



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.498 OF 2017

MUSA MWALE ASHIBIRACLAIMANT

VERSUS

AFRICAN BLOOMS LTDRESPONDENT

JUDGEMENT

On 22nd December, 2017 the claimant filed the Memorandum of Claim. The respondent was served on 18th January, 2018 and returns filed with the court.

On 7th May, 2018 the respondent entered appearance but no defence was filed.

On 4th July, 2018 the court issued hearing directions and allowed the respondent 30 days to comply by filing the defence, list of documents and witness statements. A hearing date was allocated for 3rd December, 2018. The respondent did not comply as directed.

On the due date for hearing, the respondent applied to file the defence in 21 days. The court extended time to enable the respondent comply and a new hearing date was allocated for 5th December, 2018.

On the due date the respondent had not complied and there was no attendance. The matter proceeded undefended.

Claim

The claimant was employed by Salkies Flowers on 28th December, 2000 as a Carpenter Grade II at a wage of Ksh.300.00 daily.

In October, 2010 Salkies Flowers were having problems with the bank which went under receivership and operated the company for 6 months up to 1st April, 2011.

From April, 2011 the director of Africa Blooms took over from Salkies Flowers Ltd and inherited staff who were working with Salkies where the claimant was retained in his position and on the same terms of service.

At the time of change of ownership, the claimant was earning a wage of Ksh.10, 000.00 per month. Such pay was improved in the year 211 when the claimant was paid a basic wage of Ksh.10, 000.00 and a house allowance of Ksh.700.00 per month.

The claimant continued in his employment without break or stoppage from the year 2000 to 27th October, 2017 all a total of 17 years.

On 24th October, 2017 the claimant received his pay slip with a different payment from previous months. He approached his supervisor and workshop manager Mr Chatan for an explanation. The claimant was directed to the human resources office.

On 27th October, 2017 the claimant reported to work and then went to the human resource office and the assistant manager Mrs Jackie who told the claimant to collect his letter terminating employment. The basis was that his work was finished. The claimant could not understand this explanation as he had no prior notice and nobody was willing to give proper reasons as to how this had arisen and requiring him to leave his employment. The claimant was also concerned on the notice issued to him which stated that his carpentry work could not be quantified.

This was in violation of section 35 of the Employment Act, 2007 which required the employer to explain to an employee in a language he understood the contents of a termination notice which not the case was for the claimant. The claimant thus felt it was contrary to the interests of fairness for the respondent to give an explanation by what was meant that carpentry duties could not be quantified.

The employer is required to terminate employment of valid and genuine reasons.

The reason given to the claimant lacked validity or basis in fact or in law.

Based on the pay slip issued to the claimant he was only paid his dues salary for October, 2017 and final dues amounting to Ksh.118, 592.00 which pay did not cover for the period of 17 years of service. the respondent having taken over operations from Salkies Limited, the claimant should be paid for the total years.

The claimant is seeking judgement against the respondent for a finding that his implement was terminated without due process and thus unfair; payment of notice, underpayments, pay for leave due, severance pay and compensation together with costs.

The claims are for;

- a) Underpayments from April, 2011 to October, 2017 all at Ksh.1447,100.50;
- b) Annual leave due in the year 2017 Ksh.19,614.00;
- c) Severance pay for 7 years Ksh.82,014.20;
- d) Compensation;
- e) Certificate of service; and
- f) Costs.

The claimant testified in support of his claims.

As noted above, the respondent was served with summons and entered appearance in accordance with Rule 11 of the Employment and Labour Relations Court (Procedure) Rules, 2016. There was however no compliance with Rule 13 or Rule 14 with regard to filing defence or statements as directed by the Court.

A party served with summons and who opts to appoint an advocate to represent them in court is required to attend as directed. Where the respondent thus failed to attend herein, sufficient notice having issued and directions taken, the failure to file defence or attend at the hearing is taken as an option not to defend the claims made.

The claimant's case shall therefore be assessed based on the leadings, the evidence and the applicable law.

By letter dated 7th March, 2014 the respondent confirms that the claimant was employed with them from the year 2011 as a Carpenter on permanent basis and then earning a wage of Ksh.15, 525.00 per month.

By letter dated 27th October, 2017 the respondent terminated the claimant's employment on the grounds that;

RE: Termination of Carpentry Work

In view of the above, you are hereby notified that your contract has been terminated effective as from 27th October 2017. As you are aware most of carpentry duties cannot be quantified. ...

