



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 246 OF 2015

(Before D. K. N. Marete)

MATHEW LATIEMA.....CLAIMANT

VERSUS

RAI PLYWOODS KENYA LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 30th September, 2015. The issues in dispute are therein cited as;

- a) Whether the claimant was unlawfully, unprocedurally and unfairly summarily dismissed from employment by the respondent;*
- b) Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in this memorandum of claim;*
- c) Whether the claimant is entitled to an award of certificate of service and*
- d) Who should pay costs of the suit;*

The respondent in a Respondent's Defence dated 22nd November, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that on or about the 2nd August, 2002, he was employed by the respondent as a Machine Operator at the respondent's Eldoret factory at a salary of Kshs.10,833.00. He served with loyalty, diligence, full dedication and commitment until 6th October, 2012 when he was wrongfully and unlawfully terminated from service. The respondent neglected and refused to pay his full terminal benefits.

The claimant's further case is that his termination of employment by the respondent was unfair, unprocedural and unlawful and grounded on allegations of absconding duty. He denies this and submits that he had orally sought permission from his supervisor to attend to his failing health at Huruma District Hospital and this permission was granted and adduces per annexure 11 – a patient treatment card as evidence of the malady.

He claims;

i. One month pay lieu of Notice

Basic + house allowance *Kshs.12,490/=*

ii. Pending salary of 6 days of October, 2012

6 x 10833/30 days *Kshs. 2166.6/=*

iii. Leave of year 2012

Basic salary *Kshs. 12,490/=*

iv. Severance pay

15 days x yrs worked x basic /30 days

15 days x 10 yrs x 10833/30 days *Kshs. 54,165/=*

v. Compensation for unfair termination

Gross pay x 12 months

12576 x12 months *Kshs.149,880*

TOTAL CLAIM

Kshs. 231,191.6/=

He in the penultimate prays for;

a) Declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated.

b) Kshs. 231,191.6/=.

c) Certificate of Service.

d) Cost 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 case is that the claimant was her employee but denies that he worked as a machine operator or that he was employed on 2nd August, 2002. He was employed as a general employee.

The respondent's further case is that the termination of the employment of the claimant was not wrongful and unlawful or even that it neglected to pay his terminal benefits. Instead, the claimant absconded work and by a letter dated 5th October, 2014 he was requested to show cause why disciplinary action should not be taken against him.

The respondent's other case is that the claimant in answer to the show cause letter, the claimant replied/responded that he had sought permission from his supervisor to be away from work. This was on investigation found to be untrue and he was therefore terminated from employment in a lawful, fair and procedural process. This was in the form of dismissal from employment for gross misconduct.

The respondent denies the claim for severance pay on grounds that the claimant was not declared redundant and also denies compensation for unlawful termination as his termination was proper, perfect and lawful. He also did not work in October and is therefore disentitled to salary for six days in October, 2012 as alleged and claimed.

It is the respondent's penultimate case that the claimant refused to clear on termination and owes an amount of Kshs. 41,271.00 which remains unpaid besides two (2) overalls issued to him but as yet unreturned.

This matter, its chequered history included, was in court variously until the 28th July, 2016 when the parties agreed on a disposal by way of written submissions.

The issues for determination in this cause therefore are;

1. Whether the termination of the employment of the claimant was wrongful, unfair and unlawful in the circumstances.
2. Whether the claimant is entitled to the relief sought.
3. Whether the claimant is entitled to the costs of the cause.

The claimant in his written submissions on 2nd August, 2016 reiterates his case as pleaded. He moves on to buttress his claim by a presentation of the following supporting documents.

- i. Copy of payslip (see page 6 of the memorandum of claim)
- ii. Letter of summary dismissal (see page 7 of the memorandum of claim)
- iii. Medical chits from Huruma District hospital (see page 8 of the memorandum of claim)
- iv. Tabulations on page 9 of the memorandum of claimant
- v. Demand letter dated 28th August, 2015 (see page 10 of the memorandum of claim)

He forments a case of unlawful termination of employment and grounds this as follows;

- a) *The respondent did not give the claimant termination notice as provided by Section 35 (1) (b) (c) & 36 of the Employment Act;*
- b) *The respondent denied to give the claimant his lawful leave days contrary to Section 28 (1) of the Employment Act and claimant's contract of employment.*
- c) *The respondent terminated claimant's employment without following the procedure laid down in the Employment Act, especially the procedures laid out in Section 45 and 41 of the Employment Act.*
- d) *The respondent terminated claimant's employment without proving that the reason for the termination was valid as provided under section 43 and 45 of the Employment Act.*
- e) *The respondent did not act in accordance with justice and equity as provided by section 45 (2) and 4(b) of the Employment Act.*
- f) *The respondent did not give the claimant his lawful rest days and that the claimant worked during holidays without pay contrary to Section 27(2) of the Employment Act.*
- g) *The respondent failed to pay the claimant his 12 months wages for loss of employment as*

provided under Section 49 (c) of the Employment Act.

h) The respondent failed or neglected to give the claimant a Certificate of Service contrary to Section 51 of the Employment Act.

