



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 819 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

VICTOR OMONDI OTIENO.....CLAIMANT

VERSUS

PRAFULCHANDRA AND BROTHERS LIMITED.....RESPONDENT

JUDGMENT

Vide his statement of claim dated and filed in Court on 15th May 2012, the claimant avers that his employment was unlawfully, illegally and unfairly terminated by the respondent, a registered limited liability company dealing in electrical goods.

His case is that he was employed by the respondent on or about 1st September 2000 as a shop assistant and that he was later promoted to the position of electrician, a position he held from the year 2002 until 21st January 2012 when his services were unlawfully, unfairly and illegally terminated by the Respondent herein. The Claimant averred that he was earning a basic salary of Kshs.15,000/- per month.

The Claimant states that the reason cited for his termination in the Respondent's Memo of 21st January 2012 was "*That the grievant opted not to agree with working terms and conditions of the Company.*"

The Claimant contended that on 17th January 2012 the Respondent did serve him with a memo dated 17th January 2012 setting out what he termed as inadequate/irregular and/or illegal new terms and conditions of employment with directions that he should sign the same in agreement and that should he fail to release the signed Memo by 20th January 2012 he should consider his employment terminated at his own will. Further, that termination without notice would be considered and all dues to the employee would be forfeited whatsoever.

The Claimant further contended that this in his view was tantamount to coercion, intimidation, victimization and discrimination in employment as majority of the other employees were not served with the said Memo nor were they terminated as indicated therein. The Claimant confirmed that the said employees are still under the Respondent's employment to date.

The Claimant averred that he was being forced to sign even without reading the contents of the Respondent's communication to understand and digest the same, which in his view amounted to unfair labour practice and was contrary to the provisions of Article 41 and 37 of the Constitution of Kenya, 2010.

The Claimant contended that his termination was therefore unfair, illegal and unlawful and contrary to the provisions of the Employment Act, 2007.

Aggrieved by the decision of the Respondent to unlawfully and unfairly terminate his services the Claimant filed the instant Claim seeking the following reliefs:

- a) The Court finds the termination of the grievant as unfair, illegal, unjustified, unlawful based on the Claimant's submissions and chronology of events.
- b) That the Court orders the grievant to be reinstated back to employment without loss of service, terms and conditions of employment from the date of unfair termination including salaries/wages, or in the ALTERNATIVE
- c) The Court orders the Respondent to pay the grievant his terminal benefits as set herein:

- i. One month pay in lieu of notice Kshs.15,000
 - ii. Days worked salary Kshs.15,000
 - iii. House allowance not paid
(11 years) at 2,250 per month Kshs.297,000
 - iv. Unpaid accrued leave (1 year) Kshs.15,000
 - v. Underpayment against the government
General wages order at 200 x 12 Kshs.24,000
 - vi. 12 months' compensation due to
Wrongful loss of employment
and earnings Kshs.180,000
 - vii. Gratuity for 11 years Kshs.82,500
 - viii. Certificate of Service
 - ix. Costs of the suit Kshs.150,000
 - x. Damages Kshs. 300,000
- TOTAL Kshs. 1,078,500**

The Respondent in its Reply to the Memorandum of Claim dated 3rd July 2012 and filed in Court on 4th July 2012 admits having engaged the Claimant in the year 2000. It however denied that it had at any time promoted him to the position of electrician. Further the Respondent contends that the Claimant's termination in 2012 was lawful as the Claimant was in breach of the terms and conditions of his employment services/employment.

The Respondent avers that the reason for the Claimant's termination was his refusal to conform to the laid down terms and conditions of the Respondent and further that the Claimant had sufficient time to read the contents of its Internal Memorandum and an opportunity of seeking clarification was also availed to him but he failed to utilize the same.

The Respondent denied that the internal Memorandum was only issued to the Claimant alone and amounted to victimization, coercion, intimidation or discrimination as alleged by the Claimant. It is averred that the said internal Memorandum was issued to all members of staff of the Respondent as a means of restoring order and discipline among its members of staff.

The Respondent further contended that the Claimant wilfully terminated his employment by refusing to work under the new working terms and Conditions of the Company. The Respondent further avers that the Claimant is indebted to it and prayed for judgment to be entered against the Claimant as follows:

1. The sum of Kshs.57,400 being the total sum owed to the Respondent.
2. Costs of the suit
3. Interest on (1) and (2) above
4. Such further and other reliefs as this Court may deem fit and just to grant.

In conclusion the Respondent urged this Court to dismiss the Claim with costs and to allow its counterclaim as prayed.

The suit proceeded for hearing on 21st January 2019 and 25th February 2019 with the Claimant testifying on his own behalf and the Respondent calling one witness.

The claimant in his evidence reiterated the averments made in his statement of Claim. The claimant testified that prior to his termination there was no case of misconduct. He testified that he was not accorded any disciplinary hearing or notice prior to termination.

