



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND ABOUT RELATIONS COURT OF KENYA AT ELDORET

CAUSE NO.355 OF 2017

[Formerly Cause No.633 of 2014 (Nakuru)]

ALBERT OTSIOLA SIDAWACLAIMANT

VERSUS

LAMINATE TUBE INDUSTRIES LTD RESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent on 1st October, 2001 as a Machine Operator.
2. On 1st November, 2013 the claimant's employment was terminated.
3. The claim is that the termination of employment was unlawful for the reasons that the trade union was not informed of the respondent's intention to declare a redundancy, there was no notice of payment and severance pay was not paid.
4. The claim is also that while the claimant was in employment he was grossly underpaid which was contrary to wage orders. He worked overtime without payment, never took his rest days and continued to work during public holidays without payment.
5. The claimant is seeking the following;
 - a) *One day wage for 1st November, 2013 Kshs.406.15;*
 - b) *October 2013 salary Kshs.12, 184.25 and house allowance Kshs.1, 827.60;*
 - c) *Notice pay Kshs.14, 011.85;*
 - d) *Gratuity Kshs.73, 105.50;*
 - e) *Underpayments from May, 2008 to November, 2013;*
 - f) *Compensation Kshs.168, 142.20*
6. From the claimed dues the claimant was paid Kshs.45, 900.00
7. The claimant also testified in support of his claims. Upon employment, the claimant worked diligently and his salary was increased to Kshs.12, 000.00 which was an underpayment. The claimant would be at work from 8am to 6pm for 7 days a week. The claimant would work in two shifts each running 12 hours or vice versa. On Sunday he would be at work and all public holidays without compensation. In some months overtime work was paid.
8. The claimant also testified that in 2013 he was called by the respondent to the office and issued with a cheque and told his work had terminated and he should bank the cheque. There was no reason given to the claimant despite being at work for many years with a clean record. He tried to ask for a hearing to know the reasons leading to the termination but none was given to him. The claimant reported the matter to his trade union.

Defence

9. In reply the respondent's case is that the claimant was lawfully terminated in his employment and based on his employment contract. He was paid all his terminal dues and this was acknowledged. There is no collective agreement with any trade union which required the union to be informed. The claimant took all his annual leave. Salary in lieu of notice was paid, severance pay was paid and the respondent complied with due process and the applicable law.

10. The defence is also that the claimant did not work on 1st November, 2013 as claimed and all due October, 2013 salary was paid in full. There was no underpayment and the respondent complied with wage orders and paid the statutory dues and therefore no claims are due.

11. In evidence the respondent called Valentine Saina the Human Resource Manager as the witness and who testified that he worked with the claimant and in 2013 he was issued with a letter of termination. All terminal dues were paid to him.

The claimant was registered with NSSF and gratuity is not due. The claimant signed and discharge note and has nothing owing from the respondent.

12. At the close of the hearing, both parties agreed to file written submissions. Only the claimant filed on 5th July, 2018.

Determination

13. Before addressing the emerging issues herein, it is important to revisit the question of discharge clauses where an employee is required to sign when accepting terminal dues and discharging the employer of any liability. As held by the court in the case of **Mohamed Kafafa Abduba versus Colour Crops Ltd, Cause No.139 of 2015 (Nakuru)**, a discharge clause made outside of the law is invalid to the extent of its inconsistency with the law.

14. Under Section 35(4) of the Employment Act, 2007 provides that;

(4) Nothing in this section affects the right—

(a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or

(b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.

15. Where a legal right(s) established in law exists, such cannot be negated through any other means. The court plain reading of the provisions cited above is that a contract of employment must terminate within the law and nothing stops an employee from making claim(s) for any cause recognised by law. Where there is an employment term protected in law, this cannot be invalidated by a discharge clause.

16. in the case of **Grace Wanjiku Maina versus Board of Trustees, Nanyuki Cottage Hospital [2017] eKLR** the court held that the signing of the discharge upon payment of the terminal dues and which precluded the employee from filing the suit alleging unfair termination or by having a disclaimer discharging the employer of further liability upon receipt of some terminal dues, is not a bar to the employee from urging the case of unfair termination with the court.

17. in this case, By letter dated 1st November, 2013 the respondent notified the claimant that;

TERMINATION OF EMPLOYMENT

Reference is made to the letter of offer/appointment letter dated 17th October, 2001. Section 1.TERMIANTION OF CONTRACT: where it is clearly states that the company shall be entitled to terminate this contract by giving one calendar month notice in writing or pay you one month salary in lieu of notice without assigning reasons thereto.

We regret to inform you that Laminate Tubes Industries Ltd will no longer require your services as from 1st November 2013 ...

18. The reason for termination is given as reliance to the employment Agreement which allowed for termination of employment upon one month notice and or payment in lieu of notice thereof. However, such provisions in the agreement must be in tandem with the applicable law. Termination of employment is regulated in law.

19. Section 43 of the Employment Act, 2007 requires an employer before effecting termination of employment to prove the reason(s) for the termination and where an employer fails to do so, such termination of employment is deemed unfair within the meaning of section 45 of the Act.

20. The burden to give reasons is on the rationale that section 45(2) of the Employment Act, 2007 requires an employer to demonstrate that;

(2) A termination of employment by an employer is unfair if the employer fails to prove— (a) that the reason for the termination is valid;

(b) That the reason for the termination is a fair reason—

(i) Related to the employee's conduct, capacity or compatibility; or

(ii) Based on the operational requirements of the employer; and

(c) That the employment was terminated in accordance with fair procedure.

21. Even where the parties in employment agree to terminate employment by notice and or by payment thereof, the law under section 43 of the Employment Act, 2007 demands that the employer must give reason(s) for the same. Such reason(s) must be genuine, valid and must relate to the employee's conduct, capacity, and compatibility or due to operational requirements. Where such reason(s) are lacking, section 45 declare the termination as unfair.

22. I find no reason given by the respondent as to the reason leading to the termination of employment. As the claimant testified in court, he had a clean record in his employment. He had no notice prior to 1st November, 2013 and the respondent has not offered any operational requirement that led to the summary action terminating employment.

23. The termination of employment was without any substantive reason as require din law and was contrary to procedural fairness. The summary action taken by the respondent against the claimant by issuing him with a letter terminating employment and requiring him to leave his employment was without justification. Such cannot be permissible in the context of section 35, 41 and 43 of the Employment Act, 2007 even where the respondent offered to pay for the due notice. Such amounted to unfair termination of employment under section 45 of the act. Remedies

24. The claimant admitted receipt of a cheque for Kshs.34, 458.60 being terminal dues paid and including payments for;

a) Salary for October, 2013 Kshs.10,200.00;

b) One month notice pay Kshs.10,200.00;

c) Normal Overtime = 0

d) Double overtime = 0

e) Gratuity Kshs.255,500.00;

Total Kshs.45, 900.00 Less PAYE

NSSF NHIF Advance

Leave advance

LTI Sacco deduction

Total 11,441.40

Net pay Kshs.34, 458.60

25. These payments shall be put into account in assessing the remedies due. however, notice pay claimed is acknowledged as well as pay due for October, 2013.

26. On the finding that there was unfair termination of employment the remedy is compensations as under section 49 of the Employment Act, 2007. The claimant had worked for the respondent from 2001 to 2013, a period of 12 years. Compensation for 12 months gross salary is hereby deemed appropriate and all assessed at kshs.122, 400.00.

27. On the claim for one day pay for 1st November, 2013 where the claimant reported to work on this day and was issued with the letter terminating his employment, such day is payable. Despite the payment in lieu of notice, the fact of the summary action against the claimant cannot be gain-stated. Such pay for this day is due and awarded at Kshs.406.15.

28. Claim for underpayments is on the basis that upon employment of the claimant the respondent did not comply with the wage orders and underpaid the claimant. The claimant has set out that in the period of May, 2008 to April, 2009 he was earning a wage of Kshs.5, 985.00 and a house allowance of Kshs.898 per month. That under the Wage orders he was entitled to Kshs.6, 471.00 per month and the underpayment was Kshs.486 and for the 12 months due all total to Kshs.5, 832.0.

29. The computations for underpayments are made from 2008 to November, 2013. I have gone through the calculations taken by the claimant and made reference to the wage orders applicable for the periods 2008, 2010 to 2011, 2012 to 2013 and the schedules upon which the claimant has pegged his wage upon and thus the outcome difference in alleged wage underpayment is by error. The correct wage and house allowance was dully paid to him. the schedules allocated to each part/region/council should be correctly applied.

30. On the claim for gratuity, as held in the case of **Mary Mutanu Mwendwa versus Ayuda Ninos De Africa-Kenya (Anidan K) [2013]**

eKLR service/gratuity pay where the employer has remitted all statutory dues is not payable unless there is a collective agreement, agreement in the terms and conditions of service or by a private treaty. The claimant testified that he was unionised but such details are not set out save for the letter of demand and computation of dues made by *Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers*. Such union was not recognised by the respondent and without recognition; a collective agreement does not exist.

31. I take it the gratuity paid by the respondent to the claimant as part of his terminal dues was by private agreement. Such is in addition to the statutory payments confirmed in the payment statements submitted by the claimant.

32. On the claim for severance pay, such only arise in a case of redundancy and the facts set out herein do not speak to such a scenario. The unfair termination of employment is addressed as above.

33. Though the claimant testified to having been made to work overtime, this is not set out in his prayers. In the terminal dues schedule, there is nothing arising for overtime.

Accordingly, judgement is hereby entered for the claimant with a declaration that termination of employment was unfair and compensation is awarded at kshs.122,400.00; one (1) day pay for 1st November, 2013 Kshs.406.00; and costs of the suit.

Delivered in open court at Eldoret this 24th day of September, 2018.

M. MBARU

JUDGE

In the presence of:

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