



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO. 4 OF 2018

ERICK MBAE.....CLAIMANT

VERSUS

MUTHIRU DAIRY FARMERS CO-OPERATIVE SOCIETY LTD.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as a clerk from 31st October 2009 to 24th September 2013 when he was summarily dismissed. He avers that he earned Kshs. 10,500/- per month. The Claimant avers that the termination was unlawful as the Respondent failed to issue the Claimant with the stipulated three warnings, failed to follow the laid down procedures and that the Respondent failed to give him a chance to answer charges leveled against him as required under the Employment Act. The Claimant thus prayed for a declaration that the termination of his services was unlawful, that the Respondent be compelled to pay the Claimant due terminal benefits plus the costs of the suit.

2. The Respondent filed a response and averred that it was incorporated on 11th September 2012 and that prior to this time it was not in existence. It averred that the allegations by the Claimant that he was employed by the Respondent as claimed are fallacious, far-fetched and baseless. The Respondent averred that the Claimant was engaged on a temporary and on a need basis and therefore was never at any time a formal employee of the Respondent. The Respondent averred that it made a formal communication to the Claimant about the decision to disengage him.

3. The Claimant testified while the Respondent did not call any witness. The Claimant testified that he worked for the Respondent from 31st October 2009 and that he received a dismissal letter in September 2013. He told the court that he was never called to the board and was not informed the reason as to why he was sacked. In cross-examination he confirmed that he did not have an appointment letter and he denied having knowledge of the fact that the Respondent got registered on 11th September 2012.

4. The Claimant submitted that he was unlawfully terminated due to local politics and hence entitled to the claimed terminal benefits. He further submitted that a company begins as a *de facto* and after registration it becomes a *de jure* and that in whatever state it is a company. No submissions were filed for the Respondent.

5. The issues for determination that are distilled are the date of commencement of the Claimant's employment if any, whether the dismissal of the Claimant was fair and whether the Claimant is entitled to the remedies sought. The Claimant asserts that he was employed on 31st October 2009 whereas the Respondent maintains that they had not been registered by then. The Respondent filed a certificate of registration showing that the company was registered on 11th September 2012. There is no way the Claimant could have been employed by the Respondent in 2009. Curiously, the Claimant did not avail any letter or evidence of employment in 2009. The Claimant was therefore only employed in September 2012 when the Respondent was able to contract lawfully.

6. As to whether the termination of the Claimant was lawful, Section 41 of Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The Claimant in the instant suit was only issued with a letter of dismissal, there is no evidence that he was issued with a notice to show cause nor was he accorded a hearing in accordance with the law. The tenets of fair hearing as well as principles natural justice were neglected. The Respondent also did not give any reason for termination in the letter of dismissal and the termination of the employment was therefore unfair and unlawful. As to what remedies the Claimant is entitled to, the Claimant is entitled to recompense for the unlawful dismissal. In the circumstances he is entitled to:

- i. Kshs. 10,500/- being one month's salary in lieu of notice;

ii. Kshs. 63,000/- being 6 month's salary as compensation;

iii. Costs of the suit assessed at – Kshs. 30,000/-.

iv. The sums in i) and ii) above to be subject to statutory deductions in terms of Section 49(1) of the Employment Act.

v. Interest at court rates on the sums in i) and ii) above from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 24th day of May 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar