



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 595 OF 2016

ERIC MUTUMA KAUMBUTHI.....CLAIMANT

VS

KENSALT LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Eric Mutuma Kaumbuthi against his former employer, Kensalt Limited. The claim is documented by a Memorandum of Claim dated 8th August 2016 and filed in court on 9th August 2016. The Respondent filed a Defence on 9th September 2016.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Caleb Kamote.

The Claimant's Case

3. The Claimant was employed by the Respondent on 2nd January 2013 in the position of Production Assistant. Prior to his employment, the Claimant was on attachment at the Respondent's Mombasa factory.

4. The Claimant earned a monthly salary of Kshs. 30,000 which was later increased to Kshs. 46,000. He was confirmed in his appointment by letter dated 1st July 2013.

5. On 22nd March 2016, the Claimant was summarily dismissed. He states that the dismissal was devoid of justifiable cause and in violation of due procedure. The Claimant adds that during his employment with the Respondent, he had no disciplinary issues. He goes on to state that in spite of his excellent performance, he was victimized by his supervisors.

6. The Claimant accuses the Respondent of the following instances of unfair labour practices:

- a) Using abusive language against the Claimant;
- b) Denying the Claimant his annual leave for the 4 years worked;
- c) Subjecting the Claimant to long working hours beyond 5.00 pm without overtime compensation;
- d) Denying the Claimant the right to join a Labour Union of his choice;
- e) Dismissing the Claimant arbitrarily without notice contrary to the Employment Act.

7. The Claimant seeks the following reliefs:

- a) Reinstatement with attendant benefits
- b) One month's salary in lieu of notice.....Kshs. 46,000
- c) Termination benefits for 4 years worked.....92,000

- d) 12 months' salary in compensation.....552,000
- e) Unpaid overtime for Saturdays worked over 4 years.....210,000
- f) General and aggravated damages
- g) Costs plus interest

The Respondent's Case

- 8. In its Defence dated 9th September 2016 and filed in court on even date, the Respondent denies the Claimant's claim for unlawful and unfair termination.
- 9. The Respondent states that the Claimant was duly notified vide letters dated 5th November 2014 and 17th December 2015 of his unsatisfactory work performance as a result of which his services had to be terminated. The Respondent further states that due process of the law was followed prior to the dismissal.
- 10. The Respondent maintains that the termination of the Claimant's employment was lawful and procedural. The Claimant is therefore not entitled to any of the reliefs sought.

Findings and Determination

- 11. There are two (2) issues for determination in this case:
 - a) Whether the termination of the Claimant's employment was lawful and fair;
 - b) Whether the Claimant is entitled to the remedies sought.

The Termination

- 12. The Claimant's employment was terminated by letter dated 22nd March 2016 stating as follows:

"Dear Sir

RE: TERMINATION OF SERVICES

Please refer to two Management's letters to you the latest dated 17/12/2015 and your response on the same dated 19/12/2015.

Please note that complaints related to your poor work performance have persisted and at this juncture the Management has been left with no alternative but to terminate your services with effect from 31/03/2016.

Accordingly you will be paid your final dues as follows:

- 1. Salary for the days worked upto and including 31/03/2016 (paid through March 2016 payroll)*
- 2. One (1) Month's salary being your notice in lieu.*
- 3. Cash in lieu of 3 months leave at 2.5=7.5 days being your leave entitlement as at 31/03/2016.*

You will be advised of your entitlement under the Staff Retirement Benefits Scheme under separate cover once the same has been received from ICEA Lion Assurance Co.

Please note that the above dues will be released to you less any loans/advances which might have been granted to you by the Company and after satisfactory/acceptance return/refund of any Company property in your possession including Jubilee Insurance Medical Cards and the Staff ID.

I now take this opportunity on behalf of the Management to thank you for the services you have rendered to this Company and wish you all the best of luck in your future endeavors.

