



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 1825 OF 2016**

*(Before Hon. Lady Justice Hellen S. Wasilwa on 23<sup>rd</sup> October, 2019)*

**JAMES OOKO SEDA.....CLAIMANT**

**VERSUS**

**ADSITE LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed a Memorandum of Claim in Court on 7<sup>th</sup> September, 2016, seeking compensation for unfair termination of his employment by the Respondent herein and refusal to pay terminal dues owed to him by the Respondent. The Claimant further seeks damages for unfair termination of his employment with the Respondent herein.
2. The Claimant avers that he was offered employment by the Respondent with effect from 1<sup>st</sup> September, 2012, which offer he duly accepted on 13<sup>th</sup> September, 2012. He further avers that he performed his duties diligently and to the Respondent's satisfaction until May 2015 when one of the Respondent's Directors, Mr. Samir Shah called him and informed him that his services were no longer needed at the Respondent Company.
3. The Claimant further avers that he was not given an opportunity to be heard prior to the Respondent terminating his services. He further states that there was no disciplinary action taken against him prior to his verbal termination.
4. The Claimant contended that during the subsistence of his employment with the Respondent he worked from 7.00 am to 9.00 pm on a daily basis and did not receive any overtime payment.
5. Aggrieved by the decision to unfairly terminate his services the Claimant filed the instant claim seeking the following reliefs:-

***a) A declaration that the Claimant is entitled to payment of his terminal dues.***

***b) An Order for the Respondent to pay the Claimant his dues.***

***c) A declaration that the Respondent pays the Claimant's dues constituting of the following:***

***i. One month's salary in lieu of notice                      Kshs.12,500***

***12 months' salary for wrongful dismissal***

***ii. (12 months x 1 month salary)                              Kshs. 150,000***

***iii. House allowance @ 15% of basic salary***

***for 6 years worked***

***(15/100 x 12,500 x 12 months x 6 years)                      Kshs. 135,000***

***iv. Overtime @ 4 hrs per day 313 days in a year***

*Hours Pay 12,500 x 1/26 x 1/8=60.10*

*Weekdays @ 261 days a year*

*60.10 x 4 hrs x 261 days x 1.5*

*(low rate) x 6 years* *Kshs. 564,699.60*

*v. Untaken leave @ 21 days for every year*

*42/26 days x 12,500* *Kshs. 20,192.31*

*vi. Severance Pay*

*20 days/26 x 6 years x 12,500* *Kshs. 57,692.31*

*TOTAL* *... Kshs. 940,084.22*

**d) Costs of this Claim.**

**e) Certificate of Service for the period served.**

6. The Claimant urged this Honourable Court to allow his claim as drawn.

7. The Respondent in its Response to the Memorandum of Claim dated 19<sup>th</sup> October, 2016 and filed in Court on 21<sup>st</sup> October, 2016 the Respondent admits having engaged the Claimant in the manner as alleged. It however denies that the Claimant was unlawfully dismissed as alleged.

8. It contends that the Claimant exhibited sheer arrogance, defiance and insubordination to authority in performance of his duties and failed and/or ignored to change despite being served with several warnings to that effect.

9. The Respondent contends that it had a justifiable reason to terminate the Claimant's services. It further contended that it did dismiss the Claimant in accordance with Section 44 (4) (e) of the Employment Act.

10. The Claim for overtime is denied by the Respondent as it is the Respondent's position that the Claimant worked from 8.30 am to 5.30 pm on weekdays and 8.30 am to 1 pm on Saturdays in accordance with his employment contract. The Respondent further contends that the Claim for overtime has no legal basis.

11. The Respondent further contends that it did pay the Claimant all his terminal dues at the time of separation which amount was duly acknowledged by the Claimant herein as full and final settlement of his dues as evidence by annexure "SS-6" tabulation of the terminal dues duly received by the Claimant.

12. In conclusion, the Respondent averred that the instant suit is therefore bad in law, is an abuse to the Court process and urges this Honourable Court to dismiss the same with costs to the Respondent.

13. This matter was fixed for hearing on 13/6/2019 and 27/6/2019 with Claimant testifying on his own behalf and the Respondent calling one witness to testify on its behalf.

