



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. 1289 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 9th July, 2019)

JULIUS MAINA MWANGI.....CLAIMANT

VERSUS

AFRI FASHIONS LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed the instant Claim on 28th July, 2015, through the firm of Njogu & Associates, seeking damages for unfair termination of the Claimant's employment by the Respondent and refusal to pay terminal dues owed to the Claimant.
2. The Claimant states that he was employed by the Respondent in the year 2005 earning a monthly salary of Kshs. 16,200/-. He further stated that he worked effectively, diligently and to the Respondent's satisfaction until the 23rd December, 2014 when his services were unfairly terminated.
3. The Claimant contends that his termination was unfair as the Respondent failed to follow the laid down procedure of issuing him notice prior to his termination and that he did not receive any of his terminal dues upon termination. The Claimant further contends that this act by the Respondent amounted to constructive dismissal.
4. In his Memorandum of Claim the Claimant prays for Judgment be entered against the Respondent for:-

1. Unfair Termination	Kshs. 194,400
2. Notice	Kshs. 16,200
3. Leave Pay	Kshs. 145,800
4. Service Pay	<u>Kshs. 72,500</u>

Total **Kshs. 429,300**

5. Costs of this suit together with interest thereon at such rate and for such period as this Honourable Court may deem fit to order.

6. Any other just and equitable relief as this Honourable Court may deem appropriate.

5. The Respondent filed its Statement of Defence dated and filed in Court on 2nd September, 2015, in which they admit having engaged the Claimant's services from the year 2005 to the year 2014.
6. The Respondent further contends that it did not terminate the Claimant's services as alleged but the Claimant without any just reason but that he absconded duty with effect from 23rd December, 2014. It is further the Respondent's position that the Claimant was earning a monthly salary of Kshs. 18,404 at the time of separation and not Kshs. 16,200 as pleaded by the Claimant.
7. The Respondent avers that it is entitled to claim for payment of two (2) months' notice from the Claimant in line with the Memorandum

on the terms of service signed between the Respondent and the Claimant's union forming the basis of the Respondent's Counter claim.

8. The Respondent urged the Court to dismiss the Claim as drawn with costs to the Respondent and further that the Court enters Judgment in its favour in terms of the Counter Claim for Kshs. 36,808 plus costs of the Suit.

9. The matter was thereafter fixed for hearing on 7th March, 2019 with both the Claimant and the Respondent with one witness each.

Evidence

10. The Claimant (CW1) adopted his witness statement dated 28th July, 2015 as his evidence in chief. In his statement the Claimant reiterates the averments made in his statement of Claim.

11. CW1 further testified that his services were terminated by the Respondent verbally and without any prior notice. CW1 further averred that he reported the dispute to his union but was however not called for any hearing on the same. CW1 urged the Court to allow his claim as prayed.

12. On cross-examination, CW1 insisted that the Respondent terminated his services after he had demanded for payment of unpaid wages. He further stated that he did report the matter to the union and the Respondent had agreed to reinstate his services only for them to dismiss him verbally.

13. On re-examination, CW1 stated that he was informed by his manager (Michael Wanjohi) at the Respondent Company to reapply for his job and further that he should not report to work.

14. RW1, Michael Kariuki Wanjohi, General Manager at the Respondent Company adopted his witness statement dated 2nd September, 2015 as his evidence in chief in which he reiterates the averments made in the Statement of Defence.

15. RW1 further testified that there was a meeting between the Respondent and the union on this matter whereby it was agreed that the Claimant would resume normal duty without any condition however the Claimant failed to resume work as directed.

16. RW1 averred that the Claimant had been paid all his dues at the time he absconded duty and therefore has no claim against the Respondent herein.

17. On cross-examination, RW1 stated that despite stating that the Claimant was rude he had no warning letters to prove the same.

18. Parties were thereafter directed to file and exchange their written Submissions to the Claim.

Claimant's Submissions.

19. It is submitted on behalf of the Claimant herein that his termination from the Respondent's employment was unfair and unlawful as the same did not comply with the mandatory provisions of Section 41 of the Employment Act, 2007 for the reasons that he was not accorded notice prior to his termination and no hearing was done prior to his termination. The Claimant relied on the Authority of **George Onyango Akuti Vs G4S Security Services Kenya Limited (2013) eKLR** for emphasis.

20. It is further submitted that the Respondent in terminating the Claimant's services also failed to comply with the provisions of Section 43, 45 and 47 of the Employment Act, 2007.

21. That having submitted that his termination was unlawful and unfair he urged the Court to award him 12 months' compensation for unlawful termination, a month's notice, service pay, leave pay as well as costs of the suit.

Respondent's Submission

22. The Respondent on the other hand submits that the Claimant resigned from his job and as such is not entitled to the reliefs as sought in his Statement of Claim. For emphasis the Respondent relied on the provisions of Section 35 of the Employment Act and the case of **Kennedy Obala Oaga Vs Kenya Ports Authority (2018) eKLR**.

23. The Respondent further submitted that the Claimant was not summarily dismissed as alleged by the Claimant within the meaning of Section 44 of the Employment Act, 2007 the Claimant having resigned from his position. The Respondent cited and relied on the case of **Owaga Vs Transocean (U) Ltd (1990) KLR 197** for emphasis on what amounts to a dismissal.

24. The Respondent further submitted that it did not constructively dismiss the Claimant as alleged the Claimant having voluntarily resigned from his position. The Respondent for emphasis relied on the cases of **Leah Shighadi Sinoya Vs Avtech Systems Limited (2017) eKLR**, **Coca Cola East and Central Africa Limited Vs Maria Kagai Liganga (2015) eKLR** and **Daniel Githinji Kihumba Vs Lengetia Limited (2017) eKLR**.

25. It is the Respondent's averment that the Claimant breached the terms of his employment Contract when he failed to issue two (2) months' notice prior to his resignation and that the Court finds the Claimant; liable for breach of Contract and order him to pay Kshs. 36,808/- being the amount equivalent to the Claimant's salary for two months.

26. In conclusion, the Respondent submitted that the Claim for unfair termination is baseless and that the reliefs as sought by the Claimant be deemed as an attempt at unjust enrichment at the expense of the Respondent. The Respondent urged the Court to dismiss the Claim and enter judgment in terms of the Counter Claim.

27. I have considered all the evidence and submissions of the Parties. The Claimant avers that he was unfairly terminated but the Respondents contend that he absconded duty.

28. The Claimant has indicated that after he was dismissed, he reported to the Union and his Union discussed this matter with the Respondent on the 17/3/2015 and it was agreed he be reinstated back to work on condition that he writes an apology letter to the Respondent which meant he was to reapply for his job and lose 9 years of service. He decided not to go back.

29. The Respondent in their evidence admitted to having had the meeting with the union and agreeing that the Claimant returns to work which he never did.

30. The issue of absconding duty does not arise in the circumstances as the Claimant had been terminated before the said meeting.

31. The Respondent have not explained the circumstances under which the Claimant had been terminated or the reasons that had led to the said termination. I therefore find the Claimant's termination unfair and unjustified as provided under Section 45(2) of Employment Act 2007 which states as follows:-

2. **"A termination of employment by an employer is unfair if the employer fails to prove:**

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason:-

i. related to the employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure".

32. In terms of remedies, I find for Claimant and award him as follows:-

1. **1 months' salary in lieu of notice = 16,200/=**

2. **Service pay for 9 years = $\frac{1}{2} \times 16200 \times 9 = 72,900/=$**

3. **8 months' salary as compensation for unfair and unjustified termination = $8 \times 16,200 = 129,600/=$**

TOTAL = 218,700/=

4. **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 9th day of July, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyambura holding brief Njogu for Claimant – Present

Miss Azenga Alenga for Respondent – Present