



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1486 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 24th October, 2018)

ALEX MUTUA MUENDO MUEMA.....1ST CLAIMANT

JOHNSON NJIRU NJAGI.....2ND CLAIMANT

BENJAMIN KYALO NTHUKA.....3RD CLAIMANT

CHRISANTUS ONDASO KADIMA.....4TH CLAIMANT

VS

MALPLAST INDUSTRIES LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimants herein filed their Memorandum of Claim on 13/9/2013 through the firm of Arati & Company Advocates claiming wrongful and unlawful termination of their services and failure by the Respondent to pay them their terminal dues.
2. The Claimants' case is that they were employed by the Respondents at different times on 6.1.2010, 4.2.2011, 3.7.2012 and February, 2009 respectively in different capacities; Machine Operator, Machine Attendant, Machine Operator and Welder respectively. Their salaries were 20,500/=, 12,564, 22,032 and 17,480/= respectively.
3. The Claimants aver that they worked for the Respondents diligently until the 21st June 2013, 16th July 2013, 15th July 2013 and 15th July 2013 respectively when the Respondents unlawfully terminated their services without according them a hearing. The Claimants gave their oral evidence in Court and stated that they were informed the work they were doing had reduced and so they should go away. The Respondents never gave them any notice and also never paid them their terminal dues.
4. They contend that they were never paid their lawful dues for which they now demand. The Claimants claim payment of holiday allowance, traveling allowance, leave allowance, compensatory damages for the unlawful termination as enumerated in the Memorandum of Claim. They also attached the evidence of the employment letters, payslips and termination letters as evidence.
5. The Respondents filed the Memorandum of Reply to the Claim on 11/10/2013 through the firm of Messrs Mohamed Madhani and Company Advocates. They admitted the employment relationship with the Claimants. They however aver that the Claimants were employed on different fixed term contracts, which they served.
6. They also state that the Claimants were all dismissed on 21.6.2013, 16.7.2013, 15.7.2013 and 15.7.2013 respectively on the grounds that their behavior and conduct severally amounted to irresponsibility, negligence, insubordination and absenteeism.
7. They aver that the Claimants were served with several warning letters but they ignored them leading to the termination. They also aver that due to their behavior, they were not entitled to any terminal dues and that they were members of NSSF. They aver that they nonetheless paid their dues of Kshs.46,343, 27,171, 38661 and 26,104 respectively. They were also given good recommendation letters to enable them find alternative employment.
8. They also aver that the claim by the Claimants is not justifiable. They aver that they paid each Claimant all their terminal benefits. They also aver that the Claimants took up all their leave and were duly paid for any leave not taken.
9. They contend that there was no provision in the employment contract for payment of travelling allowance and so the claim is not justified and should therefore not be allowed.

10. The Respondents annexed the Claimants' leave application forms, employment contracts, payslips and payroll records as proof of their case.
11. The Respondents also called 1 witness, the Respondent's Human Resource Manager who stated in cross-examination that the Claimants were not issued with any notices before termination nor were they given any reasons for the termination.
12. The Respondents failed to show the warning previously given to Claimants as pleaded in the Memorandum of Response.
13. The Parties herein filed their respective submissions but reiterated the averments made in their evidence in Court.
14. I have considered all the evidence and submissions from the Parties herein. The issues for determination by this Court are as follows:-

1. Whether the termination of the Claimants was lawful and fair.

2. Whether the Claimants are entitled to the remedies sought.

15. On the 1st issue, the reason for termination of the Claimants has not been stated. Section 43 of Employment Act provides as follows:-

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

16. It is imperative that valid reasons be given. The RW1 indicated that no reasons were given for the termination. The Respondents had indicated in the Response that the Claimants were terminated for unbecoming behaviour. The Respondents shifted gear however and in the oral evidence given in Court no reasons were given for the dismissal.

17. Other than this, the Respondents also admitted in their evidence in Court that the Claimants were not accorded any hearing before their dismissal. This is in breach of the provision of Section 41 of Employment Act 2007 which states as follows:-

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

18. In view of the above findings, I do find the dismissal of the Claimants unfair and unjustified as provided for under Section 45(2) of Employment Act 2007 which states as follows:-

(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.

19. In terms of remedies sought, I do find for the Claimants and award them as follows:-

1. 12 months' salary as compensation for unlawful termination computed as follows:-

1st Claimant

12 x 17,480 = 209,760/=

2nd Claimant

6 x 12,564 = 75,384/= as prayed

3rd Claimant

12 x 22,032 = 264,384/=

4th Claimant

12 x 17,480 = 209,760/=

2. 1 month salary in lieu of notice=

1st Claimant = 17,480/=

2nd Claimant = 12,564/=

3rd Claimant = 22,032/=

4th Claimant = 17,480/=

Totals

1st Claimant = 227,240/=

2nd Claimant = 87,948/=

3rd Claimant = 286,416/=

4th Claimant = 227,240/=

4. The claim for leave and traveling allowance is found not justified as per the employment contract and on account of having been utilized by Claimants.

5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 24th day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties