



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE. NO. 1541 OF 2013**

**JOHN KOMU MITAU.....CLAIMANT**

**VERSUS**

**BLOW PLAST LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant brought this suit on 25.9.2013 alleging that he was injured while on duty on 5.2.2013 and when he requested for compensation on 20.5.2013, he was dismissed from employment. It is his case that the dismissal was unlawful, inhuman and depressive and prayed for reinstatement without loss of salary. In the alternative, he prayed for three months salary in lieu of notice, service gratuity, plus General aggravated and exemplary damages.
2. The respondent filed her defence on 3.2.2014 denying the alleged unlawful termination of the claimants contract of service and averred that the claimant absconded work on 14.5.2013 and when he was served with a show cause letter he deserted employment without serving prior notice. She therefore prayed for the suit to be dismissed with costs and counterclaimed for one month salary in lieu of notice plus costs and interest.
3. The suit was heard on 9.4.2018 when the claimant testified as Cw1 and the respondent called her supervisor Mr. Daniel Barasa Sangatati as Rw1. Thereafter both parties filed written submissions.

**Claimant's Case**

4. Cw1 testified that he was employed as a Machine Operator in October 2004 earning Kshs.9,725 basic salary. He further testified that his left hand figure was copped off by the machine while on duty and he was given money to go to Hospital. Thereafter he was given light duties and the employer continued to give him money for the hospital until April 2013 when she stopped.
5. As a result of the foregoing he asked the HR Manager to fill work injury forms to enable him seek compensation but he refused. On 14.5.2013 after lunch, he was called to the office where he was kept outside until evening when he went home. On the following day he reported to work but again he was called to the office and kept there the whole day. He kept on reporting to office without being attended to until 20.5.2013 when the HR Manager Mr. Allen told him to go away.
6. He contended that the said termination was unlawful and oppressive because it was without valid reason, he was not paid his salary for the 14 days worked in May 2013, and he was not served with any termination letter. He further contended that he was not served with prior notice as required by the law. He therefore prayed for compensation, salary in lieu of notice plus service.
7. On cross examination, Cw1 admitted that NSSF was being remitted by the employer for his benefit. He contended that he started with one year contract in 2004 but thereafter he was appointed on permanent basis by the letter dated 1.7.2006. He denied that on 14.5.2013 after lunch he absconded work and maintained that he was told to stop working. He further denied being served with show cause letter on 15.5.2013 and stated that from January to May 2013 he was working for the respondent.

**Defence Case**

8. Rw1 confirmed that the claimant was employed by the respondent as a Machine Operator until 14.5.2013 when he went for lunch at 12.30 p.m. and returned the following morning and upon being served with a fault log (warning letter) he declined to sign and he was dismissed. Thereafter he was told to collect his dues after one month but he disappeared only to file this suit.

9. On cross examination, Rw1 admitted that his duties did not include HR matters. He contended that after the claimant failed to report back from lunch, he reported the matter to the office and he was served with a warning letter and thereafter he was dismissed the same day on 15.5.2013.

### **Analysis and Determination**

10. There is no dispute that the claimant was employed by the respondent as a Machine Operator until 15.5.2013 when he was terminated. The issues for determination are:

(a) Whether the termination was unfair;

(b) Whether he is entitled to any remedy.

### **Unfair termination**

11. Under section 45(2) of the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure. According to Rw1, the termination was due to the offence of absconding duty on 14.5.2013 after lunch and refusing to receive warning letter. Rw1 never produced as exhibit the alleged warning letter and the HR Manager Mr. Allen who allegedly dealt with the claimant never testified to rebut the evidence by the claimant that he never absconded work but only went to the office after being called there for requesting for forms to pursue compensation for injuries sustained while at work. The said injuries were not contested by Rw1. Consequently, I find that the claimant never absconded work on 14.5.2013 or any time thereafter as alleged by the respondent but he was dismissed from employment after requesting for forms to pursue compensation or the said occupational injury.

12. As regards the procedure followed, Rw1 admitted by his written statement and also under oath that the claimant was dismissed on 15.5.2013. The said witness never discharged the burden of proving that a fair procedure was followed before the termination. He never proved that the claimant was accorded a fair hearing before the termination as required by section 41 of the Act. The said provision requires that before terminating the contract of service the employer shall first explain to the employee in a language he understands and in the presence of a fellow employee or shop floor union official of his choice, the reason which, termination is contemplated and thereafter invite the employee and his chosen companion to air their defence for consideration before the termination is decided.

13. In this case, the respondent has not proved valid and fair reason for terminating the claimant's contract of service and that a fair procedure was followed. Consequently, I find and hold that the termination was unfair and unlawful within the meaning of section 45 of the Act and I so declare.

### **Reliefs**

14. The claimant has prayed for reinstatement with full salary from 1.5.2013. I however decline to grant such prayers because under section 12 of the Employment and Labour Relations Act, the Court cannot order reinstatement after the lapse of 3 years from the time of termination. In this case, termination occurred on 15.5.2013 and 3 years lapsed on 15.5.2016. I will therefore grant the alternative prayer for damages under section 49(1) of the Act. The claimant is awarded Kshs.11,325 being one month salary in lieu of notice plus Kshs.135,900 being 12 months gross salary compensation for the unfair termination. In awarding the said compensation, I have used basic pay plus House Allowance and excluded overtime and holidays. I have also considered the claimant's long service of over 10 years and the fact that he never contributed to any wrong doing through misconduct.

15. The claim for service gratuity is dismissed for lack of evidence. Likewise, the claim for General damages is dismissed for want of legal as well as contractual basis.

### **Conclusion and Disposition**

16. For the reasons that the claimant was unfairly and unlawfully dismissed, I enter judgment for him in the sum of Kshs.147,225 plus costs and interest. The award shall however, be subjected to statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July, 2018**

**ONESMUS N. MAKAU**

**JUDGE**