



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT KISUMU

CAUSE NUMBER 295 OF 2013

BETWEEN

SAMUEL OMONDI ADERA.....CLAIMANT

VERSUS

SUKARI INDUSTRIES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Claimant Samuel Omondi Adera, in Person

Ogejo, Olendo & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 31st October 2013. He avers that he was employed by the Respondent as a Human Resource Manager, effective 3rd March 2012. His letter of appointment is dated 31st January 2012. He worked the first 6 months, on probation.

2. On 22nd May 2013, the Respondent terminated Claimant's contract. He states that termination was abrupt, without reason or notice. The Claimant was called by the General Manager on the material day, and told to vacate Respondent's house, as Claimant's successor was on his way to the Respondent's premises. The Claimant was not given any explanation why his contract was being terminated.

3. The Claimant was advised to see the Financial Controller. He was paid a net amount of Kshs. 212,459, which was indicated to include notice pay, 24 days of annual leave, gratuity and housing benefit. He was directed to accept this amount and leave Respondent's premises. He prays the court to find termination was unfair, and grant Judgment against the Respondent in the following terms:-

a) Declaration that termination was unfair and unlawful.

b) General, exemplary, and aggravated damages for unfair and wrongful termination.

c) Cumulative pay and interest of loss of salary in gross compounded monthly occasioned by unfair termination together with 40 days' unpaid salary in lieu of leave out of one year and four months' service [?].

d) Interest at 14% per annum from the date of filing this Claim until conclusion.

e) Costs of this suit and interest thereon party and party as well as client and advocate [?].

4. The Court has placed question marks on [c] and [e] above on account of the prayers being ambiguous. The Statement of Claim was filed through an Advocate. There is no reason why the prayers should not have legal clarity. The Claimant withdrew instructions from his Advocates and currently acts in person.

5. The Respondent filed a Statement of Response, titled 'Defendant's Statement of Defence,' on 31st July 2014. It is conceded that the Respondent employed the Claimant on the terms and conditions of service, captured in the letter of appointment, dated 31st January 2012. The Respondent did not compel the Claimant to receive terminal dues. His contract was lawfully terminated after he was given several warnings by the Respondent. He was the author of his own misfortune. The Respondent prays the Court to dismiss the Claim.

6. The Claim was dismissed by the Court on 16th October 2017 for want of prosecution. It was reinstated upon the application of the Claimant, through an order of the Court issued on 11th October 2018.

7. The Court directed on 8th November 2018, that the Claim is considered and determined under Rule 21 of the Employment and Labour Relations Court [Procedure] Rules 2018. This is based on Judiciary Policy, to conclude cases filed on or before the year 2013, before the close of the year 2018. Parties confirmed the filing of their Closing Submissions at the last mention in Court on 15th November 2018.

The Court Finds:-

8. It is agreed that the Claimant was employed by the Respondent, as Human Resource Manager, through a letter of appointment dated 31st January 2012.

9. It is also accepted that the contract came to an end on 22nd May 2013, the Claimant having served for approximately 1 year and 4 months.

10. Parties do not agree on the circumstances of termination. The Claimant states it was abrupt, without notice or justification. He was called by the General Manager and told his replacement was on his way to the workplace. The Claimant was asked to clear from the residence allocated to him by the Respondent, in readiness for the new occupant of the residence. He was directed to the Financial Controller, who computed Claimant's terminal dues at a net sum of Kshs. 212,549. Throughout this ordeal, the Claimant was not told why his contract was terminated. There was no written letter of termination, spelling out the Claimant's shortcomings.

11. The Respondent replies that Claimant's services were lawfully terminated, after he was issued serial letters of warning. He failed to correct his conduct after warning, which led to termination. The Respondent states that the Claimant *'is the sole author of his misfortune, and or contributed to his termination, and no blame whatsoever can be attributed to the Respondent.'* In support of this position, the Respondent relies on letter of warning dated 12th February 2013. The Claimant was warned for disorganization and failure to control Employees placed under him. He was also alleged to have failed to attend departmental heads meeting on 12th February 2013. The Respondent gave the Claimant *'one month notice to perform.'*

12. After this warning, there is no other record of any disciplinary steps taken against the Claimant by the Respondent. There is no letter asking the Claimant to show cause, why, disciplinary action should not be taken. The Respondent has not exhibited before the Court any specific charges against the Claimant. There is no record of a disciplinary hearing. The reasons suggested in the letter of warning as comprising Claimant's imperfections, were performance and disciplinary- related. Employers have an obligation to hear out Employees under Section 41 of the Employment Act, before termination of employment, on either ground. There is no evidence that the Respondent did so. Without charges against the Claimant, and without any letter of termination, the Court cannot conclude that the Claimant was accorded fair procedure, and valid reason or reasons, as he deserved under Sections 41, 43 and 45 of the Employment Act.

13. The Respondent rushed termination of Claimant's contract, directing him to pick his terminal benefits cheque, vacate Respondent's house bag and baggage, and pave way for the new Human Resource Manager immediately. This is not how the law intends that non-performers, or even insubordinate Employees, such as the Claimant was alleged to be, are dismissed from employment.

14. The Claimant worked for 1 year and 4 months. The first 6 months were probationary. The Respondent had the leeway of extending probation, if it was the genuine feeling of the Respondent that, its Human Resource Manager, was not up to the task.

15. Termination was unfair. Payment of terminal dues, and the Claimant's execution of acknowledgment and discharge, while clearly under pressure to vacate office for the new Human Resource Manager, cannot absolve the Respondent from liability.

16. The Court has nonetheless considered Claimant's length of service, and forms the view that compensation the equivalent of 2 months' salary, would be adequate in redressing Claimant's economic injury. He was promptly paid and received terminal dues, even though under pressure, and mitigated his economic injury. He was availed notice pay, annual leave pay, gratuity and housing benefit. ***He is granted equivalent of 2 months' salary in compensation for unfair termination, at Kshs. 227,152.***

17. His prayers for general, exemplary and aggravated damages have no merit. His prayer for cumulative pay and interest, as suggested elsewhere is unclear. These prayers add no value to the Claim. Statutory compensation granted under paragraph 15 above, suffices.

IT IS ORDERED:-

a) It is declared that termination was unfair.

b) The Respondent shall pay to the Claimant equivalent of 2 months' salary in compensation for unfair termination at Kshs. 227,152.

c) No order on the costs.

d) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and signed at Mombasa this 22nd day of November, 2018

James Rika

Judge

Dated, signed and delivered at Kisumu this 6th day of December, 2018

Mathews Nderi Nduma

Judge