As noted by the claimant, section 35 of the Employment Act, 2007 requires as employer issuing a termination notice to an employee to;

(3) If an employee who receives notice of termination is not able to understand the notice, the employer shall ensure that the notice is explained orally to the employee in a language the employee understands.

Section 9(4) of the Act also requires the employer to;

(4) Where an employee is illiterate or cannot understand the language in which the contract is written, or the provisions of the contract of service, the employer shall have the contract explained to the employee in a language that the employee understands.

It therefore behoves the employer to inform the employee, to issue notice and allow the employee a chance to give their view/defence where there is a finding that there exists a position that cannot be *quantified*. Whatever reason which exists to justify termination of employment, the employee is entitled to notice under section 35 of the Employment Act, 2007 and a hearing under section 41 of the Act.

Section 45 (2) of the Employment Act, 2007 requires that;

(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.

Without any defence to address the provisions above by the respondent, the reason given to the claimant that his employment terminated due to his position as carpenter being *qualified* fails to meet the threshold of being valid, fair, based on his conduct, capability or compatibility or that such related to an operational requirement.

The failure to file defence also denied the court the nature of terminal dues paid to the claimant as to what such incorporated. A blanket pay without the respondent explaining to the claimant what such constituted only invited the filing of this suit. Such is contrary to section 35(4) as set out above. The employer has the duty to explain to an employee matters at work that relate to the terms and conditions of employment.

In the case of **Kenya plantation & Agricultural Workers Union versus Del Monte Kenya Limited [2016]** at paragraphs 13 the court held as follows;

13. Pursuant to sections 43 and 45 of the Employment Act, 2007, an employer is under a duty to prove the reasons for dismissing an employee, and that the reasons are valid and fair.

In the case of **Kenya Petroleum Oil Workers Union v Kenya Petroleum Refineries Ltd (2013) eKLR** the court summarised the legal fairness requirements set out in Section 41 of the Employment Act as follows;

a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;

b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation.

c) That the employer has heard and considered any explanations by the employee or their representative.

d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

In this case where termination of employment failed to meet the mandatory threshold with regard to substance and procedure, the same amounted to unfair termination of employment. The claimant is entitled to compensation, notice pay and the terminal dues claimed shall be assessed on their merits.

The claimant having admitted to have received some terminal dues upon termination of his employment by the respondent amounting to Ksh.118, 592.00. such shall be put into account.

Compensation is assessed as appropriate at ten (10) months gross salary all at Ksh.21, 465.00 x 6 total due Ksh.214, 650.00.

Notice pay is due at a month salary all at Ksh.21, 465.00.

On the claim for underpayments, the claimant commenced work with the respondent entity in the year 2011. The dues owing to any other entity before such period are not for the respondent to pay. In this regard the correct computation is from the year 2011, May as the claimant has not set out the details as to when exactly he was taken over by the respondent company from Salkies Limited. The underpayments assessed the claimant is awarded Ksh.120, 795.00.

The owing leave days are due under section 28 of the Employment Act, 2007 and the claimant is awarded the same assessed at Ksh.19, 614.00.

On the claim for severance pay or service pay, the reason given for termination of employment as analysed above was not valid and fair. Such is addressed with a compensation. The claim for severance pay relates to a termination arising from a redundancy which was not the case here and even where such was the reason, the unfairness of the same is redressed with compensation.

The claimant has submitted his pay statements and which confirm he was registered with statutory bodies as under section 35 of the Employment Act, 2007 and thus not entitled to service pay.

The claim for October, 2017 pay is due where not paid. The claimant had worked for this period. The pay statement for October, 2017 show the claimant was paid the salary due for the month.

Accordingly, judgement is hereby entered for the claimant against the respondent for the payment of the following dues;

a) Compensation at Ksh.214,650.00;

b) Notice pay Ksh.21,465.00;

c) Underpayments Ksh.120,795.00;

d) The claimant shall be issued with his Certificate of Service in accordance with section 51 of the Employment Act;

e) Costs of the suit; and

f) The payments above shall be paid less Ksh.118, 592.00 which the claimant has acknowledged receipt.

Dated and delivered at Nakuru this 18th day of December, 2018.

M. MBARU

JUDGE

In the presence of: