



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

CAUSE NO. 200 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

PATRICK MBUGUA KARIUKI.....CLAIMANT

VERSUS

WAIGANJO INVESTMENTS LIMITED.....RESPONDENT

JUDGMENT

The Claimant, Patrick Mbugua Kariuki filed a Memorandum of Claim dated 12th February 2016 for wrongful, unlawful and unfair termination of his employment against the Respondent, Waiganjo Investments Limited. He avers that he was employed by the Respondent on or about June 2011 as an Assistant Farm Manager at the Farran Coffee Estate which is wholly owned by the Respondent, at a gross monthly salary of Kshs.12,000/=. That despite working for the Respondent for over a year, he was never issued with a contract of service. That he undertook his duties and responsibilities with passion, earnest zeal and diligence which was acknowledged by the Respondent. That his employment was terminated by a letter dated 6th May 2014 from the Farm Manager, Mr. James Mburu without any notice, warning, reason or due process and that the termination was arbitrary, unlawful and unprocedural. He relied on documents marked Appendix 1 – 7 filed in support of his claim.

He further avers that during the period of his employment, the Respondent made the usual statutory deductions from his salary payable to NHIF and NSSF but failed to remit the said deductions as can be confirmed by the NSSF Provisional Member Data Summary at *Appendix 3 and 4* of his bundle of documents. That on 18th June 2014 his advocates wrote a demand letter to the Respondent whose advocates responded by a letter dated 9th July 2014 denying his demands. He avers that his dismissal was actuated by malice, bad faith and clear breach of statutory duty on the part of the Respondent whose particulars he lists as hereunder:-

- a) Creating false and tendentious reasons in order to legitimize the termination of the Claimant's employment;
- b) Terminating the Claimant's employment without a formal complaint or any other formal record of dissatisfaction with the Claimant's performance;
- c) Terminating the Claimant's employment without a hearing by the board of directors as required;
- d) Breaching the statutory and implied own disciplinary procedures governing the Claimant's contractual relationship with the Respondent;
- e) Failure to give the Claimant an opportunity to defend himself;
- f) Failure to give the Claimant proper notice of termination;
- g) Failure to pay the Claimant his one month salary in lieu of notice or in the alternative; and
- h) Failure to pay the Claimant salaries, allowances and benefits due to him up to date of dismissal.

The Claimant contends that the allegations in the letter from the Respondent's advocates dated 9th July 2014 are baseless, mischievous and devoid of truth because he did not release the Respondent's employees earlier than the required working hours and neither was he given any prior complaint or warning in that regard. Further, that he was never served with any Notice to Show Cause which allegations he was reading for the first time in the said letter. That after the dismissal, the Respondent paid him Kshs. 32,303/= without outlining or itemising or

explaining the payment and that the Respondent refused and/or neglected to pay him his lawful dues and benefits and to issue him with a Certificate of Service. He prays for the following –

i. One month's gross salary in lieu of notice..... Kshs.12,000

ii. Compensation equivalent to 12 months'

gross salary..... Kshs.144,000

iii. Service pay equivalent to 15 days salary for every year worked from 2011 to 2014.....
Kshs.22,500

iv..... Less the amount paid by cheque on

3rd June 2014..... (Kshs.32,303)

Total amount due Kshs. 146,197

He prays for judgment against the Respondent for:-

- a) A declaration that the termination of the Claimant's employment was in breach of the Claimant's contract of employment.
- b) A declaration that the termination of the Claimant's employment was in violation of Sections 41, 45 and 46(a) of the Employment Act and was therefore unlawful and unfair
- c) An order that the Respondent do immediately pay the Claimant his entitlements in the sum of Kshs.8146,197.00 as particularised above.
- d) An order directing the Respondent to pay Kshs.18,520.00 to NHIF and NSSF being the amount which was deducted from his salary but was not remitted to the said statutory bodies.
- e) Punitive and exemplary damages for unlawful termination.
- f) Costs of this suit.
- g) Interest on the amount to be awarded at court rates.
- h) An order that the Respondent do issue the Claimant with a Certificate of Service.
- i) Any other relief this Court may deem fit to grant in the circumstances.

The Claimant filed his Witness Statement dated 12th July 2017 wherein he states that his duties were supervising the Respondent's workers at the farm estate to weed, apply chemicals, prune and harvest coffee and operating machines in the factory. That before receiving the termination letter, he had received a text message from the farm manager informing him not to report on duty on that day being 6th May 2014 with directions from the Respondent's Director to terminate his employment. He strongly believes that the Respondent's actions violate the Constitution and various Labour Statutes.

The Respondent filed a Response to the Memorandum of Claim dated 15th February 2017 admitting to have employed the Claimant but denying that it wrongfully, unlawfully or unfairly terminated the Claimant's employment. It avers that the Claimant changed his attitude towards his duties by giving very little input, undermining his manager, underperforming, deserting and being absent from work contrary to the contract of service. Further to this, it therefore summarily terminated his employment for insubordination, dereliction of duty and defying the farm manager's directives as envisaged in **Section 44 of the Employment Act**. That this entire suit is misconceived and ought to be struck out or dismissed with costs to the Respondent.

When the matter came up for hearing on 16th January 2019, the Claimant's advocate stated that there was an order made by Ndolo J for the matter to proceed as an undefended cause and that it was coming up for final proof.

