. Proof of reason for termination**

**1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**

**2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

Section 45 (1) & (2) provides prohibits unfair termination. The section provides as follows:-

### **45. Unfair termination**

- 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.

The grounds for summary dismissal according to the Respondent as extracted from the Memorandum of Response is absenteeism. There are warning letters attached to the memorandum of defence signed by the Respondent's representative only but do not bear the Grievant's signature on a slot meant for the same. From these letters it is not clear whether the Grievant ever had sight of the same. The respondent did not participate in the hearing of the case to shed light on the said letters.

The procedure followed was not in consonance with the mandatory procedure provided under section 41 of the Act. The said provision requires that before terminating an employee on grounds of misconduct, poor performance and physical incapacity, the employer shall first explain to the employee, in a language he understands and in the presence of another employee or shop floor union representative of his choice, the reasons for which termination is contemplated and thereafter invite the employee and his chosen companion to air their representations for consideration before the termination is decided. In this case, the claimant was terminated before being accorded a hearing in the presence of another employee and as such, the termination was rendered unfair within the meaning of section 45 of the Act.

In the case of *Caliph O Ogega v National Social Security Fund Cause 280 of 2013 (unreported)* where the court held:

*“Before any employee is terminated or dismissed, such an employee must be taken through a fair procedure. This is per section 43 and 47 of the Employment Act where such an employee must receive notice with an outline of the reasons for such termination. A hearing of the employee is paramount in fair employment and labour relations based on section 35 and 41 of the Employment Act. ... due process must be followed.”*

In the instant case the dismissal is unlawful for lack of substantive and procedural justification.

#### **Whether the Claimant is entitled to the remedies sought**

The Respondent having failed to call evidence to the contrary, the reliefs sought remain unchallenged and as such they accrue to the Claimant. The Claimant in evidence admitted to have taken all his leave and therefore no sum is awarded under the head.

The claimant prays for service gratuity for 14 year, notice pay, tools allowance which the Respondent did not avail evidence to the contrary. The claims succeed as they are not contested.

Having found that the Grievant was unlawfully terminated, he is entitled to damages in lieu thereof.

#### **Orders**

Judgment is entered for the grievant against the respondent as follows –

- a) That the termination of the grievant was unfair and unlawful
- b) Terminal benefits Kshs.239,270/=
- c) Compensation

The grievant having worked for a long period of 14 years and taking into account all the circumstances of his case, I award him maximum compensation in the sum of Kshs.228,480/=.

- d) Costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF FEBRUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**