



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 823 OF 2014

LAWRENCE MUTUKU TITUS.....CLAIMANT

VS

FIMA ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Lawrence Mutuku Titus, the Claimant in this case was an employee of Fima Enterprises Limited. He filed this claim on 19th May 2014 seeking compensation for unlawful termination of employment as well as payment of terminal dues.
2. In spite of being duly served, the Respondent did not file any response. The matter therefore proceeded by way of formal proof.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent on 21st January 2012 in the position of Chef, earning a monthly salary of Kshs. 15,000. He worked until 2nd December 2012 when he was summarily dismissed.
4. The Claimant avers that his dismissal was unjustifiable and unfair. He adds that for the entire period of his employment, he was not paid house allowance. Further, the Respondent did not remit his National Social Security Fund (NSSF) dues.
5. Upon the Claimant reporting a dispute at the Ministry of Labour, the County Labour Office in Nairobi wrote several letters to the Respondent to which there was no response.
6. The Claimant now claims the following from the Respondent:

- a) Salary arrears for June, July and August.....Kshs. 45,000
- b) Notice pay.....15,000
- c) Leave pay.....10,500
- d) House allowance.....27,000
- e) Gratuity @ 25% of basic salary.....45,000
- f) Compensation for unlawful loss of employment.....180,000
- g) Unlawful deductions/withheld salary
- h) Certificate of service
- i) Costs plus interest

Findings and Determination

7. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination against the Respondent;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

8. The Claimant pleads that the Respondent terminated his employment without justifiable cause and without observing due procedure. In his witness statement dated 31st March 2014, he states that the termination came after he had asked for his unpaid salaries for the months of June, July and August 2012. The Claimant produced a copy of his letter dated 18th September 2012 by which he had asked the Respondent to pay him the salary arrears.

9. Further, the Claimant testified that prior to the termination, there was a misunderstanding between him and the Respondent’s Director, Thomas Apina regarding shortage of food at an event hosted by the Respondent.

10. These events, in my view, offer a glimpse as to why the Respondent would want to get rid of the Claimant. However, even if the Respondent had a reason to terminate the Claimant’s employment, it was under an obligation to explain the reason to the Claimant and to offer him an opportunity to defend himself at the shop floor. This is the essence of Section 41 of the Employment Act and as held severally by this Court (variously constituted), the procedural fairness requirements established under Section 41 are mandatory not optional (see *Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR* and *Gilbert Mariera Makori v Equity Bank Limited [2016] eKLR*).

11. The Respondent did not bother to respond to the Claimant’s claim much like the correspondence from the Labour Office. Having heard the Claimant, this Court, applying the balance of probability standard of proof finds and holds that the Respondent indeed terminated the Claimant’s employment without justifiable cause and in violation of due procedure.

Remedies

12. In light of the foregoing findings, I award the Claimant three (3) months’ salary in compensation for unlawful and unfair termination of employment, In arriving at this award, I have taken into account the Claimant’s length of service as well as the Respondent’s conduct in handling his case.

13. I further award the Claimant one (1) month’s salary in lieu of notice as well as salary for June, July and August 2012. In the absence of leave records to the contrary, the claim for leave pay succeeds.

14. The Claimant also claims house allowance. However, a perusal of his contract of service dated 12th January 2012, indicates that he was paid a gross salary which would ordinarily include house allowance. The claim for house allowance is therefore without basis and is disallowed.

15. The claims for gratuity and unlawful deductions were not proved and are dismissed.

16. Ultimately, I enter judgment in favour of the Claimant in the following terms:

- a) 3 months’ salary in compensation.....Kshs. 45,000
- b) 1 month’s salary in lieu of notice.....15,000
- c) Salary for June, July and August 2012.....45,000
- d) Leave pay for 1 year (15,000/30x21).....10,500
- Total.....115,500**

17. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

18. The Claimant is also entitled to a certificate of service plus costs of the case.

19. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF MAY 2019

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Juma for the Claimant

No appearance for the Respondent