It is the claimant's case that the respondent's defence is a sham which does not disclose a cause of action against the claimant and is largely frivolous and vexatious. It lacks compliance with paragraph 14 of the Industrial Court (Procedure) Rules, 2010 and Order 2 of the Civil Procedure Rules. He prays that this be struck out on the following grounds;

a) The defence discloses no reasonable cause of action or defence in law;

b) It is scandalous, frivolous and vexatious and

c) That the defence is an otherwise an abuse of the process of the court;

The claimant further seeks to rely on the authorities of;

Section 45 of the Employment Act, 2007 provides that;

“No employer shall terminate the employment of an employee unfairly.

A termination of employment by an employer is unfair if the employer fails to prove

a) That the reason for termination is valid.

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

(i) Related to the employee’s conduct, capacity or compatability; or

(ii) Based on the operational requirements of the employer;

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

The claimant further seeks to rely on the authority of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR** where the Court held that;

“... 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.”

Section 45 (4) (b) of the Employment Act, 2007 provides:-

“... that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee”

Further, the claimant sought to rely on the authority of **Alphonse Machanga Mwachanya Vs Operation 680 Limited (2013) eKLR**, the court summarized the legal fairness requirements for termination of employment on grounds of misconduct (including gross misconduct) poor performance or physical incapacity as 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 understand 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 explanation 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 the case of **Nicholus Muasya Kyula V Farmchem Limited Industrial Cause Number 1992 of 2011; (2012) LLR 235 (ICK)**, also submitted in support of the claim, the court held that:-

“It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.”

Again, in the case of **Kabengi Mugo V Syngenta East Africa Limited Industrial Cause Number 1476 of 2011** court held that;

“The Kenyan employment law no longer accepts that “at will doctrine” whereby an employer can fire employees at will, for any reason or no reason.”

And lastly in the case of **Donald Odeke V Fidelity Security Limited Industrial Cause Number 1998 of 2011; (2011) LLR 277** the honourable court held that;

“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 in her written submissions also reiterates her case. She opens by rubbishing the claimants submission that the respondents defence be struck out for being filed out of time as being misconceived as this was strictly by an arrangement of the parties and consented inter parties. Again, the submission that the defence is hollow is tasteless in that a case of absconding duty on the part of the claimant is disclosed therefore imbuing this with validity and legality.

The respondent supports a case of fair and lawful termination of the employment of the claimant as chronicled in his list of documents and supplementary list of documents dated 26th January, 2016 and 24th February, 2016 as follows;

1. First warning letter dated 12th January, 2010.
2. Second warning letter dated 6th August, 2010.
3. Notice to show cause letter issued to the claimant and dated 27th March, 2012
4. Letters from Block Board Department to Personnel's office dated 12/1/2010, 5/8/2010, 28/4/2011, 27/3/2012 and 20/6/2012 respectively.
5. Attendance status report for the period 1st July, 2012 to 30th September, 2012.
6. Medical report from Moi Teaching and Referral Hospital dated 2nd July, 2012.

The respondent submits that the claimant was issued with several show cause letters dated 27th March, 2012, 22nd June, 2012 and 5th October, 2010 but failed to do so and therefore the dismissal for gross misconduct.

The respondent further submits compliance with sections 41(1), 44, 45 (1) and 47(5) of the Employment Act laws positioning hereof for a case of lawful termination of employment. It is her further case that the claimant was a miscreant and not salvable as an employee. I agree.

A scrutiny of the case for the respective parties brings out a case in favour of the respondent. This is because her case and evidence demonstrate a clear case of absconding duty by the respondent. This amounted to gross misconduct on his part, resulting in dismissal from service. The claimant does not come out of his way to rebut this overwhelming case of misconduct as enunciated by the respondent. Instead, he elaborately cites a case of violation of the Employment Act and unlawful termination which he fails to establish and illustrate in evidence. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, the claimant would not be entitled to relief, or at all.

I am therefore inclined to dismiss the claim with costs to the respondent. And this answers all the issues for determination.

Delivered, dated and signed this 31st day of January, 2017

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the Claimant.
2. Mr. Isiji instructed by Nyairo & Company Advocates for the Respondent.