



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1677 OF 2013

JOSEPHAT MUTHAMA MUNYWOKI.....CLAIMANT

- VERSUS -

CROWN INDUSTRIES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd June, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 18.10.2013 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the dismissal or termination of the claimant's employment was unlawful and unfair and that the claimant is entitled to payment of his terminal dues and compensatory damages.
- b) An order for the respondent to pay the claimant his due terminal benefits and compensatory damages totalling to Kshs.219, 735.00 plus interest from the date of filing the suit until full payment being:
 - i) Salary from 20.07.2013 to 05.08.2013 Kshs.5, 635.00.
 - ii) One month salary in lieu of notice Kshs.11, 270.00.
 - iii) Untaken leave for 2004 to 2008 Kshs.45, 050.00.
 - iv) Service gratuity for 2004 to 2008 when NSSF dues were not remitted Kshs.22, 540.00.
 - v) 12 months' gross pay in compensation at Kshs. 11, 270.00 per month making Kshs. 138, 240.00.
- c) Costs of the suit plus interest thereon.

The statement of response was filed on 20.01.2014 through E.O. Oyaro & Company Advocates. The respondent prayed that the claimant's claim against the respondent be dismissed with costs.

The claimant entered an oral contract of service with the respondent from November 2004 to 01.03.2008 as a machine operator.

The employment was reduced in writing on 01.03.2013.

On 27.06.2013 the claimant was served with a show-cause letter alleging that the claimant had showed no respect to the respondent's management by using insulting language to his supervisor one Kioko. The claimant replied the same date but his explanation was found insufficient and a further show-cause letter seeking clarifications was served. The issue related the alleged claimant's inappropriate complaint relating to his failure to be slotted for the night shift. The claimant's case was that he was not given a disciplinary hearing and in the intervening period he was locked out. That subsequently he received the termination letter dated 05.08.2013. The termination was on account of the claimant's refusal to acknowledge receipt of a warning letter.

The respondent's witness no. 1(RW1) was the claimant's supervisor at the material time one John Kioko. His evidence was that on 27.08.2013 the claimant checked at work without picking a check-in card as required. He demanded to be assigned duty by RW despite not having picked the relevant check-in card. In the process the claimant told RW that the job and the factory did not belong to RW. RW reported the case. The claimant was told to leave work for that day. A show-cause letter issued. The claimant's explanation was found not

satisfactory. The disciplinary committee convened on 31.07.2013 and the claimant denied the accusations and he refused to address the meeting. At the time the claimant had two previous warning letters. The management decided to dismiss him.

The respondent's witness no.2 (RW2) was the human resource manager. It was his evidence that at the disciplinary hearing the claimant was given a warning letter but he rejected the reprimand so that he refused to sign in acknowledgment. The warning had been about forceful entry into the factory to be assigned work on night shift without following the check-in procedures as testified by RW1.

The **1st issue** for determination is whether the termination was unfair. The evidence is that the show-cause letter dated 22.07.2013 referred to forceful entry into the factory on 27.07.2013. The dismissal letter is on account of refusal to receive a warning letter given to the claimant dated 04.07.2013. The Court finds that the respondent did not have a genuine reason to terminate or dismiss the claimant as at time of termination and as envisaged in section 43 of the Employment Act, 2007. First the show-cause letter is prophetic in so far as it comes prior to the date of alleged misconduct – so that it was fictitious. Second, the ground for termination is clearly different from the ground of termination in the dismissal letter so that the claimant was dismissed upon a ground for which there had been no notice and hearing as per section 41 of the Employment Act, 2007. Thus the termination was unfair for want of due process and valid reasons.

The **2nd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

- a) The claimant is entitled to a declaration as prayed for.
- b) The court has considered the long service from 2004 to July 2013. The Court has considered that the claimant desired to continue in service. The Court has considered that the claimant admits that he had previous warnings on record of the service. Balancing justice the court returns that in view of the previous warnings, the award of 6 months' salaries will meet ends of justice making **Kshs.67, 620.00** at Kshs. 11, 270.00 per month.
- c) The RW 2 confirmed that from 2004 to 2008 there was no NSSF contributed for the claimant and it would be just that the claimant is paid gratuity or service pay in that regard. The claimant is awarded **Kshs. 22, 540.00** as prayed for.
- d) The termination was without due notice under section 35 of the Act and the claimant is awarded **Kshs. 11, 270.00** as prayed for.
- e) The Court returns that pay for annual leave for 2004 to 2008 will fail because the cause of action for that continuing injury ceased in 2008 and the claim is time barred under section 90 of the Act because the action should have been filed 12 months from such cessation. The action was belated and time barred.

In conclusion judgment is entered for the claimant against the respondent for:

- a) The declaration that the termination of the claimant's employment by the respondent was unfair.
- b) The respondent to pay the claimant **Kshs.101, 430.00** by 01.08.2018 failing interest to be payable thereon at court rates from the date of the judgment till full payment.
- c) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 22nd June, 2018.

BYRAM ONGAYA

JUDGE