



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 31 OF 2018

(Before D. K. N. Marete)

JOHN ASERE OKUMU.....CLAIMANT

VERSUS

NATIONAL CEREALS AND PRODUCE BOARD.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of claim dated 22nd January, 2018. The issues in dispute are therein cited as;

- 1. Wrongful dismissal and unfair termination under section 49 of the Employment Act No.11 of 2007 and Article 41 of the Constitution of Kenya.*
- 2. Two months' salary in lieu of notice.*
- 3. Annual leave due for the year 2016.*
- 4. Leave travelling allowance.*
- 5. Unpaid overtime worked.*
- 6. Refund of staff savings.*
- 7. Refund of illegally deducted money (May, 2012 – May, 2014)*

The respondent in a Response to Memorandum dated 24th April, 2018 denies the claim and prays that it be dismissed with costs.

The claimant's case is that the relationship *inter partes* operated under the provisions of the Constitution of Kenya and the Employment Act, 2007, having worked with the respondent as a weigh bridge clerk since 1996.

The claimant's further case is that on 4th October, 2016 he received a letter from the respondent's Human Resource Manager terminating his employment on grounds of alleged negligence of duty. On 19th October, 2016, he raised an appeal to the management disputing the allegation for negligence of duty and this was acknowledged by a letter dated 8th October, 2016.

The claimant's other case is that vide a letter dated 16th March, 2016, his appeal was rejected and this without affording an opportunity to interrogate the alleged negligence on his part. He was therefore condemned unheard.

The claimant avers that he served the respondent with a clean employment record save for a warning letter dated 13th January, 2015 which expired on the same year.

The claimant's further case is that his termination on grounds of negligence of duty lacks basis as a court of competent jurisdiction made a finding on the fertilizer alleged to have been irregularly sold at Kitale deport. He therefore deems the termination a violation of his constitutional rights enshrined under Article 41 and unjustified.

It is his penultimate case that the termination amounted to wrongful dismissal and unfair termination per section 49 of the Employment Act,

2007. He claims as follows;

a) *The respondent's dismissal of the claimant was unfair and unlawful thus amounted to wrongful dismissal and unfair termination.*

b) *Two month's salary in lieu of notice 2 x sh.44,810/-.....Kshs.89,620.00*

c) *Annual leave due for the year 2016:*

28 days x shs.44,810/26.....Kshs.48,256.90

d) *Leave travelling allowance for the year 2016:*

1 year x shs.9,065/-.....Kshs.9,065.00

e) *Unpaid overtime hours worked from February 2007 to 31/1/2014*

Total overtime hours.....=2125.25 hours

Sh.44,810/160 x 2125.25.....=Sh.595,202.80

f) *Refund of staff savings from July 2016 to September 2016*

Period 3 months

Staff savings shs. 2,240/- p.m

3 months x @sh5, 500/- pm.....=sh.6,721.50

g) *Refund of illegally deducted money from May 2012 to May 2014*

a) From May 2012 to April 2014

Period = 24 months

Surcharged amount = sh.5,500/-pm

24 months x @sh 5,500/- pm..... = shs.132,000.00

b) May 2014:

Amount deducted..... = Shs. 3,000.00

c) Compensation for unlawful termination:

Shs. 44,810 x 12 months..... =Shs. 537,720.00

Total amount due.....Kshs.1,421,586.20

CLAIMS ARRANGEMENT

1. Two month's salary in lieu of notice.....=Kshs.89,620.00

2. Annual leave due.....=Kshs.48,256.90

3. Leave travelling allowance.....=Kshs. 9,065.00

4. Unpaid overtime hours worked.....=Kshs.595,202.80

5. Refund of staff savings.....=Kshs.6,721.50

6. Refund of illegally deducted money.....=Kshs.135,000.00

7. Compensation for unlawful termination.....=Kshs.537,720.00

Total due.....Kshs.1,421,586.20

He prays as follows;

- a) *The respondent's dismissal of the claimant was unfair and unlawful thus amounted to wrongful dismissal and unfair termination.*
- b) *Payment of the claimant's terminal benefits amounting to Kshs.1,421,586.20*
- c) *The respondent to pay costs of this suit.*
- d) *Interest (b) above.*

The respondent's case is one of denial of the claim. It is her case that the claimant worked for the respondent as a stores clerk at her Kitale depot and was pay roll number P/No.6899.

The respondent's further case is that the termination of employment of the claimant was preceded by complaints relating to irregular and illegal sale of government subsidized fertilizer to unauthorized farmers and the claimant was involved in irregular sale.

The respondent's other case is that the claimant was not dismissed on being implicated in the irregular sale of government fertilizer but was by a letter dated 8th July, 2016 notified that he had been suspended to pave way for investigations. Upon conclusion of the investigations he was issued with a show cause letter dated 25th July, 2016 requiring that he attended a hearing and show cause as why he should not be dismissed for his role in the irregular sale of government subsidized fertilizer. She therefore denies condemning the claimant unheard.

The respondent's further case is that the claimant was awarded an opportunity to explain his side of the story in writing on 21st July, 2016 and on 13th September, 2016 he appeared before the Human Resource Advisory Committee where he was awarded the opportunity to be heard on the issues raised against him.

The respondent's case on the claimant's appeal is that the appeal board considered the written appeal against the Advisory Committee decision on 21st and 22nd February, 2017 and affirmed the Advisory Committee's decision to terminate. A hearing therefore ensued.

The respondent's penultimate case is that the termination of the employment of the claimant by the respondent was procedural and lawful as in tandem with section 44 (4) (c) of the Employment Act, 2007 which permits summary dismissal of errant employees.

The matter came to court variously until the 20th of June, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant in his written submissions dated 8th June, 2018 submits a case of unlawful termination for non compliance with section 41(1) and (2) of the Employment Act, 2007 as follows;

42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

It is his case that his termination of employment was defective and amounted to a lawful termination in that he was not afforded an opportunity to be heard.

The claimant in further support of his case seeks to rely on the authority of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** where the court held;

Section 41 of Employment Act is couched in mandatory terms. 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 situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is

ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.

The respondent did not file any written submissions in support of the defence. She however lays down a concrete case of lawful termination of the employment of the claimant by the respondent in that the claimant was taken through the various artifacts of disciplinary process as enshrined under section 41 of the Employment Act, 2007. Further, the termination was also undertaken in compliance with section 43 and 45 of the Employment Act, 2007 in that the claimant was informed of the reasons for dismissal and also taken through appropriate disciplinary process before termination of employment.

The circumstances of this case frustrate the claimant's eloquent case and submissions on unlawful termination of employment. The claimant's submissions can only be construed and reversed to apply to the defence case. This is because the respondent on a preponderance of evidence and at the risk of being lavish, balance of probability establishes a solid case of lawful termination of employment in total suppression of the claimant's case. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, he is not entitled to the relief sought.

I am therefore inclined to dismiss the claim with costs to the respondent.

Delivered, dated and signed this 29th day of June 2018.

D.K. Njagi Marete

JUDGE

Appearances

1. Mr. Tombe instructed by Tombe & Company Advocates for the claimant.
2. Mr. Olao instructed by Gikera & Vadgama Advocates for the respondent.