



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET**

**CAUSE NO. 381 OF 2017**

***(Before D.K.N. Marete)***

**PETER WASHISINO**

**GEOFFREY WESONGA and**

**FELIX MURUNGA.....CLAIMANTS**

**VERSUS**

**PROYOSHA VENTURES LIMITED.....RESPONDENT**

**JUDGMENT**

This matter was originated by way of Amended Memorandum of Claim dated 9 th day of March, 2016. The issues in dispute cited therein are;

- (a) Whether the claimants were unlawfully, and unfairly terminated from employment by the respondent*
- (b) Whether the claimants are entitled to compensation for unlawful, unprocedural unfair termination from employment as prayed for in the memorandum of claim.*
- (c) Whether the claimants are entitled to an award of certificate of service pursuant to Section 51 of the Employment Act.*
- (d) Whether the claimants are entitled to awards of compensation for breach of contract and*
- (e) Who should pay costs of the suit.*

The Respondent in a Response to Amended Claim dated 18 th April, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is presented as a complaint against the respondent who is their employer. It's their case that they were employed by the respondent on various dates between January and March, 2009 as general workers.

The claimants further case is that the activities of the respondent have contravened the law and statute and particularly the provisions of the Employment Act, 2007.

This is particularly section 47 which acts as a safety net for the enforcement of their rights.

The claimants further case is that they had previously complained of underpayments by their employer to the area labour office to no avail. There services have now been terminated without notice as required by the law. This has created an impression that the claimant are untrustworthy and therefore they cannot secure employment elsewhere. This termination of employment remains unfair in that they were not given a chance to defend themselves or even the reasons for termination explained to them in the presence of another employee of their choice or their union representative as is required of the law.

They claim as follows;

- 1. Appropriate notice (in lieu)*

2. Leave due since date of employment up to 30th August, 2010 at 21 working days for every year worked.
3. Underpayment of wages as per Legal notices Nos 70 of 2009 and 98 of 2010.
4. Service benefits for the period worked at 15 days salary for every completed year of service.
5. 12-month salary as compensation for loss of employment and unfair termination.
6. Any other relief the court may grant.

The respondents case is a denial of the claim.

The respondents have a case is a denial but there was any contract of employment between herself and the claimants on various dates between January and March, 2009.

She contends that there is no possibility that the claimant could have been dismissed on 30th August, 2010 as this period falls outside their period of employment as pleaded.

The respondents other case is a denial of receiving any letters from Kenya Union of Commercial Food & Allied Workers union as alleged. She posits that if the claimants were terminated from employment, then the same was proper as they were guilty of gross misconduct. This is as follows;

#### PARTICULARS OF GROSS MISCONDUCT

- a) Being suspected of stealing and/or handling stolen property.
- b) Conversion of the Respondent's stock.
- c) Exposing the Respondent's stock to the theft.

The claim is tabulated as follows;

#### 1. PETER WASHINIO

a) 1month pay in lieu of notice Kshs 6,221/-

b) 3 years accrued leave Kshs. 7,118/-

3x21x6221

c) Service benefit Kshs. 5,383/-

15x1.5 yearsx6221..

d) Underpayment of wages Ksh. 24,039/-

L.N 70 of 2009

56+848.25

6503.25-4500

2003.25X12 months

L.N 98 of 2010

6221+933.15

7154.15 Less 4.500

2654.15x12 months

e) Compensation for unfair termination Ksh. 10616/-

gross pay x 12 months 7154x12

Total claim Kshs. 139,225/=

## 2. GEOFREY WESONGA

- a) 1 month pay in lieu of notice Kshs. 6,221/-
- b) 3 years accrued leave Kshs. 7,118/-
- 3x21x6221..26 Kshs. 6,221/-
- c) Service benefit Kshs. 7,118/-
- 15 daysx 1.5 yearsx6221...26 Kshs. 5,383/-

