



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 573 OF 2013

DENNIS ONGERI NYABUTO CLAIMANT

v

FAST TRACK MANAGEMENT

CONSULTANTS LTD RESPONDENT

JUDGMENT

1. In a Memorandum of Claim lodged in Court on 23 April 2013, Dennis Onger Nyabuto (Claimant) alleged that the termination of his employment by Fast Track Management Consultants Ltd (Respondent) was unfair.
2. The Claimant also alleged breach of contract in respect to leave allowance, overtime and field allowances.
3. In a Memorandum of Defence filed on 18 May 2015, the Respondent contended that the termination was on account of gross misconduct and that there was no breach of contract.
4. The Cause was heard on 19 March 2018 and 26 April 2018.
5. The Claimant filed his submissions on 15 May 2018 while the Respondent filed its submissions on 28 May 2018.
6. The Court has considered the pleadings, evidence and submissions and identified the Issues in Dispute as, *whether the termination of the Claimant's employment was unfair, whether there was breach of contract and appropriate remedies/orders.*

Unfair termination of employment

7. The Claimant was employed by the Respondent as a Storekeeper in 2007 until the separation on 18 September 2012.
8. The Claimant contended that he was not afforded an opportunity to make representations before his services were terminated. He also contended he was not afforded an opportunity to appeal in contravention of section 41 of the Employment Act, 2007.
9. While testifying, the Claimant stated that on 18 September 2012, the Respondent's Human Resources Manager found him making a call to a colleague to come and assist him in the stores and accused him of idling and making a call during working hours contrary to *Regulations* (were not produced).
10. The Manager instructed him to go to the offices after which he was directed to report the next day (19 September 2012) when he gave him the letter terminating his contract. He asserted that there was no show cause or notice of termination.
11. The Respondent called a Supervisor to testify on its behalf. The witness stated that the Claimant was found by the Human Resources Manager talking on the phone, contrary to the Respondent's *Regulations*, was asked to explain but failed to give a satisfactory explanation and was therefore requested to make a written explanation.
12. The Claimant wrote a statement in explanation and was dismissed for lying.
13. The Court has keenly gone through the statement recorded by the Claimant on 17 September 2012 and the witness statement filed in Court.
14. The Respondent's witness made much of inconsistencies in the 2 statements. However, the witness statement was not before the

Respondent at the time it took the decision to terminate the Claimant's contract and therefore any inconsistencies go only to the weight to be attached to it.

15. In the view of the Court, the statement recorded by the Claimant on 17 September 2012 was of an investigatory nature. It was to establish the facts before a formal disciplinary process could be initiated.

16. The process conducted by the Respondent between the time the Human Resources Manager found the Claimant talking on phone and recording of the statement would not satisfy the statutory requirements of section 41 of the Employment Act, 2007.

17. If the Claimant had been taken through the process contemplated by the said section, nothing would have been easier to disclose than the details of who were present, where and how the proceedings were conducted.

18. The Court finds that the termination of the Claimant's contract was not proceeded by a fair process as contemplated by the law. It was procedurally tainted and the Court so holds.

19. In light of that conclusion, it is not necessary for the Court to consider whether the Respondent has discharged the burden placed upon employers by sections 43 and 45 of the Employment Act, 2007.

Breach of contract

Overtime

20. The law allows an employer to regulate the working hours.

21. And if the employment is within any of the sectors subject to the *Regulation of Wages Order(s)*, then work beyond the prescribed working hours should be paid as overtime.

22. The Claimant did not disclose the sector/industry the Respondent operated in to enable the Court determine which Regulation of Wages Order applied.

23. Equally, the Claimant did not particularise either in the pleadings or during testimony the hours he actually worked overtime and the amount of overtime he was entitled to. He also did not disclose the formula which would have applied in computing the overtime.

Salary for September 2012

24. An employee is entitled as of right to earned wages. The Claimant served until 19 September 2012 and he would be entitled to those wages as of right.

Field allowance

25. The Claimant did not lay any evidential or contractual basis for payment of a field allowance.

Leave

26. As a minimum, an employee is entitled to at least 21 days annual leave.

27. The Claimant did not mention the issue of leave during testimony. There was no disclosure that he applied for leave and was denied.

28. This head of claim or breach was not proved.

Appropriate remedies

Reinstatement

29. This is not a suitable case to order reinstatement.

Wages for September 2012

30. The Claimant is entitled to the earned wages up to date of separation which he computed as Kshs 7,500/- a sum the Respondent did not interrogate.

31. In lieu of this relief, the Court will factor the same in assessing compensation.

Compensation

32. The Claimant served the Respondent for about 5 years and in consideration of the length of service, the Court is of the view that the equivalent of 5 months gross wages would be fair and appropriate.

33. Since the Claimant was paid using a daily rate of Kshs 456/- but accumulated fortnightly, the monthly wage was about Kshs 11,856/- (multiplied by 26).

Conclusion and Orders

34. The Court finds and holds that the termination of the Claimant's employment was procedurally unfair and awards him

(a) Compensation Kshs 59,280/-

(b) September 2012 wages Kshs 7,500/-

TOTAL Kshs 66,780/-

35. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 18th day of June 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ochako instructed by J. Okerosi Ochako & Co. Advocates

For Respondent Mr. Namasake instructed by J.N. Namasake & Co. Advocates

Court Assistant Lindsey