



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 729 OF 2014

(Before D. K. N. Marete)

SETH NYANGWESO LIAGA.....CLAIMANT

VERSUS

METAL CROWNS LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Statement of Claim dated 2nd May, 2014. The issues in dispute are therein cited as;

1. *Unlawful and wrongful termination of Seth Nyangweso Liaga,*
2. *Failing to give notice or pay notice of 12 months notice and gratuity on each completed years.*
3. *Termination of services unlawfully without following the process of law and principles of natural justice and equity as the Claimant was not given an opportunity to defend herself in Section 41 of Employment Act 2007,*
4. *Respondent ignoring its obligation of settling a loan it helped the Claimant secure as the guarantor with Barclays Bank of Kenya.*

The respondent in a Response to the Statement of Claim dated 10th July, 2014 denies the claim and prays that the claim be dismissed with costs.

The claimant's case is that the respondent offered him employment on 17th September, 2009 in which he had a four (4) year stint of service. This employment was based on qualification, competence, performance and ability to handle office.

The claimant's further case is that he successfully served a three (3) month probation period and was issued with a job description which did not include the use of stand and further that every machine be maintained come intact with all its parts.

The claimant's other case is that he was a performer and this earned him various salary raises on 5th February, 2010, 25th February, 2011 and 19th December, 2011 all of which were signals of dedicated service. The respondent further guaranteed him loan facilities from his bank whose security was the pay advice slips from the employer. As at June, 2013, he had an outstanding loan facility of Kshs.,665,040.00

It is the claimant's further case that the respondent refused and ignored the principles of natural justice and equity in termination of his services. This was also in contravention of Sections 40 and 41 of the Employment Act, 2007. It was also tainted with racism perpetrated by the respondent's Director, a Mr. Gurdip who had earlier subjected the claimant to three sessions of compulsory leave, all in favour of foreign Chinese nationals. The claimant was in the end pressurized to sign a discharge certificate with a view to payment of wrongful and unlawfully calculated terminal benefits which he conditionally acceded to. This was *in toto* a contravention of Section 41 of the Employment Act, 2007 in that he was not afforded an opportunity to be heard before such dismissal.

He further enlists his case as follows;

24. *That, in line with the above offences, the court is asked to revoke a work permit issued to the director Mr. Gurdip Singh K/E/P class 'A' under relevant sections of immigration Act that prohibits violation of employees rights, and that the circumstances of renewals of this work permit for more than period allowed by the law should be investigated.*

He claims as follows;

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

Kshs.34,628/= x 12 months=.....Kshs.415,536/=

b) Compensation for disturbance by terminating the services of the claimant unlawfully months.....Kshs.415,536/=

c) Severance pay of 15 days for each completed year = Kshs.34,628/= x 4 years.....
.....Kshs.69,256/=

d) Compulsory leave the Respondent sent the Claimant unlawfully =Kshs.34,628/= /26 days x 23 days
=.....Kshs.30,632.46/=

e) Compensation for the months the Claimant has been out of work to the time of filing this case, -

Kshs. 34,628/= x 8 months.....Kshs.227,024/=

f) Full settlement of loan guaranteed by the respondent,.....Kshs.665,040/=

g) Full settlement of accumulated loan interest, details with Barclays Bank

h) Cost of this suit plus interest.

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

He prays as follows;

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 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's case is a denial of paragraph 5 of the claim and contends that the claimant should have had a stand on the main wheel shaft which he very well knew but ignored. She also denies the various overtures at loan guarantee for the claimant on her part.

The respondent's further case is that of lawful termination of employment and a denial of the racist and frustration claims made by the claimant. She also avers that the claimant signed the discharge certificate voluntarily and only denies this at his hour of need.

The respondent further avers that the claimant and had been warned of poor performance but failed to heed thus forcing his termination of service. This was apt and lawful in circumstances. Further, this court has no power to grant the prayer on revocation of the work ticket of Mr. gurdip as prayed at paragraph 24 of the claim.