LN 70 of 2009

56+848.25

6503.25-4500

2003.25x12 months Kshs. 24,039/-

LN 98 of 2010

6221+933.15

7154.15 Less 4,500

2654.15x4 months Kshs. 10616/-

### e) Compensation for unfair termination

gross pay x 12 months

7154x12 Kshs. 85848/-

Total of claim Kshs. 139,225/-

## 3. FELIX MURUNGA

- a) 1 month pay in lieu of notice Kshs .6.221/-
- b) 3 years accrued leave Kshs 7,118/-
- 3x21x6221..26 Kshs 7,118/-
- c) Service benefit
- 15 days x 1.5 years x 6221..26
- d) Underpayment of wages Kshs. 5,383/-

LN 70 of 2009

6503.25x 5 months Kshs. 32,516.25/-

LN 98 of 2010

622+933.15

7154.15 Less 4.500

2654.15 x 4 months                      Kshs. 10,616/-

e) Compensation for unfair termination

gross pay x 12 months                      kshs. 84,000/-

7154.15 x 12

Total of claim                              Kshs. 147,702.25/-

They pray as follows:

(a) *A declaration that the claimants' services were unprocedurally, unlawfully and unfair terminated.*

(b) *Kshs. 147702.25/- for Felix Murunga. Kshs. 139,225/- for Peter Washinio and Kshs. 139,225/- for Geoffrey Wesonga.*

(c) *Certificate of Service:*

(d) *Costs of this suit and Interest at court rates from the time of filing the suit until payment in full and*

(e) *Any other further and better relief the Honourable Court may deem just and fit to grant.*

The respondent's further case is a rebuttal of the claim and particularly Owings in terms of one month pay in lieu of notice, three (3) years accrued leave, service benefit, underpayments of wages and compensation for unfair termination. In any event, the termination of employment was lawful therefore disabling the prays sought.

In the penultimate, the respondent avers that the matter was reported to the police and is under investigation.

The matter came to court variously until the 19th December, 2018 when the parties agreed on a determination by way of written submissions. Strict timelines were set for the same.

The issues for determination therefore are;

1. Whether there was employment of the claimants by the respondent?
2. Whether the termination of employment of the claimants by the respondents was wrongful, unfair and unlawful?
3. Whether the claimants are entitled to the relief sought?
4. Who bears the cost of the claim?

The 1st issue for determination is whether there was employment of the claimants by the respondent. The claimants in their written submission dated 19th December, 2018 submit a case of their employment by the respondent. They respondents, who have not filed written response submissions in their defence blow hot and cold. On one hand the deny employment of the claimant whereas on the other hand, they contend and aver that the claimant's termination of employment was occasioned by their misconduct. This essentially is an admission of employment. The denial of employment therefore dissipates and leaves us with the option of employment and this, I hold. There was a case of employment *inter partes*

The 2nd issue for determination is whether the termination of employment of the claimants by the respondents was wrongful, unfair and unlawful. The claimants submits their case of wrongful, unfair and unlawful termination of their employment by the respondent for failure to comply with section 41 (1) of the Employments Act, 2007 in that the rule on procedure of fairness: affording them their right to be heard was violated.

The claimants in further support of their case choose to rely on the authority of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited, (2014), eKLR** where Mbaru, J; observed as follows;

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*... before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a suction decided by the respondent based on the representation made by the affected employee. It is not established best practice to allow for an appeal to such an employee within the internal dispute resolution mechanism and with due application of the provision of section 5(7) (c) of the Employment Act."*

Further,

“... Even in cases of serious breach of a contract as under section 44(3) or committing acts as outlined under section 44(4) of employee being absent from work, being intoxicated, negligence, abusive, failure to obey lawful orders, criminal arrest or charges, suspect in a criminal case, all these serious acts, such an employee is subject to be treated as under section 41 of the Employment Act with regard to being accorded a hearing.

The claimants further submit a violation of substantive justice by a violation of section 45 (2) of the Employment Act as follows: -

“... Section 45(2) of the Employment Act provides that termination of Employments by an employer is unfair if the employer fails to prove;-

a) That the reason for termination valid.

b) That the reason for the termination is a fair reason,

c) That the employment was terminated in accordance with fair procedure.

