



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 730 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

MICHAEL IRUNGU GATHOGO.....CLAIMANT

VERSUS

METAL CROWNS LIMITED.....RESPONDENT

JUDGMENT

The claimant filed this suit alleging unlawful and wrongful termination of his employment by the respondent, a company manufacturing metal crowns and plastic closure whose offices are located at Runyenjes Road off Nanyuki Road, Industrial Area, Nairobi. He prays for the following remedies –

- a) That the court does find that the respondent is guilty of constructive termination of the claimant and an order compelling the respondent to settle the aforesaid claims.
- b) That the court compels the respondent to pay for the damages for wrongful and unlawful termination from employment without observing the due procedures as stipulated clearly in Employment Act of 2007.
- c) That the respondent director’s work permit be revoked, level lawful penalties for racial and abuse offences committed herein.
- d) Such further or other reliefs as may be appropriate in the circumstances.

The respondent filed a response to the statement of claim admitting that it employed the claimant but denying all other averment of the claimant.

At the hearing of the case the claimant testified on his behalf while the respondent called Carolyn Moraa, its Human Resource Manager who testified on its behalf. The parties thereafter filed and exchanged written submissions.

Claimant’s Case

The claimant testified that he was employed by the respondent on 15th August 1995 as an electrician at a salary of Kshs.3,000. He was a member of the union and benefited from union negotiated salary adjustments until September 2011 when he was promoted to electrical supervisor, which was a management position. His salary at the time of promotion was Kshs.55,000. The salary was adjusted further to Kshs.70,000. The claimant’s employment was terminated by letter dated 24th August 2013. It is the claimant’s allegation that the termination of his employment was unfair, unlawful and unprocedural.

In the statement of claim dated 2nd May and filed on 6th May 2014, he seeks the following remedies –

- a) Twelve months’ salary in lieu of notice on gross income

Kshs.70,000/= x 12 months Kshs.840,000/=

- b) Compensation for disturbance by terminating the services of the

claimant unlawfully months..... Kshs.840,000/=

c) Severance pay of 15 days for 18 completed year

Kshs.70,000/ 2 x 18 years..... Kshs.630,000/=

d) Compensation for the months the claimant has been out of work to the time of filing this case

Kshs.70,000/= x 5 months..... Kshs.350,000/=

e) Cost of this suit plus interest.

f) Any other monies that is legally due to my favour.

The respondent filed a response to statement of claim in which it denies the allegations in the statement of claim and avers that claimant's termination was done lawfully and fairly in accordance with the relevant laws.

The respondent further avers that the claimant was paid all his dues and has no claim against the respondent. The respondent prays that the claim be dismissed with costs.

Evidence

The claimant testified that he was employed on 15th August 1995 and was a member of the union until 2011 when he was promoted to electrical supervisor at a starting salary of Kshs.55,000. That the salary was adjusted to Kshs.70,000 because of his good performance. That his employment was terminated instantly without notice on grounds that he did not have maintenance schedule for one machine. He testified that he used to maintain the machine together with all others and the maintenance schedule was to his knowledge the best. He testified that he was not given an opportunity to defend himself. He prayed that orders be granted as set out in the claim.

Under cross examination he testified that he joined the respondent's employment in 1995 at a salary of Kshs.3,000 paid monthly, that the certificate of service exhibited at appendix 1 of the claim was issued by the respondent's Human Resource Manager Mr. Stephen Mureithi. He admitted signing the letter at appendix 8 of the claim, which is a letter of promotion, and states he joined the service of the respondent on 1st June 2008. He further confirmed receipt of some terminal benefits in excess of Kshs.100,000 but could not recall the exact amount. He stated that on the date of termination of his employment the Director went to him at 11 am and told him to go away.

For the respondent CAROLYNE MORAA testified that she was only two months old at the company but learnt about the claimant's case from records, that the claimant was employed in 2008 and left in 2013 after working for 5 years. That the claimant's employment was terminated on account of poor performance for failing to carry out scheduled performance maintenance leading to great loss. That the reason for termination was stated in the letter and that the claimant explained what had happened.

Moraa testified that the claimant was paid his full terminal dues being one months' notice, 5 years' service pay and leave all totalling Kshs.148,476(net) which he signed for on 2nd September 2013.

