



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 182 OF 2018

JOSEPH WAHOME KARANGI.....CLAIMANT

VERSUS

EXPRESS INN.....RESPONDENT

JUDGMENT

1. In this suit the Claimant averred that he was employed as a supervisor by the Respondent on 23rd July 2017. He averred that on 1st March 2018 he reported to work as usual after his one month forced leave but upon arrival he was verbally terminated through a telephone call and no reasons given to him. He averred that the manner in which the termination took place was unprocedural, unlawful and contrary to Section 45 of the Employment Act 2007. He averred that he was entitled to a monthly salary of Kshs. 25,000/- and that it as a term of the contract that a party wishing to terminate the contract had to give the other party 28 days written notice or 28 days salary in lieu of notice. The Claimant averred that the Respondent did not give the requisite notice nor pay in lieu thereof. He thus sought maximum compensation for the unlawful termination – Kshs. 300,000/-, one months' salary in lieu of notice – Kshs. 25,000/-, salary for the month of February 2018 – Kshs. 25,000/-, the 10 unpaid public holidays @833 – Kshs. 8,333/-, 2 days off @833 – Kshs. 1,666/- as well as costs of the suit.

2. The Respondent filed a response in which it denied the averments made by the Claimant and averred that the Claimant was paid all his dues including a 28 day salary in lieu of notice. The Respondent denied that the Claimant's February salary was not paid. It averred that the Claimant is not entitled to any relief as the termination of the contract was lawful and all the terminal dues paid.

3. Parties consented to have the suit disposed of in terms of Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2016. The Claimant filed final submissions in which he submitted that there was no mention of termination of his employment at the time he proceeded on leave. He submitted that to date there has been no formal communication about his alleged poor performance neither was he formally terminated. He submitted that he only received a call and was told to go and wait to be called at a later date and be allocated other duties. He submitted that his dismissal in the circumstances was unprocedural and unfair. The Claimant submitted that the manner of termination was embarrassing, inhuman and contrary to Article 41(1) and (2) of the Constitution of Kenya and Sections 45 and 46 of the Employment Act. he relied on the cases of **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR** and **Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited [2016] eKLR** and urged the court to find his termination was unlawful.

4. The Respondent submitted that on 1st February 2018 the Claimant was sent on one month leave to end on 1st March 2018. The Respondent submitted that however on the same day it terminated the Claimant's employment on account of poor performance on the part of the Claimant. The Respondent submitted that the Claimant was then entitled to Kshs. 22,582.87 as the 28 days net salary in lieu of notice for the month of February 2018 which was duly paid and the 13 pro rata leave days – Kshs. 10,483.87. The Respondent submitted that under clause 8 of the contract of employment it reserved the right to terminate the appointment without notice in the case of gross misconduct. The Respondent submitted that the termination did not offend any articles of the Constitution and it was well within the law and terms of the contract between the Claimant and the Respondent. The Respondent submitted that the case cited by the Claimant **Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited [2016] eKLR** was in respect of a lengthy period of service. The Respondent submitted that if the Court found in his favour the compensation cannot be 12 months.

5. The law on dismissal is very clear. The Claimant was dismissed on the day he was sent on leave. That was unprocedural as he ought to have been given notice. He was entitled to leave, the notice and the notification under Section 41 of the Employment Act. *Section 41 of Employment Act is couched in mandatory terms and where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The Claimant was accused of misconduct for which there should have been a hearing. He will therefore be entitled to:-*

a. 28 days salary in lieu of notice – Kshs. 22,582.87

b. 3 months salary as compensation for the unlawful and unfair termination – KShs. 75,000/-

c. Costs of the suit

d. Interest on the sums in a), b) and c) above at court rates from the date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 8th day of October 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar