



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1811 OF 2014

(Before D. K. N. Marete)

CHRISTOPHER OMUTUBACHI.....CLAIMANT

VERSUS

METALIC CROWNS LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by a Statement of Claim dated 8th August, 2014. The issues in dispute are therein cited as;

1. *Unlawful and wrongful termination of Mr. CHRISTOPHER OMUTUBACHI*
2. *Failing to follow the right procedure while terminating the services of the Claimant,*
3. *Failing to give notice or pay notice of 12 months, severance and or gratuity on completed years.*

The respondent in a Response to The Statement of Claim dated 19th December, 2014 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that the respondent offered him employment based on qualifications, ability performance and competence to hand office. This was in the position of machine operator on a permanent basis with effect from 24th May, 2010 with an average total earnings of Kshs.32,589.00

The claimant's further case is that the respondent's director, one, Gurdip, driven by pure racism and disrespect to Kenyan workers and with or intention of frustrating the claimant wrongfully and unlawfully terminated his services and employment.

The claimant's other case is that he had left his place of work for the washroom, which act he explained to the Human Resource Manager but the respondent instead forced him to sign an illegal tabulation in acceptance of his termination from employment. This was based on fabricated and untrue allegations on the part of Mr. Gurdip.

The claimant avers that he had not been given a previous warning on non performance or shoddy performance and neither was he given an opportunity to correct and improve on alleged non performance, which he denies. He did his best but this was not taken into consideration due to the director's disrespect for Kenyans.

The claimant in the penultimate submits and avers a termination that was unlawful and or contravention of the law and principles of natural justice as he was not offered an opportunity to defend himself as provided in section 41 of the Employment Act, 2007.

He claims as follows;

a) *Twelve months salary in lieu of notice on gross income Kshs.32,589/= x 12 months=.....Kshs.391,068/=*

b) *Twelve months compensation for disturbance by terminating the services of the Claimant unlawfully.*

Kshs.32,589/= x 12 months =.....Kshs.391,068/=

c) *Payment of annual leave for 12 months of notice.*

d) *Payment of salary in arrears for the months the Claimant has been out of employment from 20th March, 2013 to the date as will be determined by*

this honorable court due to wrongful and/or un-lawful termination.

e) *Severance pay for each completed year (3 years) at*

Kshs.32,589/= x 3=.....Kshs.97,767/=

f) *Compensation for damages suffered by the Claimant from the time of this wrongful and unlawful retirement.*

g) *Cost of this suit plus interest.*

h) *Any other monies that is legally due to my favor.*

He prays thus;

a) *That this Honorable court does find that the Respondent is guilty of constructive termination on the claimant and an order compelling the Respondent to settle the aforesaid claims.*

b) *That this honorable 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 be compelled to settle in full the bank loan that the Claimant was guaranteed by the Respondent plus all interests.*

d) *That the Respondent director's work permit to be revoked, level lawful penalties for racial and abuse offences committed herein.*

e) *Such further or other reliefs as may be appropriate in the circumstances.*

The respondent's case is a denial of the claim.

She, however, does not dispute the contents of paragraphs 1, 2, 3 and 4 of the claim save the issue of his address for service and that the claimant at the time of appointment earned Kshs.15,627.00 which was reviewed to Kshs.18,509.00 as at March, 2014.

The respondent's further case is a denial of the allegation of racism and disrespect to Kenyans and avers that this is scandalous and made in extremely bad faith. It is her case that the claimant willfully neglected his duties prompting a lawful termination of employment out of which he sign his discharge documents on his own free will and volition. In any event, the claimant had been regularly warned to improve his performance but failed on this thereby prompting his termination of employment.

The respondent in the penultimate denies unlawful termination of employment and posits an opposite case thereby praying for a dismissal of the claim with costs to herself.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submissions dated 4th November, 2018 reiterates his claim of unlawful termination of employment.

The claimant further submits as follows;

- That his letter of termination dated 3rd April, 2014 serialized the reasons for his termination as follows;
- That on 29th March, 2014 he neglected his duties by leaving his machine running while he chatted with colleagues causing an overflow of plastic closures in the packaging carton (carton?). This compromised the quality of the closures which are a food packaging components.

- This action displayed lack of due diligence in the discharge of duties and irresponsible work attitude.

The claimant submits that heavy plastic closure machine is design to have a machine operator, assistant machine operator and a packer whose duty is to pack finished plastic closure and cartons placed on a pallet and lift the fully packed carton on a pallet by hydraulic pallet to the warehouse.

In the instant case, the claimant submits that there was serious lapse in planning of man power allocation on that particular day. The respondent allowed the assistant machine operator and packer off duty leaving the claimant to perform the duties of the two. He did this and visited the washrooms only to find the company's chairman standing next to the machine and this was the source of his woes. The dismissal was therefore unwarranted for lack of substantive justification.

The claimant also submits a case of lack of procedural fairness in his dismissal. He was not awarded an opportunity to ventilate his case. The employer must keep a record of the employees misdeeds and the disciplinary action taken like warnings, reprimand, cautions and show causes in the event of repeated failures. At all times, a fair hearing must be had in the event of contemplated termination of employment. A record of disciplinary proceedings, meetings and minutes must be had and produced by the employer.

The claimant in support of his case sought to rely on the authority of **Kenya Science Research International Technical and Allied Workers Union (KRISTAWU) Vs Stanley Kinyanjui and Magnate ventures Ltd, (Industrial**

Court Cause No. 273 of 2010) where the court observed as follows;

... once poor performance of an employee is noted, the proper procedure is to point out the shortcomings to the employee and to give them opportunity to improve over a reasonable length of time. In the opinion of the Court, 2-3 months would be reasonable.

The claimant further sought to rely the authority of **Alphonse Sulpice Mzungu v Mombasa Air Safari Ltd, Cause No. 110 of 2013** where the court observed thus;

Prior to the Employment Act, 2007 an employer could dismiss an employee for a bad reason or no reason at all, provided it was on notice. That has now changed. Section 45 of the Employment Act has made serious inroads in regard to dismissals. An employer is under an obligation to prove the existence of good and valid reasons for dismissal even if he gives notice.

The claimant therefore submits a case of unfair and unlawful termination of employment for the respondents failure to uphold the tenets of substantive and procedural fairness as encapsulated under sections 41, 43 and 45 of the Employment Act, 2007.

The respondent in her written submissions dated 5th November, 2018 submits a case of lawful termination of employment. On this, he relies on section 47 (5) of the Employment Act, 2007 which comes out as follows;

47 (5) "For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer"

It is her case and submission that the claimant in the circumstances does not discharge his burden of proving that unfair termination of employment did occur. This is because the reason for the termination was communicated and further, the claimant was afforded a hearing before termination. The letter of termination comes out as follows;

On Saturday 29th March, 2014, you neglected your duties by leaving your machine running and going to chat with colleagues leading to the filling and over flow of plastic closures in the packaging carton. As a result, the quality of the closures was compromised being a food packaging component.

This is the reason for termination and a disclosure of the same. I disagree with the respondent's submission on burden of proof. Section 47 (5) as relied on by the respondent effortlessly shifts the burden of proving fair termination to the employer. She must justify the grounds of termination or wrongful dismissal once this has been demonstrated by the employee claimant. The absence of this, as in the instant case leaves the respondent's case hanging. It cannot stand.

The issue of burden of proof is not heavenly. It is not cast on stone and the employee is only required to lay down a probable case of unlawful termination to shift the burden of disapproving this to the employer. This is the essence of section 47 (5) of the Employment Act, 2007. It cannot be denied in the instant case. A case of unlawful termination of employment can be sensed and to me, established on a balance of probability and preponderance of evidence.

Here, the claimant has demonstrably enunciated a case of unfair and unlawful termination of employment for lack of fairness: substantive and procedural. This automatically shifts the burden of justification of termination to the respondent. The respondent has not in any way adduced evidence of disciplinary proceedings in defence. The reason for termination is shaky and not supported by law and precedent. I therefore find a case of unlawful termination of employment and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won on a case of unlawful termination of employment, he becomes entitled to the relief sought.

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

i. Eight (8) months for compensation for unlawful termination of employment Kshs. 32,589.00 x 8
=.....Kshs.260,712.00

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

Dated and signed this 29th day of November 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 3rd day of December 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Mr. Omondi instructed by Omwakwe & Associates for the claimant.
2. Miss Magu Instructed by Kabue Thumi & Company Advocates for the respondent.