



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

SUIT NO. 834 OF 2014

ARCHYBALD MUNIALO MUNIALO.....CLAIMANT

VERSUS

METAL CROWNS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed this suit seeking to recover for his alleged wrongful dismissal from employment by the Respondent, failure to pay notice, gratuity and follow the due process of law, the principles of natural justice and equity. The Claimant averred that the Respondent employed him and confirmed him as well as gave certain salary increments as the Claimant dutifully performed his duties as an employee. The Claimant stated that the Respondent even gave assurance to the Claimant's bank for a loan the Claimant obtained and the repayment was to be through the salary he earned. The Claimant said that the director one Gurdip driven by racism, disrespect for Kenyan employees and malice made efforts to frustrate the Claimant in his work and force him out of the company. He averred that the director had his way through the human resource manager who failed to investigate the claims and institute a legal or lawful process of investigating the claim made. He averred that he was pressurized to sign a discharge certificate to effect illegally tabulated terminal benefits figures which the Claimant received in order to pursue the correct course. The Claimant averred that he had never been warned of any underperformance or advised to improve and that he had been doing his best in the prevailing circumstances. He averred that he was dismissed contrary to the provisions of the Employment Act and that he was therefore entitled to remedies sought in the claim. He urged the court to find that the director was working under a work permit that was irregularly and illegally renewed yet there were Kenyans capable of working in that field. He sought 12 month's salary as payment in lieu of notice Kshs. 735,600/-, compensation for the termination of the Claimant's services Kshs. 735,600/-, compensation for the period the Claimant was out of work to the time of filing the claim Kshs. 551,700/-, full settlement of the loan guaranteed by the Respondent Kshs. 649,194/-, full settlement of the interest accumulated on the loan at Barclays bank, costs of the suit plus interest and any other monies legally due to him and the revocation of the director's work permit and imposition of suitable penalties for racial abuse and offences committed therein. His testimony followed similar lines as the averments.

2. The Respondent's response was filed on 14<sup>th</sup> July 2014 and in it, the Respondent averred that at no time did the Respondent guarantee the loan nor did it guarantee that the Claimant would remain in its employ for the duration of the loan repayment. The Respondent denied the allegations of racism levelled against it and that the same were driven by vendetta and malice. It was averred that the Claimant was paid all his terminal dues and the termination was lawful. The Respondent averred that he signed a discharge voluntarily. The witness for the Respondent Caroline Moraa Asuma the HR and Administration Officer rehashed the Respondent's testimony.

3. In the written submissions filed, the Claimant submitted that the Respondent promoted him due to the good performance he had in his discharge of duties assigned to him. He therefore had no performance issues and as at the time of dismissal was earning Kshs. 61,300/- a month. He submitted that he was not given an opportunity to respond to allegations that he requisitioned for more than the required parts and that the outcome of the investigation was not revealed to him nor was he called to give his side of the story. He submitted that there was not accorded the substantive fairness and procedural fairness required under the law. He submitted that in **Transport & Allied Workers Union v Societe International de Telecommunications Aerotechniques [2011] eKLR** the court had held that in respect of persons outside the coverage of the CBA, the employer could borrow the terms and conditions contained in a CBA and incorporate them in the industrial contract of the person who is not eligible to benefit from the CBA. The Claimant submitted that the provisions of Section 43 applied as the Respondent had not made any effort to subject him to internal disciplinary process. He cited ILO Convention 158 of 1998 and submitted that in line with Article 7 of the Convention, he was not supposed to receive a termination of employment without being given an opportunity to defend himself against the allegations made, there should have been consultation of the workers representative and so on. The Claimant submitted that once poor performance of the employee is noted the proper procedure is to point out the shortcomings to the employee and to give them an opportunity to improve over a reasonable length of time. It was submitted that the denials by the Respondent in the pleadings was improper and reliance placed on the cases of **Simon Muguku Gichigi v Taifa SACO Society Limited [2012] eKLR**, **Meshack Kio Ikulume v Prime Fuels Kenya Limited [2013] eKLR** and **Reuben Mwambogo v Bahnhof Bar & Restaurant [2013] eKLR**. The Claimant submitted that the Employment Act 2007 had altered the course of dismissal at will as the employer was under an obligation to prove the existence of good and valid reasons for dismissal even if he gives notice. The case of **Alphonse Sulpice Mzege v Mombasa Air Safari Ltd [2013] eKLR** was cited for this proposition. The Claimant argued that a credible performance appraisal process must be evidently participatory and cited the case of **Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR**. The cases of **Alphonse Machanga Mwachanya v Operation 680 Limited [2013] eKLR** and that of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Limited [2013] eKLR** were cited for the procedural safeguards and substantive fairness expected of an employer in situations leading to dismissal of account of poor performance. In **Moses Kaunda Moro v CMC Motors Group Ltd [2013] eKLR** the court held that there was no evidence that the Claimant had been subjected to the Respondent's internal disciplinary process or afforded the protection under Section 41 of the Employment Act. The Claimant thus submitted that he was entitled to the prayers sought in his memorandum of claim.

4. The Respondent submitted that the Claimant's services were procedurally terminated and the Claimant paid his terminal dues. The Respondent submitted that salary for days worked, one month in lieu of notice, gratuity and service pay were made to the Claimant at the time of dismissal. The Respondent submitted that the Claimant gave an absolute discharge upon payment of the sums.

5. The Claimant's suit is on his alleged unlawful dismissal. It seems that the Respondent did not accord the Claimant the safeguards under Section 41 of the Employment Act thus bringing it under the purview of the substantive and procedural fairness test. The Claimant asserts that the Respondent did not abide by the provisions of the ILO Convention 158 in particular Article 7 thereof. The Respondent asserts that the Claimant received all his terminal dues upon dismissal and signed a discharge. The material parts of the discharge the Claimant signed reads thus:

*This is to confirm that I, Archybal M. Munialo of Identity Card No. has received my final terminal dues from Metal Crowns Ltd totalling Kshs. 163,957/- and that I have no further claims against Metal Crowns today or in future.*

The discharge certificate was however not signed by the Claimant and though it was signed by the witness, it cannot be stated to have been executed by the Claimant. Its probative value is therefore doubtful. It only proves there was an effort to tie the Claimant down to discharge the Respondent but that was not executed.

6. The Claimant made out a case that he was dismissed without adherence to the dictates of the law and his termination was therefore unlawful. He was entitled to be heard and given an opportunity to defend himself. He was paid all his terminal dues and save for the failure to adhere to the dictates of Section 41, the Claimant was dismissed for good cause.

7. In the final analysis I will enter judgment for the Claimant against the Respondent for compensation which I peg at 3 month's salary for the unlawful dismissal. The sum will be subject to statutory deduction as per Section 49 of the Employment Act.

i. 3 months compensation Kshs. 201,900/-;

ii. Each party to bear their own costs for the suit.

It is so ordered.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of October 2018**

**Nzioki wa Makau**

**JUDGE**