



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1554 OF 2015

MUTISO MULE..... CLAIMANT

- VERSUS -

PAK SPACE LIMITED.....RESPONDENT

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

JUDGMENT

The claimant filed the memorandum of claim on 03.09.2015 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- i) A declaration that the dismissal of the claimant from employment was unlawful and unfair and that the claimant is entitled to payment of his terminal dues and compensatory damages.
- ii) An order for the respondent to pay the claimant his due terminal benefits and compensatory damages in the sum of Kshs.268, 000.00 (notice pay Kshs.17, 000; untaken leave Kshs. 47, 600; 12 months' compensation Kshs. 204, 000).
- iii) Costs of the suit plus interest thereon.

The response was filed on 08.10.2015 through Mwenda Kinyua & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The respondent employed the claimant as a machine operator effective 17.06.2013.

The claimant's case is that on 26.04.2015 it was alleged that he was producing defective boxes. His work identification card was confiscated by a director known as Elias Ikunya and the security guards were instructed not to allow the claimant in the premises. He reported at work on 27.04.2015 but the director told him to leave. He returned a few other days but he was locked out. The claimant stated that the dismissal was unfair because he was not given a hearing and a notice per section 41 of the Employment Act, 2007.

The respondent's case was that on 26.04.2015 the respondent was informed about producing work of low and unacceptable standards and the claimant replied by insulting the respondent's chairman and handing over his work overall to his supervisor and walking out of the appointed place of work. The claimant was then summarily dismissed on account of absence without permission, willful neglect to perform work which was his duty to perform; performing work carelessly and improperly, using abusive language, and failing to obey lawful orders and commands. In view of the long service, the claimant was paid one month salary in lieu of notice.

First the Court finds that the respondent failed to accord the claimant a notice and a hearing as was envisaged in section 41 of the Employment Act, 2007. To that extent the Court returns that the termination was unfair. The court observes that nowhere in the statement of claim does the claimant deny that the products he made were defective. In his evidence he stated that the products were not defective. The respondent testified that the reason for termination was desertion and the termination was effective 27.04.2015. The respondent's evidence was contradictory and the letters the respondent purported to rely on either had erroneous dates or the witness RW1 denied the contents - such as the letter of 04.05.2015 which the witness stated should be disregarded. RW1 contradicted himself on the date of termination - stating it was effective 27.04.2015 or 4th or 5th May 2015. The Court returns that the claimant's account on circumstances of termination was true - that on 26.04.2015 there was an issue about alleged defective products on his part, he handed in his overall as directed, and was subsequently locked out after being told to leave on 27.04.2015.

The Court has considered the claimant's service and that the alleged reason for termination being poor performance, the same was not established. There was no due process. The termination was sudden and unfair. Considering the circumstances, and the warnings which on a balance of probabilities were issued, and that the claimant partially contributed to his predicament, but he desired to continue in employment,

he is awarded the 6 months' pay in compensation under section 49 of the Act. He is also entitled to notice pay per section 35 of the Act. He is also awarded leave pay as prayed and the court notes that the respondent did not provide any material evidence or pleading to deny the claim as the Court deems the claimant has established it on a balance of probabilities.

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

- a) The declaration that the termination of the contract of employment by the respondent was unfair.
- b) The claimant to pay the respondent **Kshs.166, 000.00** by 01.08.2018 failing interest at Court rates to be payable thereon from the date of the judgment till full payment.
- c) The respondent to pay costs of the suit.

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

BYRAM ONGAYA

JUDGE