



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2033 OF 2014

JOHN KARABA MWANGI.....CLAIMANT

v

METAL CROWNS LTD.....RESPONDENT

JUDGMENT

1. On 9 September 2014, Metal Crowns Ltd (Respondent) wrote to John Karaba Mwangi (Claimant) to inform him that his employment was being terminated because he had been found sleeping while at work and for being found twice on the phone and going outside the company premises without gate pass/permission.

2. The letter advised the Claimant that he would be paid earned wages, pending leave days, pay in lieu of notice and service pay less any owing liabilities.

3. On 13 November 2014, the Claimant moved Court alleging unfair termination of employment and breach of contract.

4. In its Response, the Respondent contended that the termination of employment was fair and that all terminal benefits dues had been paid.

5. The Cause was heard on 13 May 2018 when the Claimant and the Respondent's Human Resources Manager testified.

6. The parties did not file submissions as directed and agreed.

7. The Court has considered the material on record.

Breach of contract

8. The Claimant alleged that the Respondent failed to pay him benefits as outlined in the letter of termination.

9. According to the Respondent, and documents and records were produced, the Claimant was entitled to Kshs 204,984/- made up of earned salary up to 7 September 2014, 1 month pay in lieu of notice, 12.5 days outstanding leave and service pay for a total of 5 years.

10. In terms of the computations, the Claimant had liabilities (owing to a sacco and advance) and PAYE totalling Kshs 171,590/- and was thus paid Kshs 33,395/-.

11. Although admitting signing the certificate of payment of dues, the Claimant stated in Court that he did not take the payment because of erroneous calculations because overtime was not included.

12. The Claimant's testimony that he did not receive or accept payment is corroborated by the Respondent's witness testimony that a new cheque was issued and forwarded to the Claimant's advocate on 29 January 2015 after the commencement of these proceedings (there was no denial that the advocate received the cheque or disclosure as to whether the cheque was returned).

13. The Court therefore finds that the dues indicated in the letter of termination of employment were paid to the Claimant's advocate and nothing turns on the same.

Overtime

14. The Claimant sought Kshs 738,422/40 on account of overtime for the years 2011 to 2014.

15. The Claimant did not make any reference to the question of working hours in the filed written statement. He equally did not advert to the issue of working hours during examination-in-chief.

16. It is only in cross examination that he referred to failure to include overtime as one of the matters which made him decline payment of the dues indicated in the termination letter.

17. Considering that the Claimant did not lay any evidential basis as to the contractually agreed working hours and the actual hours he worked and/or the *Regulation of Wages Order* applicable to the sector the Respondent operated in, the Court finds no breach in respect to overtime.

Unfair termination of employment

18. The Claimant testified that the termination of his employment was unfair because there was no notice of termination. He also impugned the termination on the basis that there was no hearing prior to the dismissal.

19. In terms of section 35(1)(c) of the Employment Act, 2007, prior notice of termination was required.

20. There was no evidence from the Respondent that one was given.

21. As to the requirement by section 41 of the Employment Act, 2007 for a process of alerting an employee of contemplated termination of employment and affording him an opportunity to be heard, the Respondent's witness stated that a *show cause notice* was issued, but none was produced in Court.

22. On the actual hearing, if it was oral, the Respondent did not produce any records in the form of minutes or disclose who heard the Claimant, where he was heard, when or how.

23. In the view of the Court, the termination of the Claimant's employment was devoid of procedural fairness.

Compensation

24. The Claimant sought Kshs 716,100/- under what he termed *compensation for loss of earnings* rather than as compensation for unfair termination of employment.

25. With the conclusion that there was unfairness in the process and considering that the Claimant served the Respondent from 2009 to 2014, a period of about 5 years, the Court is of the view that the equivalent of 5 months gross wages as compensation would be appropriate.

Conclusion and Orders

26. The Court finds and holds that there was no breach of contract on payment of terminal dues and that the benefits were paid.

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

(a) Compensation **Kshs 298,375/-**

28. Each party to bear own costs, the parties having failed to file submissions.

Delivered, dated and signed in Nairobi on this 6th day of July 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Omaari instructed by Howard Nick Advocates

For Respondent Mr. Kabue instructed by Morara, Apiemi & Nyangito Advocates

Court Assistant Lindsey