



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 269 OF 2017

CHARLES KAMUNYA NDERITU.....CLAIMANT

VERSUS

NAIROBI PLASTICS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued his erstwhile employer asserting that his dismissal from employment was unlawful. He was employed in 2008 and worked as a machine operator. He would work on either day shift or night shift and the rota was that one worked for a week during the day shift and the following week on night shift. The Claimant was paid Kshs. 630/- for day shift and Kshs. 1,200/- for night shift. He was dismissed on 25th April 2017 without any warning and this came as a shock to him. He thus sought a declaration that his dismissal was unfair, unlawful and wrongful; a month's salary in lieu of notice – Kshs. 21,960/-; payment in lieu of leave not taken for 8 years – Kshs. 141,895.40; severance pay – Kshs. 101,353.90; compensation for unfair termination for 12 months; general damages for breach of employment; interest on the sums; certificate of service costs of the suit and any other relief the honourable court may deem fit to grant.

2. The Respondent was opposed and in the defence filed denied that the Claimant was its employee and put him to strict proof thereof. In the alternative and without prejudice to the foregoing, it averred that if the Claimant was its employee he was dismissed in accordance with the law as the Claimant was a daily employee whose contractual period had expired and was not renewed due to his unsatisfactory performance. The Respondent averred that the Claimant's services were terminated on account of the lapse of the contract and in accordance with the letter of employment together with the general terms and conditions of employment and if there is any amount of money compensable to the Claimant then the same was fully compensated to the Claimant therefore not payable. The Respondent asserted that the Claimant was given a certificate of service dated 4th April 2017 and that the claim was incurably defective as the Claimant had concealed material facts. The Respondent sought the dismissal of the suit with costs.

3. The Claimant replied to the reply and averred that he was not paid any terminal dues and that the Respondent did not support its averments with any documents. He averred that he was never given a contract of service and that he was never told that his performance was unsatisfactory and that the allegations by the Respondent are incorrect. He denied that he was employed on contractual basis and that the Respondent's averments were mere blanket denials.

4. The Claimant testified in the same vein as the averments above as did the Respondent. The Respondent's witness Mary Wangu Kahuthu stated that she was the HR manager of the Respondent and that she knew the Claimant who was a former employee of the Respondent. She stated that the Claimant was a machine operator paid a daily wage every two weeks for convenience – on the 15th and end month. She said that the Claimant was on 3 months contract at any given time. She stated that the Claimant signed a clearance form and in the form was 3 months accrued leave, notice and service pay, off days for 3 months. She said that renewal of the contract depended on the availability of work and conduct of employees. She stated his contract had ended and his conduct was wanting as there was repeated absence.

5. In cross-examination she stated that contracts before the court were genuine and that payment per day was 615/- and Kshs. 1,200/- for the night. The Claimant was paid through Mpesa. She said that the Claimant's contract was terminated for misconduct and absenteeism without permission. She stated that the Claimant had been given several verbal and written warnings and she confirmed that there were no written warnings presented to court as evidence of warnings issued by the Respondent. He was not given a hearing on the misconduct and no certificate of service was issued.

6. In re-examination she stated that the contract exhibited was signed in her presence and that she had custody of the document. She said that the Claimant cleared his contract and he did not come back or seek renewal. She stated that the certificate of service was issued upon request.

7. The Claimant submitted that the issues for determination were whether the Claimant's termination was unfair and unlawful, whether he was entitled to the reliefs sought and who was to bear the costs of the suit. The Claimant relied on the case of **David Kipkosgei Muttai v Green Palms Academy [2014] eKLR** where the court held that unfair termination occurs where the employment is terminated without a

valid and fair reason and without following a fair procedure. Section 43 and 45 of the Employment Act were cited and it was stated that the Claimant was not given a hearing or notice prior to the termination. The Claimant submitted that by dint of Section 15(c) of the Labour Institutions Act and Section 49(1)(c) of the Employment Act he was entitled to compensation for unfair termination. The Claimant thus submitted he was entitled to the reliefs sought.

8. The Respondent submitted that the issues for determination were the nature of engagement of the Claimant at the time of termination of the employment, whether the termination was unfair, unlawful and wrongful and whether the Claimant is entitled to the reliefs sought. It was submitted that the Claimant was on contract basis at the time of dismissal and that he was engaged on a three months contract. It was submitted that under Section 2 of the Employment Act which replicated Section 2 of the Labour Relations Act on fixed term contract such as the one the Claimant had been engaged on a 3 month contract when his services were terminated. The Respondent submitted that under Section 47 of the Employment Act, the Claimant had a burden of proving the unfair termination or wrongful dismissal and upon doing so the Respondent was required to justify the grounds for the termination. The Respondent submitted that the contract of employment came to an end as it was for a definite period. The case of **Samuel Charles Mwits v Kenya Medical Research Institute [2014] eKLR** where the court stated that a fixed term contract will naturally terminate on the expiry date and the termination thereof will not constitute a dismissal as the termination thereof was not occasioned by an act of the employer and the proximate cause of the termination of employment was not an act of the employer. The Respondent submitted that the giving of notice was not necessary as the contract had a built in termination notice and the Claimant duly cleared and confirmed he had no claim against the Respondent and therefore not entitled to any of the reliefs sought.

9. The Claimant was no doubt an employee of the Respondent and the defence by the Respondent therefore a sham. The Claimant was alleged to have been repeatedly absent and a poor performer. The Respondent asserted that the Claimant was dismissed for misconduct and chronic absenteeism. To bolster their position the Respondent filed a schedule which showed ticks and crosses. A close scrutiny of the document indicates that many ticks were converted into crosses ostensibly to show the frequent absenteeism. This demonstrates the bona fides of the Respondent are doubtful. The record of his attendance was altered. Either the Claimant was dismissed for the poor performance or was absent. He cannot both be absent and perform poorly, he cannot also be said to have had his contract come to an end at the same time. In the defence filed the Respondent is equivocating waxing both hot and cold. The Claimant was employed for a period of time that placed his contract under the provisions of Section 35 of the Employment Act. The contract exhibited was blank in the material parts and seemed to be altered as well to show that there was a contract in place at the time the Claimant alleges his summary and unlawful dismissal. In the finding of the Court, the dismissal was unfair and unlawful and the Claimant was entitled to a notice as well as a hearing before dismissal. He did not prove the claims on leave dues and the end result is that he will be entitled to a judgment as against the Respondent for:-

- i. One month's salary in lieu of notice Kshs. 21,960/-
- ii. 3 month's salary compensation Kshs. 65,880/-
- iii. Costs of the suit
- iv. A certificate of service
- v. Interest on the sums in i), ii) and iii) above at court rates from the date of judgment until payment in full.

It is so ordered.

Dated and delivered at Nyeri this 31st day of October 2018

Nzioki wa Makau

JUDGE