



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1749 OF 2013

KENYA BUILDING, CONSTRUCTION,

TIMBER & FURNITURE INDUSTRIES

EMPLOYEES UNION (KBCT & FIET).....CLAIMANT

VERSUS

NEWLINE FURNITURE LIMITED.....RESPONDENT

JUDGEMENT

The claimant herein, Kenya Building, Construction, Timber and Furniture Industries Employees Union filed the Memorandum of Claim on 29th October, 2013. The respondent was served and hearing notices issued. Appearance was entered on 3rd June, 2015 through the firm of Messrs Gerane & Associates Advocates. The response was filed on 25th May 2015. The appearance and defence as filed became subject of various applications and the court has since delivered ruling in this regard and the essence of which is the response filed before the respondent's advocates entered appearance was of no legal effect vide Ruling delivered on 9th July, 2015 and 7th November, 2017. There is therefore no valid defence/response on the record.

Claim

The claim is made for Mr Daniel Orina Nyamboga, the grievant.

The claimant being a registered trade union has members within the respondent company. The claimant and the respondent have a Recognition Agreement and a Collective Bargaining Agreement.

The grievant was employed by the respondent in November, 2000 as a Technician which position he held until he was terminated from such employment on 3rd March, 2011. At the time he was earning a wage of Kshs.13,858.00 per month.

The claim is that the grievant was dismissed from his employment by the respondent for reasons which have never been disclosed. There was no notice or hearing and the provisions of section 41(1) of the Employment Act, 2007 were not followed.

The claim is also that on 3rd March, 2011 while the grievant was on duty he received a call from the respondent's managing director who directed him to report to his office after work hours. The grievant proceed from his work station then based at United Nations Headquarters in Gigiri to the respondent's office at Chester House in the central business district. He was verbally informed that his services were not required by the respondent. efforts to get an explanation, reasons or hearing were rejected. The grievant was also directed to collect his terminal dues on 5th March, 2011 where he was handed two letters dated 3rd March, 2011 on his dues calculated at Kshs.23,072.00.

The grievant had no disciplinary record and was of good performance while serving the respondent. he reported the matter to the claimant and a dispute was lodged with the minister. A conciliator was appointed and who heard the parties and made a recommendation that the grievant be paid dues amounting to Kshs.88,279.00 but the respondent failed to pay.

The claimant is seeking judgement for;

- (i) *One month in notice Kshs.13,585.00*

- (ii) 2 days salary unpaid Kshs.1,066.00
- (iii) 21 leave days Kshs.11,193.00
- (iv) 12 months compensation Kshs.166,272.00
- (v) 10 months arrears of underpayments Kshs.6,730.00 Total Kshs.199,119.00

The claimant is also seeking for his Certificate of Service and costs of the suit.

The grievant testified in support of the claims made by the claimant.

The grievant testified that upon employment by the respondent he worked diligently for 11 years without any case of misconduct. On 3rd March, 2011 while at work at United Nations headquarters in Gigiri he was called and directed to report at the head office at Chester House. He met the manager who told him his services were not required and should report on 5th March, 2011 to collect his dues. He was issued with a cheque for Kshs.29,000.00 which was too little and he declined to collect such dues.

The grievant also testified that he was a member of the claimant and thus he made a report and the matter was escalated to the Minister. A conciliator was appointed and who heard the parties and directed the respondent to pay for unfair termination as no reason had been given, pay in lieu of notice, pay for 21 leave days and all computed at Kshs.88,279.00 but declined to pay.

The grievant also testified that he has wasted a lot of time pursuing the respondent to pay for unfair termination of employment. He was not given any reason(s) for termination of employment and there is failure to abide the recommendations of the conciliator. The claims made should thus be paid with costs.

As noted above, there is no defence by the respondent.

At the close of hearing, the claimant filed written submissions.

By a letter dated 3rd March, 2011 the respondent terminated claimant's employment with them in the following terms;

TERMINATION OF EMPLOYMENT

We at Newline Limited hereby terminate your services as a Technician effective 3rd March 2011. From this day forward you are no longer an employee in our establishment. ...

The action of termination of the claimant's employment is summary, without reason or due process. On the evidence that the claimant was called from his duty station to the head office by the respondent on 2nd March, 2011 and then advised to collect his letter on the next day, reason must be given as to why the respondent opted to effect termination in such a manner. Where the claimant was recalled from his duty station on 2nd March, 2011 there must have been good basis for the respondent to issue the notice terminating employment on the next day. There is no reason(s) given.

Section 41, 43 and 44 of the Employment Act, 2007 requires that before termination of employment, the procedural fairness test must be adhered to. An employer must issue notice and give an employee a fair chance to give a defence where there is a case of poor performance, incapacity or misconduct. There must be fair and valid reasons which are genuinely within the work place to justify such action.

Even in a case where an employee has misconducted himself, such an employee must be given notice however short before summary dismissal. In this case, there is no effort set out in the letter dated 3rd March, 2011 giving notice, reasons or the genuine work place conditions justifying the termination of employment.

In **Alex Kago versus Hebattula Brothers Ltd [2016] eKLR** the court held as follows;

An employee on full time employment is entitled to notice before termination; reasons before termination; a hearing before termination pursuant to the provisions of section 35, 43 and 41 of the Employment Act respectively. Even in cases where the misconduct complained of warrant summary dismissal, a hearing and notice and the reasons for the dismissal is required by the provisions of section 44 and 41(2) of the Employment Act. Where circumstances are of the nature that the employer is not able to hear or give the employee a notice before termination, the duty is upon the employer to demonstrate these exceptional circumstances that led to summary action.

The procedural requirements to be followed under sections 41, 43 and 45 of the Employment Act, 2007 are addressed in the case of **Kenya petroleum oil workers union versus Kenya petroleum refineries Ltd [2013] eKLR** as follows;

Section 41 of the Employment Act has outlined the essential requirements which an employer should comply with when terminating the services of an employee on the grounds of misconduct, poor performance and physical incapacity.

The essential requirements in brief are that the employer should explain to the employee in a language the employee understands the reasons for which the employer is contemplating terminating the services of the employee and hearing any representations to be made

by the employee.

The employee is also entitled to be accompanied by a fellow employee or shop floor union representative and to be heard and his explanations considered. This is what is called procedural fairness in employment law and the rule of natural justice in administrative law. The rule is captured in the Latin maxim audi alteram partem.

It is therefore imperative for an employer to ensure that before termination of employment is effected, there is substantive and procedural fairness. Justice also demands that once a claim is filed with the court, the employer to attend and justify such substantive and procedural requirements as otherwise, termination of employment is unfair in terms of section 45 of the Employment Act, 2007. In this regard, and where no defence is filed and the records submitted, I find the claimant was summarily dismissed contrary to the clear provisions of the law, the same was not justified for lack of procedural and substantive reasons. Such is unfair and the remedy is compensation in terms of section 49 of the Act.

Remedies

Upon the finding that the termination of employment failed to meet the procedures set out in law, notice pay is due. section 35 of the Employment Act, 2007 allow for one months' notice or payment in lieu thereof. The claimant is awarded Kshs.13,585.000

On the claim for 2 days not paid, where termination was effected on 3rd March, 2011 after the grievant had been at work until 2nd March, 2011 such pay is due and is hereby awarded at Kshs.1,066.00.

On the claim for leave days untaken and not paid for, the claim for 21 days earned at the time is made and assessed at Kshs.11,193.00 which is hereby confirmed as due and owing.

On the claim for underpayment for 10 months, though the grievant testified in court in support of the claim, this part of the claim was not addressed at all the nature of the underpayments for 10 months is found without basis. Such is declined.

Compensation is due in a case found to have been of unfair termination of employment. The claimant is hereby awarded compensation amounting to ten (10) months gross wage all at Kshs.135,850.00 .

Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;

- (a) Compensation at Kshs.135,850.00;**
- (b) One month in notice Kshs.13,585.00;**
- (c) 2 days salary unpaid Kshs.1,066.00;**
- (d) 21 leave days Kshs.11,193.00; and**
- (e) Costs of the suit.**

Delivered in open court at Nairobi this 18th day of May, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistant:

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