



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 647 OF 2014

ALFRED OCHIENG OGOLA..... CLAIMANT

VERSUS

BOOTH EXTRUSIONS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 17th May, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 16.04.2014 through Nzioki Mutua & Associates Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination of the claimant's employment was wrongful, unjustified, irregular and unfair.
- b) An order that the respondent pays the claimant an equivalent of 12 months' pay at Kshs. 50, 469.00 per month.
- c) Costs of the suit with interest at Court rates.

The respondent filed the memorandum of response on 25.07.2014 through A.F.Gross & Company Advocates. The respondent changed the advocates to Michuki & Michuki Advocates.

There is no dispute that the claimant was employed by the respondent effective sometimes in 1983. The claimant was initially employed as unskilled worker and was promoted through the ranks as a Press Operator, Acting Working Charge-hand or Machine Operator in Extrusion Plant, Junior Supervisor (Technical), Junior Supervisor (Operations), Assistant Supervisor (Operations), and finally Supervisor (Operations). By the letter dated 18.04.2012 his salary was revised to Kshs. 50, 469.00, effective 01.01.2012.

The respondent addressed to the claimant the inter office memorandum dated 03.10.2012 thus, **"It has been observed that the check valve in the outlet of the hydraulic system has been deliberately reversed. As a Supervisor In-charge of the shift, please explain how/why and who did this mischief. It has been confirmed that this happened during the day shift on 2nd October, 2012. This mischief resulted in production loss and machine downtime causing big financial loss to the company. Please let us know within 48 hours, in writing, about the above incident failing which we will hold you for negligence and malafide behaviour in the factory."** It was signed by U.V. Ramana.

The claimant replied by his letter dated 04.10.2010 thus, **"On 02.10.2012 after we had finished removing aluminium chips from the caster pit at around 12.45pm, the operator tried to bring up the caster so that we can start casting but it could not come up. He reported the problem to me which I informed you (Ramana) immediately since you were in foundry at that time as I called Kimani and Muchiri to attend to the breakdown and you also sent Mukumi to come and check what could be the problem. They then found that the hydraulic pump was faulty and changed it with the one which was being used to tilt the furnace at casting time. Then they fitted another pump in place of the one that we were using to tilt the furnace. Whenever there is any breakdown, I always call the mechanical crew to attend to it. And that is what I did on that day, as am not conversant with the functional of the hydraulic system in foundry."**

The respondent did not accept the claimant's explanation as per the letter dated 06.10.2012 by which he was severely warned and suspended from duty with immediate effect without pay for 2 weeks as a deterrent measure. He was advised to take his job seriously and live up to the expectation of the management as a supervisor. By the letter dated 29.11.2012 and being further to the letter dated 06.10.2012, the respondent terminated the claimant's employment effective 30.11.2012 on account of loss of trust and confidence in the claimant as the claimant's loyalty and integrity had been called in question.

The claimant's case is that the termination was unfair, unprocedural, high handed, arbitrary and unlawful as no proper investigation was

conducted and neither was there any diligence nor procedure followed by the respondent in terminating the claimant's employment. The claimant prayed for maximum compensation of 12 months' salaries under section 49 of the Employment Act, 2007 being **Kshs. 605, 628.00**.

The respondent's case was that the claimant was given reasons for the termination and due process had been followed including the show-cause notice and a hearing.

The claimant's evidence was that on 02.10.2012 the machine broke down and the operator on duty reported the same to the claimant. The claimant immediately reported the break down to his Head of Department (Ramana) who was also at the claimant's office at the material time. He also called the mechanics Kimani and Muchiri to attend to the break down. Ramana also called an electrician one Antony Makumi to assist in repairing the machine. That was at about 12.30 to 12.45pm. The machine was repaired and the claimant left job at 05.30pm that evening when the machine was operational. The claimant testified that he supervised operators but did not instruct mechanical and electrical technicians. The claimant further testified that the operators lacked capacity to deliberately reverse the valves. The claimant stated that it was not his fault that the machine broke down on that material day.

The respondent's witness (RW) was one Mark Onyango, the Supervisor Engineering Department. He confirmed that Ramana called him on the material day and reported that the machine was not working. He then assigned the mechanical technicians Kimani, Muchiri and Bernard Ouma to repair the machine. Diagnosis of the problem was done by trouble shooting the caster machine. The horse pipes for in-lets and out-lets were normal. The pump was also normal. They had to go deeper using the manual and they noted one non-return valve had been reversed with effect that the movement was blocked. RW reported to Ramana that a person in the Department in which the machine was used must have reversed the valve. In cross-examination RW confirmed that the claimant was a supervisor without engineering knowledge and the machine had operated well in the night shift and had not been used thereafter until the repairs done on that day had been completed. RW confirmed that the claimant had reported the break down to his immediate boss, Ramana. Further the problem was discovered after going deep in the machine using tools usually in custody of RW's department and it took 3-4 hours to repair the machine. RW confirmed that it was the stoppage of the machine that led to the claimant's dismissal.

The Court has considered the pleadings, the evidence and the submissions filed for the parties. Whereas the claimant was given the show-cause notice and he replied in writing, it is clear that at no point was he accorded a hearing as provided in section 41 of the Employment Act, 2007. It is also the evidence that as a supervisor the claimant was in charge of assigning work to machine operators and preparing relevant reports. He had no special or technical knowledge in the work of mechanical or electrical technicians or engineering. Thus the Court returns that he has established that he performed his assigned duty when on the material date he promptly reported to his immediate supervisor about the machine that had broken down. The Court returns that the respondent has failed to show that the reason for termination related to operational requirements of the respondent and the claimant's conduct as envisaged in section 45 of the Act. As at termination the respondent has failed to show that it had a valid or genuine reason to terminate the claimant's employment as envisaged in section 43 of the Act. The Court returns that the termination of the contract of service was unfair both in substance and procedure.

The claimant prays for 12 months' salaries in compensation under section 49 of the Act. The Court has considered the factors in the section. It is clear that the claimant had a clean record of service of over 29 years and he had served with due diligence and loyalty as demonstrated in the numerous and meritorious promotions he earned. The evidence is that the claimant did not contribute to his termination in any manner or whatsoever. The Court has considered the aggravating factor that after imposing a severe warning and suspension for 2 weeks without pay as per the letter of 06.10.2012, the respondent subjected the claimant to double jeopardy when it inflicted the termination of the contract by the letter dated 29.11.2012 and on account of the same alleged misconduct for which severe warning and unpaid suspension had already issued. The Court returns that the respondent in such circumstances had imposed gross unfairness and the Court awards the claimant the 12 months' pay as prayed for.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination of the contract of service by the respondent was unjustified and unfair.
- b) The respondent to pay the claimant **Kshs. 605, 628.00** (less PAYE) by 01.07.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- c) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 17th May, 2019**.

BYRAM ONGAYA

JUDGE