Determination

The issues for determination are the following –

1. Date of employment of claimant
2. Whether the claimant was unfairly terminated.
3. Whether the claimant is entitled to the remedies sought.

Date of Employment of Claimant

The claimant's position is that he was employed 15th August 1995. To support his claim the claimant produced a certificate of service signed by Stephen Mureithi, the Human Resources Manager of the respondent. It is dated 27th August 2013. The respondent denies this and has relied on the claimant's letter of promotion dated 23rd August 2011 in which it is stated that–

“Exit from CBA

For the period you worked under terms and conditions of CBA, you shall be paid on exit all service/gratuity due to you per the CBA terms applying then [in your case three (3) complete years from date of joining, 1st June 2008 – 30th June 2011 at the rate of 21 days for every completed year at the prevailing basic salary then of Kenya Shillings Twenty One Thousand Six Hundred and Seven (Kshs.21,607/=) only per month].”

It is therefore the respondent's position that the claimant worked for only 5 years from 1st June 2008 to August 2013. The respondent however produced a certificate of service, also on the face of it signed by Stephen Mureithi the Human Resources Manager on 27th August 2013, which states that the claimant worked for the respondent for 2005 to August 2013.

The respondent thus has two different employment dates for the claimant, 2005 as stated in the certificate of service and 1st June 2008 as stated in the letter of promotion.

Under Section 10 and Section 74 of the Employment Act, it is the duty of an employer to keep employment records. Such records include the date

of joining employment, Section 9(2) specifically provides that –

(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).

Section 10(2) further provides that

(2) A written contract of service shall state—

- (a) the name, age, permanent address and sex of the employee;**
- (b) the name of the employer;**
- (c) the job description of the employment;**
- (d) the date of commencement of the employment;**
- (e) the form and duration of the contract;**
- (f) the place of work;**
- (g) the hours of work;**
- (h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits; the intervals at which remuneration is paid; and**
- (i) the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and**
- (j) Any other prescribed matter.**

Where an employer fails to provide the prescribed records, Section 10(7) provides that the burden of proving or disproving any averment by an employee rests with the employer.

In the present case, the claimant avers that he was employed on 15th August 1995. The employer denies the same and has come up with two different dates of employment, one in 2005 and the other in June 2008. In the circumstances, it is my finding that the respondent has failed to discharge the burden of disproving the claimant's averment that he was employed on 15th August 1995. I thus find and hold that 15th August 1995 is the date of employment of the claimant.

Whether Termination of Claimant's Employment was Unfair

The claimant testified that he was terminated without a hearing and without notice. He further testified that the reason for termination was not valid and to the best of his knowledge he had scheduled maintenance for all machines.

The claimant's letter of termination states that the reason for termination is negligence of duty being that the claimant failed to schedule proper maintenance of the chillers that led to poor production of plastic closures and huge losses to the company. No evidence was adduced to support this allegation. No evidence was produced to show that the claimant was given a hearing or an opportunity to state his defence in terms of Section 41 of the Employment Act. The claimant's evidence that he was terminated instantly was not controverted.

From the foregoing, I find that the respondent failed to prove that it complied with the procedure for termination or to prove the reasons for termination. The termination of the claimant's employment was therefore unfair in terms of Section 45(2) of the Employment Act and I declare accordingly.

Remedies

I will now consider the claimant's prayers.

1. 12 months' salary in lieu of notice

The claimant's letter of promotion provided for notice of one month's salary or payment in lieu. He is not entitled to 12 months' notice as prayed. His gross salary was Kshs.70,000, I therefore award him one month's gross salary in lieu of notice in the sum of Kshs.70,000.

2. Compensation

The claimant prayed for compensation in the sum of Kshs.840,000 being 12 months' salary. Having worked for 18 years with a clean record, taking into account his expectations after such long service and the manner in which his employment was terminated, I award the claimant maximum compensation of 12 months' gross salary in the sum of Kshs.840,000.

3. Severance Pay

The claimant was not declared redundant and is not entitled to severance pay. The prayer is dismissed.

4. Compensation for the months the claimant was out of work

This is a duplication of prayer (2) above and is dismissed.

5. Costs

The respondent shall pay the claimant's costs.

6. Interest

The decretal sum shall attract interest at court rates from date of judgment.

The respondent having not submitted any proof of payment of terminal dues to the claimant, the amounts granted herein above shall be in addition to any payments already made to the claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE