



**REPUBLIC OF KENYA**

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

**CAUSE NO.109 OF 2017**

**RUSTUS ODHIAMBO OTIENO.....CLAIMANT**

**VERSUS**

**STYLE INDUSTRIES LIMITED.....RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent as a general worker on 1<sup>st</sup> November, 2012 until 28<sup>th</sup> November, 2014 when his employment terminated and was later recalled on 4<sup>th</sup> July, 2016 until 8<sup>th</sup> December, 2016.

The claim is also that the claimant worked for the respondent continuously at their Nairobi premises as a human resource assistant from 1<sup>st</sup> November, 2012 until 28<sup>th</sup> November, 2014 when his services were unlawfully terminated without any explanation and was paid ksh.56,000.00 only.

He was recalled a Nakuru premises on 4<sup>th</sup> July, 2016 as supervisor.

On 7<sup>th</sup> December, 2016 the claimant reported on duty at 7.30am and proceeded to the mixing section as supervisor. At 12.30pm the production manager Mr Hammad Ataya came to his section and informed the claimant that he had received a phone call from the head office requiring the claimant to report there. No reasons were given save that he was to meet the legal officer Mr Oluoch.

At the head office the claimant was informed that there were allegations made against him at Nakuru to the effect that he had instigated workers to join a trade union which allegations the claimant denied. The claimant was directed to return to his work station but was denied entry. The human resource manager came to the gate and sent him away without pay.

The claimant wrote a demand letter via G4S without feedback. The termination of employment was not justified and was contrary to fair labour relations and practices and seeks the following dues;

- a) Notice pay Ksh.17,391.00;
- b) Pro rata leave ksh.5,072;
- c) Wages for days worked Ksh.4,637.60;
- d) Compensation; and
- e) Costs.

The claimant testified to his memorandum of claim and his claims on the ground he was unfairly dismissed from his employment and was not paid any terminal dues. He had served the respondent continuously since the year 2012 to December, 2016. He had no union activities at the workplace as alleged and was not a union member.

The defence is that the claimant had a written contract with effect from 22<sup>nd</sup> June, 2016 as a general labourer in the production department at a wage of Ksh.15,000.00 per month. He was on probation for 6 months.

The claimant was evaluated after 6 months and was found not fit to be employed as he was not meeting his set targets despite being guided on how to improve his work performance and thus his contract was brought to an end. The contract had a probation clause. It ended on such terms.

Daniel Owino Ongoya testified that as the Industrial Relations Manager of the respondent the claimant was employed on contract with provision for probation from July to December, 2016. He was not successful. He was evaluated and found wanting.

The claimant was paid his dues benefits of salary due in December, 2016, one month notice pay and due leave days. The claims made should be dismissed.

The claimant's case is based on the facts that he worked for the respondent continuously from July, 2012 to December, 2016 when he was dismissed over alleged trade union activities. The defence is that the claimant was under a contract of employment running from June to December, 2016 on a 6 months' probation and he was not successful. He was terminated in his employment and paid his dues.

The claimant has attached his letter of appointment dated 29<sup>th</sup> October, 2012 as a Payroll Clerk at Nairobi. From the claimant's evidence, such employment ended on 28<sup>th</sup> November, 2014 and was paid ksh.56, 000.00 in terminal dues.

The Memorandum of Claim herein was filed on 8<sup>th</sup> March, 2017 including claim going back to the contract ending 28<sup>th</sup> November, 2014. However, the claimant does not state the nature of claims arising from his contract under this phase. The claims made relate to the last contract starting July, 2016 to December, 2016.

By contract dated 22<sup>nd</sup> June, 2016 the claimant was employed by the respondent as a general worker at Nakuru premises. The commencement of his employment was subject to 6 month probations as set out under Clause one (1) of the contract dated 22<sup>nd</sup> June, 2016.

In the letter dated 31<sup>st</sup> December, 2016 the claimant was terminated in his employment on the grounds that the claimant had been issued with verbal warnings from his manager with regard to his poor work performance and his inability to set targets. He had been guided but failed to initiate or take the necessary steps to improve on his work. The respondent also communicated that the claimant would not be confirmed in his employment as his *probation period was not successful*. The respondent offered to pay the due salary, notice pay and leave days due.

In **Yvonne Achitsa Odedere versus Maseno University [2017] eKLR** and in the case of **Narry Philemons Onaya-Odeck versus Technical University of Kenya [Formerly, the Kenya Polytechnic University College]** the court held that an employer puts an employee on probation so as to be able to assess his performances and capability within the workforce and the essence of section 42 of the Employment Act, 2007 is to allow the employer terminate the contract of service with less time where the employee's performance should be found wanting.

In **Danish Jalango & Another versus Amicabre Travel Services [2014] eKLR** the court held that an employee whose contract is subject to probation under section 42(2) of the Employment Act, 2007 can be terminated without the application of the requirements of section 43 and 45 of the Employment act with regard to procedural and substantive justification. In **Dede Esi Annie Amanor-Wilks versus Action aid International [2014] eKLR** the court held that where an employee is found incompatible this is a fair ground for termination under probationary terms.

In this case, as against what the claimant testified that his employment terminated due to alleged unionisation is not correct. The letter terminating his employment and dated 31<sup>st</sup> December, 2016 was clear to the extent that he was not successful during his probationary period and the respondent as the employer was thus invoking its prerogative to terminate employment during such period or probation. Such is a lawful ground. It is justified under the provisions of section 42 of the Employment Act, 2007.

The claimant was paid for notice, for days worked and for the leave days owing. Employment having terminated lawfully and as agreed under the terms and conditions of contract of employment, the claims made are without merit.

**Accordingly, the claim is hereby dismissed in its entirety. The claimant shall meet costs due to the respondent at Ksh.20, 000.00.**

**Delivered at Nakuru this 10<sup>th</sup> day of July, 2019.**

**M. MBARU**

**JUDGE**

In the presence of:

Court assistants: .....

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