



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1738 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

THOMAS MUKOYA.....CLAIMANT

VERSUS

METAL CROWNS LIMITED.....RESPONDENT

JUDGMENT

The Claimant, Thomas Mukoya filed a Statement of Claim dated 8th August 2014 alleging unlawful and wrongful termination of his employment by the Respondent, Metal Crowns Limited. He avers that the Respondent offered him permanent employment as a Supervisor in the fabrication department at a gross salary of Kshs.50,000/= which was later reviewed to Kshs.54,175/= and further to Kshs.56,375/= as reflected in his *Appendix 2, 3 and 4*. That he served the Respondent to the best of his ability and experience which earned him salary increment with approvals by the human resource manager and the general manager. That on or about February 2012, the Respondent's director initiated a scheme to frustrate him and force him out of the company leading to the Respondent unlawfully and wrongfully terminating his services. He avers that he was forced to sign a discharge and clearance certificate and that the Respondent did not follow the law and principles of natural justice and equity in terminating his services. He further avers that he was never received issued with any written warning on his performance or given an opportunity to improve on any alleged non-performance.

He continues to aver that the Respondent did not give him any notice before terminating his employment and that the Respondent has not proved its reasons for terminating his services. He prays that this court revokes the work permit issued to the director, Mr. Gurdip Singh *K/E/P class 'A'* under the relevant sections of the Immigration Act prohibiting violation of employee rights and that the circumstances of this work permit's renewals for more than the allowed period should be investigated. He contends that he was advanced a loan by Barclays Bank against his payslip after due process of certification was done by the Respondent through its Human Resource Manager and Key Accounts Manager and that he was to repay the outstanding loan of Kshs.1,520,276/= for a period of 60 months while in employment. That after the unfair termination of his employment by the Respondent, the Bank and its agents have been calling him demanding payment of the full loan amount which he is currently unable to pay since he lost his job.

He prays for the following remedies: -

- a) 12 months' salary in lieu of notice on gross income (Kshs.56,375 x 12 months) being Kshs.676,500/=
- b) 12 months compensation for unlawful termination of services being Kshs.676,500/=
- c) Payment of annual leave for 12 months of notice (30 days Kshs.56,375/208 hours per month = Kshs.271.03/= per hour x 8 hours per day = Kshs.2,168 per day x 30 days) being Kshs.65,048.80/=
- d) Pay and fully settle bank loan that the Respondent guaranteed the Claimant being Kshs.1,520,276/=
- e) Pay in full the accumulated co-operative shares which was not paid at the time of termination being Kshs.64,560/=
- f) Pay and fully settle accumulated interest on the loan that the Respondent guaranteed the Claimant.
- g) Payment of salary in arrears for the months the Claimant has been out of employment from 10th January 2013 to the date as will be determined by this court due to wrongful and/or unlawful termination.
- h) Payment of accumulated leave days for the period the Claimant has been out of employment from 10th January 2013 to the date as will be determined by this court.

- i) Severance and disturbance pay of 15 days for each completed year (9 years) at (Kshs.56,375/2 x 9) being Kshs.253,687.50/=
- j) Compensation for damages suffered by the Claimant from the time of his wrongful and unlawful retirement.
- k) Costs of this suit plus interest.
- l) Any other monies that is legally due to my favour.

The Claimant further prays that:

- a. This Court does find that the Respondent is guilty of constructively terminating the Claimant's services and an order compelling the Respondent to settle the aforesaid claims.
- b. This Court compels the Respondent to pay for the damages for wrongful and unlawful termination from employment without observing the due procedures as stipulated clearly in Employment Act of 2007 and ILO Convention 158 of 1982.
- c. The Respondent pays for the costs of this suit.
- d. The Respondent director's work permit be revoked, level lawful penalties for racial and abuse offences committed herein.
- e. Such further or other reliefs as may be appropriate in the circumstances.

The Claimant filed a Witness Statement dated 3rd August 2015 in which he states that there was a Trade Union recognised by the Respondent and a CBA existing between the union and the company. That the Respondent ignored the CBA and instead issued a termination letter to him without following due procedure, that this Court should deal with substantive justification and procedural fairness. He also filed a Witness Statement dated 20th August 2015 by Boaz Omori Obop who was employed by the Respondent as an Assistant Human Resource Manager and had worked with the Claimant. Mr. Boaz states in the statement that the Claimant was not issued with any warnings for misconduct nor was he summoned for any disciplinary hearing. That the director Mr. Gurdip always ordered the head of human resource department to execute terminations without any justifications and that the director made all the decisions singlehandedly. That in his opinion, because the Respondent failed to convince the Claimant of valid reasons for terminating his employment the termination was unfair.

The Respondent filed a Response to the Statement of Claim dated 1st November 2014 and another one dated 5th May 2017 admitting to have employed the Claimant but denying that its director initiated a scheme to frustrate the Claimant. It avers that it paid the claimant notice, service dues and outstanding leave days and that it terminated his services lawfully in accordance with the law. Regarding the loan the claimant took while in employment the respondent contends that he signed the discharge documents of his own free will and that the respondent was not party to the loan agreement. That the Claimant failed to show sufficient cause why disciplinary action should not be taken against him after he was issued with notice and that the respondent gave him the reason for termination. That the court has no power to grant the prayers sought under paragraph 15 of the statement of claim and that the allegations made therein are frivolous and made in extremely bad faith. That the loan advanced to the Claimant by the bank was not a guarantee that he would remain in employment for the period of the loan and that the Claimant should pay the loan since he benefitted from the same. It prays that the Claimant's claim is dismissed with costs.

The Respondent filed a Witness Statement dated 15th March 2018 by its Human Resource Manager, Stephen Muriithi who states that the Claimant was its employee from 1st August 2001 to 14th May 2012 and that he had been severally warned of his poor work performance both verbally and in writing. It contends that the Claimant signed for the receipt of his dues on 21st July 2012 in the presence of his own witness as evidenced in the computation form. That the Claimant ceased being a member of the Kenya Engineering Workers Union when he accepted the terms and conditions of a supervisor by signing the letter dated 10th December 2010 and that the Respondent paid his terminal benefits totalling to Kshs.304,804/= after deducting company liabilities as follows:

- a. Salary up to and including 14th May 2012 - Kshs.26,308.33
- b. Outstanding leave (19 days) – Kshs.35,704.17
- c. One month in lieu of notice – Kshs.56,375/=
- d. Service at the rate of 21 days per year – Kshs.34,213/=
- e. Gratuity at the rate of 25 days for 9 years at Kshs.17,588 – Kshs.152,204/=.

On 1st November 2018, Advocates for both parties applied for leave to adopt their pleadings, which include the Statement of Claim together with annexures and Claimant's list of documents and the Respondent's two Statements of Response, list of documents and Witness Statements. They were thereafter granted leave to dispose of this matter by way of written submissions.

Claimants' Submissions

The Claimant submits that the statements as in the letter of termination failed to highlight the technical know-how and trainings of the person in charge that is required to maintain the fabrication machine and that he was not trained in the said field. Further, that it failed to address

whose duty it was to provide him with the Manufacturers Manual and Maintenance Schedule and to provide the procedures of maintaining the said machine since wrong procedures would cause injury or even death. That the union wrote to the Respondent advising it to use his then present basic earnings in calculating his dues as per their CBA but which advice the Respondent ignored.

That the Respondent's defence lacks evidence of investigations and notice of his impending termination for poor performance and that it also failed to explain the reasons for its decisions as per Section 43 of the Employment Act. That the Respondent failed to adduce evidence of any Minutes of meetings, memos, emails, notices, show cause, cautions and warnings to support its reasons for termination as under Section 45(2) of the Act and that he was not heard before being dismissed so as to prepare a defence on the same. In general, he submits that the Respondent failed in substantive justification and procedural fairness under Section 41 of the Act and that his termination was thus unfair. That in Cause No. 1099 of 2012: Benjamin Nyambati Ondiba –v- Egerton University, the court held that an employee must be afforded every opportunity to defend themselves before disciplinary action is taken against them.

He relies on Articles 41 of the Constitution of Kenya on the right to fair labour practices including fair remuneration and the case of Kenya Scientific Research International Technical & Allied Workers Union (KSRITAWU) -V- Stanley Kinyanjui and Magnate Ventures Ltd (Industrial Cause No. 273 of 2010 where it was held that once poor performance is noted, the proper procedure is to point out the shortcomings to the employee and allow them to improve over a reasonable length of time being 2-3 months in the Court's opinion. It further cites the case of Simon Muguku Gichigi -V- Taifa Sacco Society Limited [2012] eKLR where the court held that an employer cannot circumvent their obligation to an employee by waving a form of discharge signed by the employee stating that if the law is not complied with, no form of discharge can cure the irregularity.

The Claimant submits that this Court has jurisdiction to enforce the Bill of Rights within an employment relationship as articulated by Majanja J in USIU -V- Attorney General [2012] eKLR. That he is entitled to the reliefs he seeks as set out in Section 49(1) of the Employment Act in relation to notice pay and 12 months' salary compensation. He further prays in his submissions for payment of erroneously calculated gratuity and service at Kshs.487,860.50 and Kshs.409,803.03 respectively.

Respondent's Submissions

The Respondent submits that by virtue of Section 47(5) of the Employment Act, the Claimant ought to discharge the burden of proving that his dismissal was unfair or wrongful which he failed to do. That the termination letter dated 14th May 2012 at Exhibit 3 in the Claimant's bundle, clearly demonstrates the reason for the termination of employment. That the company experienced machine breakdowns and low production which was not good for business and that it could not continue having a supervisor in the very critical fabrication department who could not discharge his duties as expected. That this constituted a valid and justifiable reason to terminate the Claimant's employment in accordance with Section 43 and 45 of the Act and that the termination was thus fair.

It submits that the claim for notice pay, annual leave, gratuity and service pay must fail because it paid the same. That the claims for compensation, settlement of loan and payment of salary arrears from the time of termination are unsubstantiated and unfounded and should not be awarded. That the Respondent used to remit NSSF on behalf of the Claimant which is confirmed by the payslip in the Claimant's list of documents and so the said claim cannot arise. It relies on Bramwel Airo Imbudila -V- Noble Conference Centre Limited [2016] eKLR where the court dismissed a claim for unlawful termination.

Determination

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

The Claimant has demonstrated that there was no disciplinary hearing convened for him to defend himself against the allegations and no investigation report or minutes of a hearing were produced in court by the Respondent to rebut the same. It is my finding that the Respondent in terminating the Claimant's services failed to follow the procedure under **Section 41 of the Employment Act** thus rendering the termination unfair as was held in the case of *Benjamin Nyambati* cited by the Claimant. It is further my finding that the respondent failed to demonstrate that the claimant was informed of the shortcomings in his performance and given an opportunity to improve before the termination.

Having been unfairly terminated, the Claimant is entitled to compensation under **Section 49 of the Employment Act**. Considering that he worked for the Respondent for 9 years, and taking into account all the circumstances of his case, including the fact that the Claimant did not deny the Respondent's claim that it paid him notice, annual leave, service and gratuity, I award him 10 months' salary as compensation.

The claimant did not demonstrate how he arrived at the he figures claims arise from what he alleges is wrong calculation of his gratuity and service pay. I therefore dismiss the same as not having been proved.

On prayers that the respondent pays the claimant's loan, I agree with the respondent that it is under no obligation to pay the same and that the claimant having benefited from the loan must pay the same.

For the foregoing reason I enter judgment for the claimant in the sum of Kshs.563,750 being compensation. All other prayers are dismissed for not having been proved.

The respondent shall pay claimant's costs. Decretal sum shall attract interest at court rates.

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

MAUREEN ONYANGO

JUDGE