The court ruled that the defence filed on 15th February 2017 was therefore filed out of time without leave and without setting aside the orders made on 14th December 2016. The case proceeded as an undefended claim.

Claimant's Evidence

The Claimant testified that he wished to adopt his statement and the documents filed as his evidence in this case. He referred the court to the termination letter at page 2 of his bundle and stated that when he was given a cheque for Kshs.32,303/= he was not informed what the money was in respect of. That the said payment was made after the Respondent received a demand letter from his advocate filed at page 6 of his bundle. He produced documents showing the months the Respondent skipped to remit his NSSF contributions being the months of April,

May, June, July, October and December in 2012; the months of August, September, October and December in 2013; and the months of January, February, March and April in 2014. He testified that the Respondent also failed to remit his NHIF for the months of March and April in 2014; the months of January, February, March, April, May, June, July, August, September, October in 2013; and the months of November and December in 2012. He referred the court to page 1 of his bundle dated 3rd May 2012 stating that the letter confirmed he was an employee of the Respondent.

Claimant's Submissions

The Claimant submits that under **Section 43 of the Employment Act**, the burden of proving that the reasons for terminating an employee constitute justifiable or lawful grounds for dismissal lies with the employer and that where the employer fails to do so, the termination shall be deemed unfair within the meaning of **Section 45 of the Employment Act**. Further, that he was condemned unheard contrary to the natural justice rule of *audi alteram partem* which is to the effect that no person should be judged without a fair hearing where a party is given the opportunity to respond to the evidence against them. That for summary dismissal, justice has to both be done and seen to be done and that a hearing and notification are mandatory and necessary as envisaged under **Section 41 of the Employment Act** as was held by Ongaya J in **Shankar Saklani –v- DHL Global Forwarding (K) Limited [2012] eKLR**.

That the court in the **Shankar Saklani case** also held that **Section 44(1) of the Act** only entitles an employer to terminate on account of gross misconduct with less notice than that which the employee is entitled to by any statutory provision or contractual term. He also submits that the Respondent contravened **Article 47 of the Constitution** on the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

It is submitted by the Claimant that the Respondent's discretion to terminate his employment must be exercised reasonably as was held by the court in **Associated Provincial Picturs Houses Limited –v- Wednesday Corporation [1947] 1KB 23** which Ongaya J cited with approval in the **Shankar Saklani case** above. That in this regard, the Respondent acted unreasonably by failing to take into account matters that were relevant such as complying with the statutory requirement to hear him. That this rendered his dismissal unfair. He urges this Court to find so.

He submits that in the absence of a contract of service prescribing the period of termination notice, **Section 35 of the Employment Act** which prescribes the notice period in various circumstances should apply. That the applicable provision is **Section 35(1)(c)** since he was paid his salary after every month and urges this Court to thus award him one month's salary in lieu of notice. That he is also entitled to 12 months' gross salary as compensation for unfair termination of employment as provided under **Section 49(1)(c) of the Employment Act** and further entitled to service pay for the 3 years he worked for the Respondent under **Section 35(5) of the Act**. He urges the court to consider the NSSF Statement he produced for the period between 2011 and 2014 and to find that the Respondent did not remit the said dues. He refers this Court to the holding of Makau J in **Cesar Warui –v- Sirona Hotel Limited [2018] eKLR** where the claimant was awarded service pay for 8 months on the basis that the respondent failed to remit the claimant's contributions regularly. The Claimant therefore urges this court to direct the Respondent to pay the NSSF and NHIF deductions to the statutory bodies and to also issue him with a Certificate of Service.

The Claimant submits that he has proved his claim on a balance of probability and urges this Court to grant the reliefs sought and to order the Respondent to pay the Claimant's costs of the case.

Analysis and Determination

The first issue for determination is whether the Claimant was wrongfully, unfairly and unlawfully terminated from his employment by the Respondent. The second issue for determination is whether the Claimant is entitled to the reliefs sought in his claim.

The Respondent filed its defence on 15th February 2017 after Ndolo J. had already ordered that the matter would proceed undefended and the Respondent did not file any other pleading or attend court for hearing. The Respondent simply pleaded that it summarily dismissed the Claimant for insubordination and defying of directives as under **Section 44 of the Employment Act**.

The Claimant has submitted that the Respondent did not adhere to due process while dismissing him from employment contending that there had never been any formal complaint or warning and he was not heard before a disciplinary committee. Further, that the reasons for termination were never explained to him. I agree with his submission that hearing and notification are mandatory under **Section 41 of the Employment Act** as was reiterated by the court in the **Shankar Saklani case** above. In that regard, he was unfairly and unlawfully dismissed from employment by the Respondent. He is therefore entitled to compensation for the unfair dismissal, which I award him at 6 months' salary taking into account the length of service and all other relevant circumstances of his case. He is also entitled to pay in lieu of notice. As the respondent did not pay his NSSF regularly, he is entitled to service pay as prayed.

I therefore find and declare the summary dismissal of the claimant and award him the following as against the respondent –

1. Pay in lieu of notice	Kshs.12,000
2. Service pay	Kshs.22,500
3. Refund of NHIF deducted and not reemitted	Kshs.11,920
4. Compensation	Kshs.72,000
Total	Kshs.118,420

The amount is payable less

(Kshs.32,303)

Amount Awarded

Kshs.86,117

Item no. 3 is payable with interest at court rates from date of filing suit while the other times shall attract interest at court rates from date of judgment.

The respondent shall pay claimant's costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE