



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**ELRC NO. 1869 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 19<sup>th</sup> June, 2019)**

**BERNARD INGATI.....CLAIMANT**

**VERSUS**

**CRESCENT COMPUTER SERVICES LIMITED**

**ALSO KNOWN AS CRESCENT TECH LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant herein filed his Memorandum of Claim on 21<sup>st</sup> October 2015 in which he avers that he was employed by the Respondent as a Service Engineer on 1<sup>st</sup> July 2006 until 30<sup>th</sup> June 2015 when he was terminated for poor performance.

2. He avers that prior to his termination, the Respondent did not take him through any disciplinary process and that there was no substantive reason for his termination. He therefore seeks the following reliefs:

***1. An order declaring that the Respondent's actions towards the Claimant amounted to unfair and unlawful termination of employment.***

***2. A certificate of service issued to the Claimant.***

***3. An award of Kshs. 1,381,575.00 made up as follows:***

***a) 12 months compensation for unfair and unlawful dismissal- Kshs. 1,275,300.00***

***b) Costs of the suit.***

***4. Any other relief that the Court may deem fit to grant.***

**Claimant's case**

3. The Claimant testified that pursuant to his contract with the Respondent he was employed as a Printer Engineer. He testified that he separated with the Respondent upon being given sales targets after the sales staff left. He testified that he had no training on sales but they were forced to sign the targets.

4. He testified that he was terminated for refusing to sign the Key Performance Indicators (KPIs) but he eventually signed the document on 15<sup>th</sup> June 2015 fearing his termination. He testified that despite signing the document his performance was never appraised.

5. He testified that he had signed 2 KPIs but he was expected to sign 3 and that this was the reason for his termination. He testified that he had been issued with a warning letter for refusing to sign the KPIs.

6. He testified that he was not issued with a show cause letter and that he had a salary review showing good performance. He testified that he was not invited to a disciplinary hearing and that he was not issued with a certificate of service. In cross-examination, he testified that he had been taken through a training that improved him.

**Respondent's Case**

7. The Respondent filed its Reply to the Memorandum of Claim on 13<sup>th</sup> May 2016 denying the particulars in the claim but did not call any witness. It is the Respondent's case that the Claimant had undergone training to enable him achieve the set targets but the Claimant constantly failed to meet his revenue targets.

#### **Claimant's submissions**

8. The Claimant submitted that the Respondent failed to discharge its burden of proof under Section 47 (5) of the Employment Act and Section 107 of the Evidence Act as no evidence was tendered to show that there was a valid reason for his termination.

9. He submitted that the reasons adduced by the Respondent for terminating him had no nexus to his skill and job description, which was never reviewed or changed before being issued with fresh KPIs.

10 The Claimant submitted that his summary dismissal was unfair as the Respondent never explained the reasons for the intended dismissal and that it required the Claimant's representative to attend the hearing.

11. He therefore submitted that the Respondent had failed to meet the requirements under Sections 41, 44 and 45 of the Employment Act. He relied on the decision in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the Court held:-

***"...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination."***

12. The Claimant submitted that the procedure laid out in statute is mandatory and that no employer can purport to circumvent it for any reason. He submitted that he is entitled to compensation as provided under Section 49 of the Employment Act.

#### **Respondent's submissions**

13. The Respondent submitted that the Claimant constantly failed to meet his KPIs and consequently failed to achieve his revenue targets which meant that he was not repairing the required amount of printers to meet his targets hence he automatically attracted dismissal. It submitted that the dismissal was in compliance with the law as the Claimant was issued with both oral and written warnings.

14. The Respondent submitted that the Claimant is not entitled to 12 months compensation for unfair dismissal as dismissal was in compliance with the law.

15. It submitted that the Claimant is not entitled to 1 month notice since he received warning letters and that should the Court find that the Claimant was not issued with 3 months notice, it should find that the Claimant was issued with 2<sup>1/2</sup> months notice and therefore award Kshs. 53,138 being a half a months salary. In conclusion it submitted that the Claimant has failed to prove his termination was unfair and unlawful hence the claim should be dismissed.

16. I have examined all the evidence and submissions on record. From the evidence of the Claimant, he was terminated on 30/6/2015 for poor performance. The Claimant told Court that he is an Engineer but had been given sales targets, which he could not meet without training.

17. There is no indication that the Claimant would have done sales work when he had been employed as a Service Engineer. There is also no indication that he was subjected to a disciplinary hearing as envisaged under Section 41 of Employment Act 2007 which states as follows:-

***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".***

18. The Respondent failed also to call any evidence to counter the Claimant's evidence. I therefore find that the Claimant's case remained uncontroverted and therefore remain standing.

19. In terms of remedies, I find that the termination of the Claimant was unfair and unjustified and I declare it so.

20. I also award the Claimant compensation for the maximum 12 months salary for unlawful and unfair termination = 12 x 106,275=1,275,300/=

21. I also award Claimant 1 months salary as notice pay = 106,275/=

**Total awarded = 1,381,575/=**

22. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

**Dated and delivered in open Court this 19<sup>th</sup> day of June, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Parties