The claimant further testified that he was not given any loan as alleged by the Respondent. The claimant urged the Court to allow his Claim in terms of the prayers therein.

On cross-examination, he confirmed having been served with the Respondent's Memorandum. He further confirmed that the said memo was issued to all workers of the Respondent. He stated that he did not recall having signed the acknowledgment at page 7 of the Respondent's documents.

On further cross-examination, the claimant stated that once issued with the Memo staff were given 3 days to sign the same. He confirmed that some of his colleagues signed the Memo within the said timelines. He however, failed to sign as he had issues with some provisions of the Memo but was not granted an opportunity to respond. The claimant further testified that he did not receive any payment and that he was just asked to sign without confirming what he was signing for.

The claimant further testified that the Respondent deducted NSSF but the said amount was never remitted to NSSF. He stated he did not have any evidence to support this assertion.

The claimant stated that his promotion from shop attendant to electrician was discussed and agreed verbally between the Respondent and himself. The claimant further stated that the Respondent paid his children's school fees following his good performance.

On re-examination, the claimant stated that school fees was paid for his children as recognition for his good work. He further stated that the said school fees was never granted to him as a loan.

KAPLESH DESAI, RW1, the Respondent's Chief Executive Officer, testified that he knew the claimant who was employed as a shop assistant, a position he held until his termination. RW1 testified that the Claimant was terminated for refusing to take and sign internal rules of the Respondent Company.

RW1 averred that the Claimant's services were terminated by the Respondent's letter dated 21st January 2012 and that his termination date was 31st January 2012. RW1 further testified that the reason for the Claimant's termination was clearly stated as failure and/or refusal to comply with company rules. He testified that the Claimant failed to clear his outstanding loans with the Respondent despite being required to clear the same. He urged the Court to dismiss the Claim and allow the respondent's counterclaim against the Claimant as prayed.

On cross examination, RW1 stated that the Claimant was given between 10 and 20 days to look at the changes in the Memo then sign the same. RW1 confirmed that the Claimant's termination was due to the fact that the Claimant failed to sign in agreement to the new terms of engagement. He testified that the Claimant was not issued with any show cause letter prior to his termination and that he was only informed verbally.

On further cross-examination RW1 stated that the Claimant was paid for days worked in January and leave days outstanding at the time of separation. He further stated that no evidence was before the Court as proof of the payments made to the Claimant. He stated that he was not aware that the school fees paid for the Claimant was a loan.

On re-examination RW1 stated that the effect of the Claimant not signing amounted to his refusal to obey company rules and as such the Respondent was not obliged to conduct any disciplinary hearing prior to his termination. RW1 confirmed that the Claimant was paid all his dues at the time of separation.

Submissions by the Parties.

It is submitted on behalf of the Claimant that he was a permanent employee of the Respondent as proved by the termination letter. The Claimant urged the Court to find that he was an employee of the Respondent herein.

The Claimant further submitted that the termination of his employment was unfair, unlawful and wrongful and that the same was contrary to the provisions of Section 41 and 44 of the Employment Act, 2007. The Claimant relied on the cases of *Shankar Saklani Vs DHL Forwarding (K) Limited (2012) eKLR*, *Abisalom Ajusa Magomere Vs Kenya Nut Company Limited, Cause Number 2525 of 2015* and *Joseph Kiprotich Bett Vs Kenya Commercial Bank Limited, Cause Number 243 of 2013*.

The Claimant further submitted that he is entitled to the reliefs sought in his Memorandum of Claim. On the counterclaim the Claimant submitted that the same ought to be dismissed for want of evidence. In conclusion the Claimant urged the Court to allow his Claim as drawn.

Respondent's Submissions.

For the Respondent it is submitted that the Claimant's termination was lawful and fair, that it was in compliance with the provisions of Section 45 of the Employment Act, 2007. The Respondent further submitted that the Claimant's termination was in accordance with fair procedure.

The Respondent submitted that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim specifically the Claimant is not entitled to the prayer for house allowance and that his employment contract did not provide for gratuity.

The Respondent submitted that the Claimant is equally not entitled to service pay by virtue of the provisions of Section 35(5) as read with Section 35(6)(d) of the Employment Act, 2007 having been a member of the National Social Security Fund which was duly paid by the Respondent.

The Respondent further submitted that it was entitled to the Counterclaim as prayed and urged the Court to allow the same and to dismiss the Claimant's claim with costs.

Analysis and Determination

There is no dispute that the Claimant was employed by the Respondent as a shop attendant in the year 2000 to 31st January 2012. It is further not in dispute that the Claimant's employment was terminated by the Respondent's letter dated 21st January 2012. The issues for determination are:-

1. Whether the termination was unfair
2. Whether the Claimant is entitled to the reliefs sought in his Claim
3. Whether the Respondent is entitled to the counterclaim.

Unfair Termination

Under Section 45(2) of the Employment Act, termination of an employee's contract of service is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason(s) relating to the employee's conduct, capacity or compatibility or based on the employer's operational requirements; and that a fair procedure was followed.

Reason for termination

The reason cited by the Respondent in her Memo dated 21st January, 2012 was that *"the Claimant opted not to agree with the working terms and conditions of the Company thus resulting in termination of his employment."*

Section 10(5) of the Employment Act provides that where any term of an employee's contract changes, the employer shall revise the contract to reflect the change and notify the employee of the same in writing. The Section further provides that such change shall be done in consultation with the employee. Further, Section 9(4) requires that an employer explains changes to an employee. As expressed by the claimant, the memo contained some conditions that were adverse to the claimant. The tone of the memo also signifies that the respondent was punishing the employees collectively. The opening paragraph of the memo states –

"In reference to the above, we would like to express our disappointment generally in respect to your employment with us and therefore would like to bring the following to your attention."

I agree with the claimant that the tone of the memo amounted to coercion and intimidation of the employees and that the respondent acted unilaterally and thus failed to comply with Section 10(5) of the Act, and further that this does not constitute a valid ground for instant dismissal of the claimant in the manner it was done in the case herein.

Procedure followed

Section 41 of the Employment Act, 2007 requires that before terminating the services of an employee for misconduct, poor performance or physical incapacity, the employer must explain to the employee in a language the employee understands, and in the presence of another employee or shop floor union official of the employee's choice the reason for which termination is contemplated and thereafter accord such an employee an opportunity to air his or her view or representations which the Respondent ought to consider prior to reaching the decision to terminate such an employee.

In the instant case, the Claimant was not accorded any opportunity to state his case prior to his termination. In the case of **Walter Ogal Anuro -V- Teachers Service Commission (2013) eKLR** the Court held that:

"... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination."

In Francis Mbugua Boro -Vs- **Smartchip Dynamics Ltd (2017) eKLR** it was held:

"...It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 and missing that essential ingredient and a hearing the court teaches the conclusion that the summary dismissal of the claimant was procedurally unfair."

I thus find the termination of the claimant's employment both substantively and procedurally unfair.

Whether the Claimant is entitled to the reliefs sought

Having found that the Claimant's termination was unfair, I find that the Claimant is entitled to the following reliefs:

- i. One Month pay in lieu of notice Kshs.15,000
- ii. Days worked salary Kshs.15,000

The Claimant is entitled to this since the Respondent despite their assertion that the Claimant was duly paid for days worked prior to his separation failed to avail any evidence to support the assertion yet the claimant denies having been paid. The claimant's letter of termination does not reflect any payment.

iii. House allowance not paid

The Claimant in his pleadings, evidence and submissions contended that he was not provided with housing and was not paid any house allowance by the Respondent. The Respondent averred that the Claimant was not entitled to house allowance as the terms and conditions of his employment did not provide for the same.

Section 31(1) of the Employment Act, 2007 provides as follows:

“An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”

The statutory basic minimum wage for a Shop Assistant in January 2012 was Kshs.10,239. With 15% house allowance, this would come to 11,774.85. This therefore means that the salary earned by the claimant of Kshs.15,000, in the absence of explanation to the contrary, was inclusive of house allowance. This is especially so as the claimants did not prove that he had demanded the same before the termination of his employment. The prayer therefore fails and is dismissed.

iv. Compensation for unfair termination of employment

The claimant prayed for maximum compensation. Taking into account his long service and clean record of about 12 years, the circumstances under which he was terminated and the fact that he was sent home without a hearing and without any terminal benefits and further taking into account the claimant's legitimate expectation, it is my opinion that maximum compensation is reasonable. I accordingly award the claimant the sum of Kshs.180,000

Total Award Kshs.210,000

v. The Claimant is also entitled to a certificate of service by dint of Section 51 of the Employment Act, 2007

The above amount is subject to statutory deductions.

The claimant is further awarded costs of the suit and interest at court rates from the date of judgment until payment in full.

Whether the Respondent is entitled to the counterclaim.

By way of counterclaim the Respondent claims the following from the Claimant:

1. The sum of Kshs.13,400 loaned to the Claimant by the Respondent
2. The sum of Kshs.44,000 being school fees paid on his behalf by the Respondent
3. Costs of this suit.

The Claimant denied that he was in any way indebted to the Respondent. He averred that the school fee paid for his children by the Respondent was on account of his good performance and the same was not a loan. RW1 stated in his testimony under cross-examination that the claimant did not fill any loan forms. The respondent did not produce any evidence to prove that it advanced any loan to the claimant. There was further no proof that the loan was being deducted from the claimant's salary.

In the circumstances, I find that the counterclaim has not been proved dismiss the same with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE