



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 581 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

CEVINE OTIENO OWINO.....CLAIMANT

VERSUS

COAST BUS (MSA) LIMITED.....RESPONDENT

JUDGMENT

The Claimant, Cevine Otieno, filed a Statement of Claim dated 9th April 2018 alleging unlawful or wrongful termination of his employment by the Respondent, Coast Bus (Msa) Limited. He avers that he was employed by the Respondent as a Bus Conductor/Loader in 2007 initially without a formal contract and served until 18th December 2015 when his employment was confirmed by way of a written contract. That the said contract of employment took effect on 1st January 2016. He was paid a monthly gross pay of Kshs.13,607/= consisting of Kshs.11,566/= as basic pay and Kshs.2,041/= as house allowance. The duration of the said contract was three months with the Respondent reserving the right to renew the same at the end of the period upon being satisfied that his performance of the tasks assigned to him had met its expectations.

He avers that during the entire period of employment with the Respondent, he performed his work diligently with commitment, enthusiasm and enterprise and that as a result of his loyalty, his salary was reviewed upwards to a gross pay of Kshs.18,280/= as at May 2017. That his services were however arbitrarily, unlawfully and maliciously terminated by the Respondent on or about 6th January 2018 without justifiable cause. That he was issued with a termination letter unprocedurally without being accorded an opportunity to be heard. He particularises the malice and bad faith by the Respondent to include: creating false reasons in attempts to legitimize termination of his employment; terminating his services without any formal complaint or formal record of dissatisfaction or any historical disciplinary matters; and terminating his services without convening a disciplinary committee to investigate and/or look into the allegations against him.

The Claimant prays for judgment against the Respondent for:-

- I. A declaration that the termination of the Claimant's employment by the Respondent was unlawful.
- II. An award of Kshs.219,360/= being twelve months compensation for unfair termination in light of the long period of service.
- III. Payment of Kshs.18,280/= in lieu of termination notice.
- IV. An order for payment of costs for this claim.
- V. Interest on II, III and IV at court rates from the date of filing claim until payment in full
- VI. Any other relief the Court may deem fit to grant.

The Claimant also filed his Witness Statement dated 11th April 2018 stating that after the three months lapsed, the Respondent retained him as its employee and that in the 11 years of his employment he only received one caution letter dated 21st March 2015, instructing him not to allow hawkers into the Respondent's buses. That he was shocked when he received a termination letter alleging he had been missing from work for 20 minutes and also that he had previously been rude to his superiors in the cause of his duties. That as these reasons were unfounded and unreasonable, he sought audience with the Respondent through Mr. Ijaz, Mr. Izhar and Madam Agnes but his efforts were futile and he ended up being humiliated which humiliation heightened on 11th January 2018 when Mr. Ijaz stripped him naked in public in an attempt to forcibly retrieve a uniform from him.

The Respondent having failed to enter appearance in this suit, the Court directed on 5th February 2019 that the case be certified to proceed as an undefended claim and to proceed by way of pleadings, statements and submissions.

Claimant's Submissions

The Claimant submits that under Section 43(1) of the Employment Act, it is the duty of the employer to prove that the reasons for termination are justifiable. That since the Respondent herein did not respond to the proceedings, it offered no explanation for termination and as such, did not discharge the burden placed on it. That his averments were not challenged and if it were to be argued that he went missing from work for about 20 minutes, then this would not amount to abscondment of duty to warrant a summary dismissal. That the explanation that he had taken a client to the office to be charged for extra-luggage was not so unreasonable as not to have been met with mercy and that the punishment of summary dismissal was not commensurate with the offence of "missing from work for 20 minutes". That this also amounts to unfair termination as under Section 45 of the Employment Act.

Further, that his dismissal was also procedurally unfair because the termination letter was issued to him two days after the date he is alleged to have committed the offence and that no evidence was produced to show that procedure under Section 41 of the Employment Act was followed. That in the case of **Kenya Union of Commercial Food & Allied Workers –v- Meru North Farmers Sacco Limited [2014] eKLR**, the court held that section 41 is couched in mandatory terms and where an employer fails to follow the mandatory provisions and an employee is terminated after such flawed process, such termination is ultimately unfair. That in **Kenfreight (E.A.) Limited -V- Benson K. Nguti [2016] eKLR**, the Court of Appeal held:

“Apart from issuing proper notice according to the contract (or

payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken.

Looking at the pleadings, the correspondence between the parties and the evidence on record, no reason at all was given to the respondent why his services were terminated. He was not informed of his transgressions. Neither was he given an opportunity to explain himself.”

Analysis and Determination

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

In the case of **Monica Kanini Mutua -V- Al-Arafat Shopping Centre & another [2018] eKLR**, this Court held that in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of the employment.

In **Elijah Kioko Kitavi -V- Allied Plumbers Limited [2019] eKLR**, the court found that because the respondents had not rendered any evidence in Court, the claimant's claim remained uncontroverted. The court cited the case of **CMC Aviation Limited vs. Cruisair Limited (NO1) 1978) KLR 103, (1976-80) 1 KLR 835** wherein Madan J (as he then was) rendered himself thus:-

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them, or any of them, by the parties, they are not evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, until their truth has been established or otherwise, they remain unproven...”

In the case of **Herman Ilangarwa Shidakwa -v- Armati Security Solutions Limited [2019] eKLR**, the court noted that the respondent had failed to enter appearance or file a defence despite being served with summons and held that the claimant had proved his employment relationship with the respondent through bank statements, which fact was not contested by the respondent. The Court also held that the claimant had been unfairly terminated.

In the instant case which is an undefended claim, I find that the Claimant has established existence of an employment relationship with the Respondent through copies of payslips, which evidence payment of salary periodically by the Respondent. I agree that his termination was substantively and procedurally unfair because the reason for termination does not seem valid and fair and neither did the Respondent accord the claimant an opportunity to tender his defence before terminating his services. Due procedure as under section 41 of the Employment Act was not adhered to thus rendering the termination of the Claimant's employment unfair as was similarly rendered in the **Kenfreight case** above.

The Claimant is therefore entitled to compensation as under Section 49 of the Employment Act having concluded that his employment was unfairly terminated. The termination letter which is referenced "Notice of Termination of Your Service" indicated that the Claimant's services would stop after the notice period of One month and so it is my finding that having been given notice, he is not entitled to notice pay.

The only remedy the claimant is entitled to, based on the prayers in his claim, is compensation. I have considered his long service, the fact that the respondent in spite of having been served has ignored to respond to the claim, the fact that the claimant had no other terminal benefits and the circumstance under which his employment was terminated. Having considered all these as well as the total package that the award entails, **I award the claimant maximum compensation being 12 months' salary in the sum of Kshs.192,660** (based on his monthly

gross pay of Kshs.16,055).

The respondent shall also pay claimant's costs and the decretal sum shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE