



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1564 OF 2017

TYRAS MUNIU NJOROGE

CLAIMANT

V

POWERSTAR SUPERMARKET KASARANI LIMITED RESPONDENT

JUDGMENT

1. This Cause was heard on 5 March 2019 when Tyras Muniu Njoroge (Claimant) testified and on 13 June 2019 when the General Manager of Powerstar Supermarket Kasarani Ltd (Respondent) testified. Both witnesses also adopted their witness statements.

2. The Claimant filed his submissions on 11 July 2019 while the Respondent's submissions were not on file by this morning.

3. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as examined hereunder.

Whether termination of Claimant's employment was unfair

4. The Claimant was employed by the Respondent on 15 October 2010 as a Line Attendant. By the time of separation, he was serving as a Manager.

5. It is not in dispute that the Respondent's Director informed the Claimant of the termination of his employment on 10 June 2017. A dismissal letter was not issued.

6. The Claimant challenged the fairness of the termination of his employment on the grounds that he was not afforded an opportunity to be heard, and that the reasons were invalid. Prior to the termination of contract, the Claimant had been placed on suspension (verbally).

7. Section 35(1)(c) of the Employment Act, 2007 requires an employer to give *written notice of termination of employment* at least 28 days in advance if the employee is paid by the month. There was no evidence from the Respondent that it issued any written notice to the Claimant.

8. Apart from the written notice, by dint of section 41 of the Act, an employer should afford an employee an opportunity to make representations before taking a decision to terminate a contract of employment (on the listed grounds).

9. Such a hearing may be preceded by a show cause.

10. In the case at hand, there was no suggestion or evidence that the Respondent called upon the Claimant to make representations as to why he should not be dismissed (or that a colleague of the Claimant's choosing was present at such a session).

11. If a hearing as contemplated by the law was held, no notes or minutes of such a hearing were placed before the Court. Not even the date of any hearing was disclosed nor the persons present at such a hearing.

12. The Respondent's witness testified that he was only informed of the termination of the Claimant's contract by the Director after the decision had been taken. The Director was not called to testify despite being the primary witness as to the facts surrounding the termination of the Claimant's contract.

13. The Court can therefore and does conclude that the termination of the Claimant's employment was procedurally unfair.

Pay in lieu of notice

14. For the unfair termination of employment, the Court holds that the Claimant is entitled to the equivalent of 1 month salary in lieu of notice.

Compensation

15. The Claimant served the Respondent for about 7 years and in consideration of the length of service, the Court is of the view that the equivalent of 7 months gross wages as compensation would be appropriate (gross pay was Kshs 55,000/- per month by time of separation).

Breach of contract/statute

Leave

16. At a minimum, an employee is entitled to 21 days annual leave. The Claimant sought Kshs 10,576/- on account of accrued *pro-rata* leave by time of termination of contract.

17. The Respondent did not produce the Claimant's leave records, and pursuant to section 10(3) & (7) of the Employment Act, 2007, the Court will allow the head of claim.

House allowance

18. On account of house allowance, the Claimant sought Kshs 643,500/-. He contended that he was not provided with housing nor paid house allowance.

19. The Claimant stated in his written witness statement that he was earning a gross salary.

20. The Court in effect finds this head of claim not proved/unmerited.

Overtime

21. The Claimant was a Manager.

22. The Employment Act, 2007 leaves it to the contracting parties to agree on working hours.

23. This head of claim was therefore in the nature of special damage(s).

24. The Claimant did not lay any evidential or other legal foundation to his claim for overtime pay or demonstrate that as a Manager, he would be entitled to overtime pay.

Certificate of Service

25. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 15 days.

Conclusion and Orders

26. The Court finds and declares that the termination of the Claimant's employment was unfair and awards him

(a) Pay in lieu of Notice Kshs 55,000/-

(b) Compensation Kshs 385,000/-

(c) Accrued leave Kshs 10,576/-

TOTAL Kshs 450,576/-

27. Respondent to issue Certificate of Service within 15 days.

28. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 20th day of September 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muli instructed by Muli & Co. Advocates

For Respondent Mr. Chege instructed by C.K. Chege & Co. Advocates

Court Assistant Lindsey