



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 936 OF 2014

(Before D. K. N. Marete)

WILLIAM WAMBUA MUNYAO.....CLAIMANT

VERSUS

THIKA COFFEE MILLS.....RESPONDENT

JUDGEMENT

This matter was originated by way of memorandum of claim dated 5th June, 2017. The issue in dispute is thereon cited as;

Unlawful termination of employment by the respondent and failure to pay terminal dues and/or benefits to the claimant.

The Respondent in a Statement of Defence dated 5th August, 2014 denies the claim and prays that it be dismissed with costs.

The claimant's case is that on 1st September, 2004 he was employed as a fitter/welder by Kenya Nut Company. This was vide a letter of appointment dated 7th September, 2004, annexed as "WWM 1"

The claimant's further case is that on 1st October, 2010 he was transferred from the Kenya Nut Company to the respondent. This was in a letter dated 25th October, 2010. His salary was later adjusted as he was appointed to the position of Team Leader in-charge of the respondent's Technical Department. He was not issued with a revised job description or a letter on transfer and reassignment as alluded by the respondent.

The claimant's other case is that he served with loyalty, dedication and diligence until 18th October, 2012 when a memorandum was prepared by the respondent scrapping the claimant's position. He was handed a letter dated 17th October, 2012 requesting him to proceed on annual leave as the respondent conducted investigations on the production. Then, he earned Kshs.53,059.00 per month.

He claims as follows;

a) The process resulting in the termination was unfair as the claimant employment was constructively terminated on the 18th October, 2012 by a memo prepared scrapping his position at the respondent. This memo was prepared in blatant contravention of the elaborate procedure set out at Section 41 (1) of the Employment Act with regard to termination on the grounds of poor job performance.

b) In the alternative, the aforesaid memo having been preceded by a letter dated the 17th of October 2012 requesting that the claimant proceed on leave to enable investigations on low production it was apparent that his termination was as a result of low factory production allegedly attributable to his job performance. It was therefore mandatory under section 41 (2) of the Employment Act that the claimant be accorded an opportunity to make his representations regarding the said allegations. The respondent was also required by the law to give consideration to representations made by the claimant prior to reaching its decision to terminate his employment. The representations sought by the respondent from the claimant vide the letters dated 28th November 2012 and 21st January 2013 were clearly only done after respondent had already made up its mind regarding terminating the claimant and had indeed proceeded to earlier scrap his position and suspend his salary.

c) The representations by the claimant in its letters to the respondent were never taken into consideration in reaching the decision to terminate the claimant's employment.

d) The respondent did not seek to obtain from the claimant his representations before writing the letter summarily dismissing him.

e) *The claimant was entitled to receive a certificate of service immediately upon termination of his contract of service which the respondent did not issued to him.*

f) *The respondent in terminating the claimant's contract of service failed to act in accordance with justice and equity.*

He claims as follows;

i) *One month salary in lieu of notice;*

ii) *12 months salary as compensation for unlawful dismissal (as per section 49 (1) (c) of the Employment Act and Section 15 of Labour Institutions Act).*

iii) *Any other relief this Honourable court may deem just.*

The respondent denies the claim and particularly that the claimant served with loyalty, dedication and diligence. Instead, he accuses the claimant of causing frequent instances of breakdowns of pulping stations by either wrong fittings or inferior spares sourced on his recommendation. This is expressed as follows;

6. *The respondent avers that contrary to paragraph 8 of the statement of claim the claimant's salary was paid including his terminal dues and he acknowledge receiving the salary and terminal dues by signing the copy of the respondent's forwarding letter dated 3rd August 2013.*

7. *The respondent denies paragraphs 9 & 10 (a) of the statement of claim that scrapping the post of leader in-charge Technical resulted in constructive dismissal as the memorandum scrapping the position was not addressed to the claimant and in any event the claimant was still a technician who continued to receive a salary without any deduction even after the position had been scrapped.*

8. *The respondent denies paragraph 10 (b) (c), (d) & (f) of the statement of claim and in reply the respondent avers the claimant was accorded a fair hearing and an opportunity to make representation on the investigations touching on technical issues affecting production in compliance with the law by being requested to respond in writing to respond to the said issues raised in the claimant's letter dated 28th November 2012, which was well before the termination letter dated 4th February 2013, which was three months later.*

9. *The respondent further avers contrary to paragraph 10 (c) the claimant took into consideration the claimant representations contained his letters dated 30th November 2012 by specifically requesting him to respond to the letter dated 21st January 2013 and requested the claimant to avail himself for a meeting for 28th January 2013, which was again well before the claimant's employment was terminated and therefore claimant's allegation lacks factual basis.*

This matter came to court variously until the 16th April, 2018 when it was set for judgement on the basis of the pleading on record. This was in the absence of the defence when he had chosen to be away from the hearing.

The issues for determination therefore are

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is 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 by the respondent was wrongful, unfair and unlawful? The claimant in his written submissions dated 12th October, 2016 submits a case of unlawful termination of employment in that the respondent violated section 45(1) and 4(b) and 45(5) of the Employment Act, 2007. Section 45(5) provides as follows;

*In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-*

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(e) the existence of any previous warning letters issued to the employee.

The claimant further submits as follows;

23. *In the present suit in determining whether the termination of the claimant's services was fair this Honourable Court should consider the following;*

a. The claimant was not warned of the impending termination; he was not given an opportunity to present his side of the case. He was called to meeting to answer to charges of tampering with machinery and his services were terminated for something completely different.

b. The conduct of the Claimant up to the date of termination was exemplary. There was no evidence of incompetence or unsatisfactory job performance of the claimant since he joined the Respondent's employment.

c. The Respondent has not complied with any of the statutory requirements of fair dismissal under Section 41 of the Employment Act. Secondly, the claimant did not issue the claimant with a certificate of service as required under section 51.

d. The claimant has never received a warning letter from the Respondent the entire period he has been in its employment.

On this the claimant sought to rely on the authority of **Mary Chepmweno Kiptui v Kenya Pipeline Kenya Limited [2014] eKLR and Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR** in which emphasis on compliance with sections 43 and 41 (1) and (2) of the Employment Act, 2007: substantive and procedural fairness was made.

The respondent does not file written submission in this cause. Inasmuch, it was always her duty to rebut the claimant's case of unlawful employment by adducing evidence of disciplinary proceedings where the claimant's case was heard in compliance with the dictate of section 41(1) and (2) of the Employment Act, 2007 as is required. In the absence of such evidence, the claimant's case remains not contradicted and takes sway. On a test of preponderance of evidence and balance of probability, the claimant's case overwhelms that of the respondent. I therefore find a case of unlawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won on a case of unlawful termination of employment, he becomes entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

i. One (1) months salary in lieu of notice.....Kshs.53,059.00

ii. Six (6) months salary as compensation for unlawful

Termination of employment Kshs.53,059.00 x 6 =.....Kshs.318,354.00

Total Claim.....Kshs.371,413.00

iii. The respondent be and is hereby ordered to issue the claimant with a certificate of service.

iv. The cost of this claim shall be borne by the respondent.

Dated and signed this day of 2018.

D.K. NJAGI MARETE

JUDGE

Delivered and signed this 31st day of July, 2018.

MAUREEN ONYANGO

PRINCIPAL JUDGE

Appearances

1. Mr. Ayako instructed by Ameli Inyangu & Partners Advocates for the claimants.

2. No appearance for the respondent.