This matter came to court variously until the 15th October, 2018 when the parties agreed on a disposal by way of written submissions.

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 her written submissions dated 1st November, 2018 reiterates his case of unlawful termination of employment and a violation of sections 35, 41, 43, 45 and 47 (5) of the Employment Act, 2007.

The claimant further seeks to rely on the authority of **Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd, Industrial Court Cause No. 66 of 2012** where the court observed as follows;

a) Section 41 of the Employment Act, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the Act, the right to a hearing was not part of the employment contract unless it was expressly incorporated into the contract by agreement/staff manuals or policies of the parties or through regulations for public entities.

b) An employer was free generally to dismiss for a bad reason or a good reason but on notice or payment in lieu of notice. The employer could even dismiss for no reason at all. There was no obligation to notify or listen to any representations by the employee.

c) The law was very harsh on employees. I believe this could have been one of the factors which led to incorporating what has long been referred to in administrative law as the rules of natural justice and embodied in the Latin maxim *audi alteram partem* rule into the employment contract. Whatever the reasons, the Employment Act, 2007 has fundamentally changed the employment relationship in Kenya.

d) And what does section 41 of the Act require? The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness.

e) The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

f) Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defense/state his case in person, writing or through a representative or shop floor union representative if possible.

g) Thirdly, if it is a case of termination, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

h) Compliance with the procedural fairness outlined in section 41 of the Employment Act is not a mechanical rote process where an employer is expected to keep a check list. The essentials are to notify an employee of the charges or reasons being contemplated to terminate his services in a language the employee understands, giving him an opportunity to prepare and respond to the charges either in person or colleague/union representative or considering his representations.

i) The Respondent has failed to demonstrate that it notified the Claimant of the charges/reasons for termination or that he was offered an opportunity to prepare and respond before the termination on 12th July 2012.

j) The Respondent has not met the threshold expected of an employer under section 41 of the Employment Act, and to my mind therefore the termination of the Claimant was procedurally unfair.

The respondent in his submissions dated 5th November, 2018 submits that the claimant was issued with a show cause letter dated 15th June, 2013. She further seeks to rely on the authority of **Kenya Revenue Authority vs. Manguiya Salim Murgani(1010) eKLR** as cited in case of **Fulgence Sunza Masai v Kenya Revenue Authority (2014)eKLR** where the court observed thus;

The thrust of Dr. Kuria's submission was that the internal disciplinary procedure of the appellant should have involved an oral hearing of the respondent either by the staff committee or the board being the appellate body or both. However, in our view, the fairness of the hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing. (emphasis added)

The respondent in further support of her case filed an expense analysis for the 2013/2014 financial year in a Respondent's Supplementary List of Documents dated 9th February, 2016. This indicated massive increase in expense analysis in respect of a Mr. Njoroge. The relationship between this and the claimant is not clear.

The respondent in all his case and lists of documents does not adduce any evidence of the procedural and substantive fairness as is required by section 41 and 43 of the Employment Act, 2007. He did not subject the claimant to a fair disciplinary process or even afford him a hearing at all. The reason for dismissal was not thrashed out in a proper forum as provided by the law and therefore cannot stand. The entire process of termination is opaque. It did not offer the claimant an opportunity to present his case, or at all and therefore the authority in **Kenya Revenue Authority vs. Manguiya Salim Murgani(2010) eKLR** she sought to rely on is not applicable to the circumstances of this case. I therefore find a case of wrongful, unfair and unlawful termination of the employment of the claimant by the respondent and hold as such.

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, however, note that the claimant was paid his terminal benefits, including payment in lieu of notice at the time of separation. He was also issued with an affectionate certificate of service.

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

i. 12 months compensation for unlawful termination of employment Kshs. Kshs.34,628 x

12=.....Kshs.415,536.00

ii. The costs of this 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 holding brief for Mr. Omwakwe instructed by Omwakwe & Associates Advocates for the claimant.
2. Mr. Magu holding brief for Kabue instructed by Kabue Thumi & Company Advocates for the respondent.