Yours faithfully

KENSALT LIMITED

(Signed)

C.M. KAMOTE

Human Resource Development Manager”

13. According to this letter, the Claimant’s employment was terminated on account of poor performance. While this is a legitimate ground for termination, it must be proved. The proper handling procedure of cases of poor performance is as stated by my brother **Rika J in Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Limited (Cause No 273 of 2010)** as follows:

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”

14. In **Lillian O. Ochang v Kenol Kobil Limited [2015] eKLR** this Court held that disciplinary action based on poor performance must be preceded by a capability hearing within the parameters set out in Section 41 of the Employment Act, 2007. In other words an employee facing accusations of poor performance is entitled to an opportunity to defend their performance, before any adverse action is taken.

15. On 5th November 2014, the Claimant was issued with a show cause letter in the following terms:

“RE: UNSATISFACTORY PERFORMANCE OF DUTY

It has been reported by your Managers that on 3/12/2014 you left your place of work before completing the assignment which had been assigned to you.

This was inspite of the fact that you had been informed by your General Manager that you need to remain behind and ensure that you complete the monthly stock taking.

This is not acceptable considering that you are a Senior Management staff.

Please explain in writing why this happened and show cause why disciplinary action should not be taken against you for this offence.

Yours faithfully

KENSALT LIMITED

(Signed)

C.KAMOTE

Human Resource Development Manager”

16. A similar letter was issued on 17th December 2015. It reads as follows:

“RE: UNSATISFACTORY WORK PERFORMANCE

It has come to the notice of management that your work performance has not been upto its expectations.

Your managers have indicated that they have been discussing this issue with you verbally on several occasions but there seems to be no remarkable improvement and this is not acceptable.

Please show cause why disciplinary action should not be taken against you for poor work performance. Your explanations should reach the undersigned by 21st December 2015.

Yours faithfully

Kensalt Limited

(Signed)

C.M. KAMOTE

Human Resource & Development Manager”

17. The Claimant admitted receiving both letters to which he responded on 8th December 2014 and 19th December 2015 respectively. He told

the Court that he asked for a detailed job description and a hearing but his request was not granted. He stated that in 2014, he was assigned additional duties relating to dispatch of goods to third party companies. He claimed that there was a gap between the duties he was performing and what was reported to his seniors.

18. The Respondent's Human Resource and Development Manager, Caleb Kamote testified that the Claimant had informed him that he was having a problem with his line managers. Kamote therefore decided to convene a meeting on 18th December 2015 which the Claimant failed to attend. On his part, the Claimant denied having notice of any meeting on 18th December 2015.

19. Kamote told the Court that the meeting of 18th December 2015 was a capability hearing. There was however no evidence of any prior notice to the Claimant of the said meeting. Even if the Court were to believe Kamote's testimony that the Claimant had received oral communication on 17th December 2015 that a meeting would be held the following day on 18th December 2015, such communication would fall far short of the procedural fairness requirements set out under Section 41 of the Employment Act. First, there were no written administrative charges put to the Claimant and second, the notice was way far too short for any meaningful preparation by the Claimant.

20. Overall, the Court finds and holds that the termination of the Claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

Remedies

21. Flowing from the foregoing, I award the Claimant eight (8) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service coupled with the Respondent's conduct in effecting the termination. I further award the Claimant one (1) month's salary in lieu of notice.

22. The claim for overtime compensation was no proved and no basis was laid for the claims for general and aggravated damages. These claims therefore fail and are dismissed. The claim for termination benefits was abandoned at the trial.

23. Finally, I enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation.....Kshs. 368,000

b) 1 month's salary in lieu of notice.....46,000

Total.....414,000

24. This amount will attract interest at court rates from the date of judgment until payment in full.

25. The Claimant will have the costs of the case.

26. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF OCTOBER 2018

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JUDGE

Appearance:

Mr. Ngaira for the Claimant

Mr. Nyambicha for the Respondent