#### **Evidence**

14. The Claimant, CW1 in his testimony adopted his witness statement dated 17/8/2016 as his evidence in chief.

15. CW1 further testified that on 30/5/2015 he reported on duty as usual only to be informed by the Respondent's director, Mr. Samir Shah that his services were no longer required and that he was paid some money Kshs 12,290/-.

16. He further stated that he was forced to write to the Respondent seeking payment of his terminal dues and he was paid Kshs. 21,648/-. He further averred that he did not receive any house allowance during the subsistence of his employment with the Respondent.

17. CW1 contended that he never received any warning from the Respondent prior to his termination.

18. On cross-examination, CW1 confirmed that at the time of his separation he did receive leave allowance, notice pay for one month. He further confirmed having received house allowance of Kshs. 1,575/- as indicated in his payslip. He however insisted that the house allowance was only paid for 2 years.

19. CW1 insisted that he did not request for any leave during the subsistence of his employment with the Respondent.

20. On re-examination, CW1 stated that in document SS-7 he is sought permission to go to the hospital, as he was unwell. He insisted that he did not at any time request for annual leave. He further stated that the leave payment he received from the Respondent was only for 1 year.

21. On further re-examination CW1 stated that he did work overtime being a storekeeper at the Respondent Company as he was often forced to report to work as early as 7.00 am and would leave late.

22. Mr. Ramesh Shah, the Respondent's CEO testified as RW1 on 27/6/2019. He also adopted his witness statement dated 16/5/2018 as his evidence in chief and produced documents 1 to 7 attached to their Response to the Memorandum of Claim. In brief he confirmed having employed the Claimant as a store keeper and cleaner.

23. RW1 further stated that the Claimant was not assigned any other general duties and working hours were between 8 am and 5 pm from Monday to Friday and between 7 am to 12.30pm on Saturdays.

24. RW1 contended that the respondent had a problem with the Claimant as he reported late for duty and would leave early and that items would also get lost at the store. He further stated that he warned the Claimant severally on this behaviour however, no change was seen and he decided to terminate his services verbally.

25. RW1 confirmed having served the Claimant with a show cause letter, which letter was not responded to. He also confirmed that the Claimant was paid house allowance during the subsistence of his employment contract with the Respondent. He therefore urges this Honourable Court to dismiss the Claim as prayed.

26. On cross-examination, RW1 insisted that the Claimant reported to work late. He however stated that there were no records in court to confirm this. He also confirmed that there were no written warnings from the Respondent to the Claimant.

27. On further cross-examination, RW1 insisted that the Claimant was issued with a termination letter and he was not chased away.

#### **Submissions by the Parties**

28. It is submitted by the Claimant that his dismissal did not meet the legal threshold of fairness as set out under Section 41, 43 and 45 of the Employment Act, 2007.

29. He further contended that the dismissal was therefore unlawful, un-procedural and unfair in the circumstances. To buttress this position the Claimant cited and relied on the Court decisions in the cases of **Kenya Human Rights Commission & Another Vs Non-Governmental Organization Co-ordination Board & Another (2018) eKLR**, **Daniel Kiplagat Kikeibut Vs Smp Deposit Taking Micro Finance Limited** and **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR**.

30. The Claimant further submitted that having shown that his termination was unfair he is entitled to the reliefs as sought in his Memorandum of Claim and urged this Honourable Court to allow the same as prayed. To fortify his argument the Claimant cited and relied on the cases of **Saklani Vs DHL Global Forwarding (K) Limited (2012) eKLR** and **John Wafula Vs Star Production Limited (2016) eKLR** for emphasis.

31. In conclusion, the Claimant urged this Court to allow his Claim as prayed having proved his case as against the Respondent on a balance of probability.

#### **Respondent's Submissions**

32. The Respondent on the other hand submitted that they had a valid reason to terminate the Claimant's services and it did accord the Claimant a fair hearing prior to his termination. they however contended that the Claimant failed and/or ignored to attend to the hearing. The Respondent further contended that prior to his termination the Claimant was issued with several warnings.

33. The Respondent further submitted that the Claimant has failed to discharge the burden of proof for unfair termination as provided under Section 47(5) of the Employment Act, 2007.

34. The Respondent contends that the Claimant is not entitled to the reliefs as sought in his Memorandum of Claim urging this Honourable Court to dismiss the same with costs to the Respondent.

35. On the issue of house allowance, the Respondent submitted that it did provide the Claimant with reasonable housing allowance as provided by the Act and evidenced by the Claimant's payslip.

36. On the issue of payment of one month's salary in lieu of notice the Respondent contends that it was not required to give any notice to the Claimant having summarily dismissed him from his employment on grounds of gross misconduct by dint of Sections 35 and 36 of the Employment Act, 2007.

37. It is further contended that the main aim by the Claimant is to unfairly benefit from the Respondent. The Court is therefore urged to also dismiss this claim.

38. With regards to the claim for 12 months' salary compensation for wrongful dismissal, the Respondent affirms that the Claimant's termination was done in accordance with the law and therefore urged this Honourable Court to dismiss the same. To fortify its argument the

Respondent relied on several authorities among them **Robert Kimutai Rutto Vs Hotel Cathay Limited (2018) eKLR**, **Kiambaa Dairy Farmers Co-operative Society Limited Vs Rhoda Njeri & 3 Others (2018) eKLR**, **CMC Aviation Limited Vs Mohammed Noor (2015) eKLR** and **Koki Muia Vs Samsung Electronics East Africa Limited (2015) eKLR**.

39. With regards to the Claim for overtime payment the Respondent submitted that this is only meant for the Claimant to unjustly enrich himself as the Employment Contract stipulated for working hours and the Claimant failed to adduce necessary evidence to support his assertion of working overtime. To buttress its argument the Respondent relied on the judicial decisions in **Kenya Plantation & Agricultural Workers' Union Vs Keen Kleeners Limited (2014) eKLR** and **Kesi Mohamed Salim Vs Kwale International Sugar Co. Limited (2017) eKLR**.

40. The Respondent further submitted that the Claimant's prayer for severance pay cannot be allowed as the same is a preserve in cases of redundancy. For emphasis, the Respondent cited the Cases of **Krystalline Salt Limited Vs Kwekwe Mwakele & 67 Others (2017) eKLR** and **Haji Hassan Mohammed Vs Salim Mohamed Al-Moudy Limited (2014) eKLR**.

41. In conclusion, the Respondent urged this Honourable Court to dismiss the Claimant's suit with costs to the Respondent.

42. I have examined all the evidence and submissions of the Parties. The Claimant's case is that he came to work as usual on 30/5/2015 but the Respondents terminated his services orally without any reasons. He was then paid 12,290/= only as his terminal dues.

43. The Respondents RW1 also admitted that he terminated the Claimant's services and there is no termination letter that was served upon him to explain reasons for the termination.

44. The Respondent aver that they terminated the Claimant because he used to be a trouble shooter and came to work late and leave early. He was however warned of this and he did not change.

45. The Respondent however did not produce any documents to show the Claimant's erratic attendance and lateness nor any warnings issued to him. This therefore show that the Respondent had no valid reason to terminate the claimant.

46. This is contrary to Section 43 of Employment Act which states as follows:-

*1) "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

*2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".*

47. In the same vein, there is no indication that the Claimant was also taken through any disciplinary process as envisaged under Section 41 of Employment Act 2007.

48. It is therefore my finding that the termination of the Claimant was unfair and unjustified as stated under Section 45(2) of Employment Act for lack of proper reasons and want of due process.

49. Having found as this, I find for the Claimant and I award him as follows:-

*1. 1 Months' salary in lieu of notice = 12,500/=.*

*2. 12 months compensation for unlawful termination = 12 x 12,500 = 150,000/=.*

*3. House allowance at 15% of the salary for 3 years – the other 3 years being time barred = 15% x 12,500 x 36 = 67,500/=*

*Total = 238,750/=*

*4. The Respondent will 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 23<sup>rd</sup> day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Baabu for Respondent – Present

Thuku holding brief Wesonga for Claimant