The claimant in the penultimate and further support their case by relying on the authority of **Walter Ogal Anuro Vs Teachers Service Commission, (2013)eKLR**, where the court observed thus

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.

Further, the claimants relied on the celebrated authority of **Donald Odeke V Fidelity Security Limited, (2012) Eklr**, where the court observed as follows;

“...It does not matter what offence the employee is accused of. If the employee is not heard, the termination is ipso facto unfair”

The respondent as earlier provided did not file written submission in support of her case.

This matter tilts in favour of the claimants. This is because they have established a case of unlawful termination of employment on a balance of probability and preponderance of evidence. The claimants have brought out a case of termination without pursuance of the legal provisions required in a case of lawful termination of employment. The respondent in so terminating the services of the claimants did not award them a hearing as is expected of section 41(1) of the Employment Act, 2007. Further, the respondent did not give a valid reason for the termination of employment. She also failed to *in toto* comply with section 45 on fair termination of employment. I therefore find a case of wrongful, unfair and unlawful termination of employment and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimants are entitled to the relief sought. They are. Having succeeded and won on a case of unlawful termination of employment, they become entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

i. A declaration be and is hereby issued that the termination of the employment/services of the claimant was unprocedural, wrongful, unfair, and unlawful

**ii. PETER WASHINIO**

i. One (1) months' salary as payment in lieu of notice.....Kshs 6,221.00

ii. 3 years accrued leave

iii.  $3 \times 21 \times 6221 \div 26$ .....Kshs. 7,118.00

iv. Underpayment of wages

L.N 70 of 2009

56+848.25

6503.25-4500

$2003.25 \times 12$  months.....Kshs. 24,039.00

L.N 98 of 2010

6221+933.15

7154.15 Less 4.500

2654.15x4 months.....Kshs. 10,616.00

V. Eight (8) months' salary as compensation for unfair

termination of employment Ksh. 7154 x 8.....Ksh. 57,232,00

**Total of claim.....Kshs. 105,226.00**

## **1. GEOFFREY WESONGA**

i. One (1) months' salary as payment in lieu of notice.....Kshs 6,221.00

ii. 3 years accrued leave

iii.  $3 \times 21 \times 6221 \div 26$ .....Kshs. 7,118.00

iv. Underpayment of wages

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2003.25X12 months.....Kshs. 24,039.00

L.N 98 of 2010

6221+933.15

Less 4.500

2654.15x4 months.....Kshs. 10,616.00

v. Eight (8) months' salary as compensation for unfair termination

of employment Ksh. 7154 x 8.....Ksh. 57,232,00

**Total of claim.....Kshs. 105,226.00**

## **2. FELIX MURUNGA**

i. One (1) months' salary as payment in lieu of notice.....Kshs 6,221.00

ii. 3 years accrued leave

iii.  $3 \times 21 \times 6221 \div 26$ .....Kshs. 7,118.00

iv. Underpayment of wages

L.N 70 of 2009

6503.25x5 months.....Ksh. 32,516.25

7154.15 Less 4,500

2654.15 x 4 months.....Kshs. 10,616.00

v. Eight (8) months' salary as compensation for unfair

termination of employment Ksh. 7154 x 8.....Ksh. 57,232,00

**Total claim.....Kshs. 113,703.25**

VI. The total cumulative claim is.....**Kshs. 324,155.25**

VII. The respondent be and is hereby ordered to issue the claimants with certificates of service respectively within thirty 30 days of today's date.

VIII. The costs of the claim shall be borne by the respondent.

**Delivered, dated and signed in open court this 20<sup>th</sup> day of December 2018**

**D.K. Njagi Marete**

**JUDGE**

**Appearances**

1. Mr. Githaiga holding brief for Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimants
2. Mr. Mathai holding brief for Yego instructed by Z.K. Yego Law Offices for the respondent.