



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1302 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

STEPHEN MUTUA WAMBUA.....CLAIMANT

VERSUS

METAL CROWNS LIMITED.....RESPONDENT

JUDGMENT

In November 2001, the Claimant was employed by the Respondent as a quality control inspector. He served in this position until 15th March 2014 when the Respondent terminated his employment on grounds of poor performance. At the time of termination, he was earning a gross salary of Kshs.37,975.00. Aggrieved by the termination the Claimant filed the cause herein on 23rd July 2015, seeking the following reliefs:

- a. That the Court do find that the Respondent is guilty of constructive terminating the Claimant services and order the Respondent to settle the following claims:
- i. 12 months' salary in lieu of notice on gross income in the sum of Kshs.455,700.00.
 - ii. 12 months compensation for disturbance by terminating the services of the Claimant unlawfully in the sum of Kshs.455,700.00.
 - iii. Payment of annual leave for the period of claim of payment of service and notice as shall be determined by the Court.
 - iv. Pay and fully settle bank loan that the Respondent guaranteed the Claimant in the sum of Kshs.881,950.00.
 - v. Pay and settle the accumulated interest on the bank loan that the Respondent guaranteed the Claimant.
 - vi. Payment of all monies contributed to the Sacco as savings amounting to Kshs.131,986.00.
 - vii. Compensation for damages suffered by the Claimant from the time of this wrongful and unlawful retirement.
 - viii. Cost of the suit plus interest.
 - ix. Any other monies that is legally due to his favour.
- b. That the Court compels the Respondent to pay for the damages for wrongful and unlawful termination from employment without observing the due procedures as stipulated in the Employment Act, 2007 and ILO Convention 158 of 1982.
- c. The Respondent pays for the costs of this suit.
- d. That the Respondent director's work permit be revoked, level lawful penalties for racial abuse offences committed herein.
- e. Such further or other reliefs as may be appropriate in the circumstances.

It is the Claimant's case that the termination of his employment was unlawful as the Respondent did not follow the requisite procedure. It is his further case that he did his best while working under a director who had no respect for his rights and that he was never issued with a warning letter for his poor performance or given an opportunity to improve.

The Claimant avers that he was coerced into signing a discharge and clearance certificate to allow the Respondent calculate his terminal benefits. It is his case that he only acknowledged clearance so as to take the appropriate legal action.

It is the Claimant's case that he acquired a loan after the Respondent's confirmation through its HR and Key Accounts Managers that he qualified for loan facilities which he was to repay for a period of 60 months at Kshs.17,639.00 per month. Further, that the Respondent never refunded his Sacco savings of Kshs.131,986.00.

The Respondent did not file a response despite being granted leave to do so.

Submissions by the Parties

The Claimant in his written submissions submits that the Respondent has not adduced evidence of the investigations carried out or his poor performance yet there ought to have been records kept. The Claimant also submits that he should have been given room to improve his performance and accorded a fair hearing. As such, the respondent failed to prove that there was substantive justification for the termination and that due process was followed.

To buttress his case, the Claimant relies on the case of *Simon Muguku Gichigi vs. Taifa Sacco Limited [2012] eKLR*, *Reuben Mwamboga vs. Bahnhof Bar & Restaurant [2013] eKLR*, *Alphonse Sulpice Mzenge vs. Mombasa Air Safari Limited [2013] eKLR*, *Jane Wairimu Machira vs. Mugo Waweru and Associates [2012] eKLR*, *Anthony Mkala Chitavi vs. Malindi Water & Sewerage Company [2013] eKLR*, *Benjamin Nyambati Ondiba vs. Egerton University [2014] eKLR* and *United States International University vs. Attorney General [2012] eKLR*.

On its part, the Respondent submitted that the Claimant had failed to prove that his employment was unlawfully terminated as required under Section 47(5) of the Employment Act, 2007. The Respondent submitted that the Claimant's termination letter indicated that the Claimant had been given time to correct his poor performance.

It is the Respondent's position that the reason for termination was valid and justifiable under law which it had proved in accordance with Section 43 and 45 of the Employment Act.

Analysis and Determination

After considering the pleadings filed before this Court, analysing the evidence adduced and the parties' arguments as set out in their submissions, the following are the issues for determination: whether the Claimant's employment was unfairly terminated and whether he is entitled to the orders sought.

Termination of Employment

Section 41(2) of the Employment Act requires an employer who is terminating an employee's services on account of poor performance, to hear and consider any representations which the employee may have. The Respondent did not adduce any evidence to prove that the Claimant had been given room to improve or afforded a fair hearing before his employment was terminated.

Further, the Respondent did not adduce any evidence to justify terminating the Claimant's employment for poor performance. The evidence that the Respondent had relied upon to arrive at the conclusion that the Claimant was guilty of poor performance was not adduced in Court. As such the claimant's evidence is un rebutted. I therefore find that the respondent has not justified the grounds for the Claimant's dismissal or proved fair procedure as required under

Sections 41 and 43 of the Employment Act.

As was decided in *Alphonse Sulpice Mzenge vs. Mombasa Air Safari Limited [SUPRA]* the employer under the regime of the existing employment Act has the obligation to hear their employees before terminating their services. Consequently, I find that the Claimant's employment was unlawfully and unfairly terminated.

Reliefs Sought

The Claimant's case was that he was coerced into signing the discharge and clearance certificate and that he only signed it because he knew he would take legal action. However, the Claimant did not adduce any evidence regarding coercion and neither did he deny being paid his dues. The fact that the Claimant did not claim all his terminal benefits as they ought to have been paid as outlined in his termination letter, certainly raises serious questions.

The case of *Simon Muguku Gichigi vs. Taifa Sacco Limited [SUPRA]* can be distinguished from the case herein. In this case, the Court had records of the Claimant complaining to the Respondent about certain omissions and typographical errors and there was no attached schedule for the tabulation of his dues.

The claim for compensation for disturbance is not founded in law and neither has it been justified. The claim for settlement of the claimant's

bank loan and interest thereon fails as the Respondent cannot be held liable for the Claimant's personal liabilities. The claim for annual leave fails as the amount claimed has not been specified or proved. The claim for payment of his Sacco savings fails as it has not been proved.

The claim for revocation of the Respondent's director's work permit cannot be granted because the Director was not enjoined to this suit and no evidence has been adduced to support the claim. Further, this being an employment matter, the court has no jurisdiction to grant the said orders.

In light of the foregoing, the Claimant is only entitled to compensation for wrongful termination which I award him at 12 months' gross salary in view of his length of service of 15 years, the failure of the respondent to adduce evidence to justify the termination or controvert the averments by the claimant and the unique circumstances of the case.

The respondent will also pay claimant's costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2019

MAUREEN ONYANGO

JUDGE