



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 111 OF 2016**

*(Before D. K. N. Marete)*

NAFTALI AYOT OKANJA.....CLAIMANT

VERSUS

RAI PLYWOODS KENYA LIMITED.....RESPONDENT

**JUDGEMENT**

This matter was brought to court vide a Memorandum of Claim dated 24th June, 2016. 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 Reply to Statement of Claim dated 16th July, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that on or about 6th March, 2008 he was employed by the respondent as a General Worker at a salary of Kshs. 9,400.00. This grew gradually and at the time of unfair termination he earned Kshs. 21,000.00.

The claimant's other case is that he served with loyalty and diligence until the 10th July, 2013 when his services were unlawfully and unfairly terminated by the respondent on grounds/allegations of abscondment from duty. This is denied.

It is the claimant's case that the termination of his employment was a frustration of the Employment Act, 2007 as follows;

- 7. The claimant submits that the respondent terminated his services summarily without following the right procedure laid down in the Employment Act, 2007.*

8. The respondent violated Sections 41(1) of the Employment Act 2007 which provides that when an employer intends to dismiss or terminate the employment of an employee for among other reasons misconduct, it must explain to the employee in a language the employee understands the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. The claimant contends that the respondent never explained to him the reasons for the intended dismissal.

9. Section 44(4) of Employment Act lists matters which amount to gross misconduct and which would entitle an employer to summarily dismiss an employee; however the same provides that an employee should be given an opportunity to dispute the truthfulness of the accusation. The claimant submits that the respondent did not give him a chance to dispute the correctness of the accusation before dismissing him.

10. The Claimant avers that the termination was unfair because the respondent did not act in accordance with justice/equity and it failed to prove that the reason for termination was valid thus violated section 45 (2)(a) and 4(b) of the Employment Act, 2007.

11. The claimant avers that the termination was unlawful and/or illegal on the following grounds;

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 failed to pay the claimant his 12 months wages for loss of employment as provided under Section 49 (c) of the Employment Act, 2007.

g) The respondent failed or neglected to give the claimant a certificate of service contrary to section 51 of the Employment Act.

He prays as follows;

i. One month pay lieu of Notice

Basic + House allowance.....Kshs. 21,000/-

ii. Pending salary of 10 days for July, 2013

10 x 21,000/26 days.....Kshs...8,076/-

iii. Leave dues (prorate) for the year, 2013.....Kshs.12,250/-

iv. Compensation for unfair termination

Gross pay x 12 months

21,000 x 12 months..... Kshs.252,000/-

**TOTAL CLAIM**

**KSHS.293,326/-**

In the penultimate, the claimant prays thus;

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

*(b) Kshs. 293,326/-*

*(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 denies having employed the claimant as a general worker on or about 6th March, 2008. She also denies the starting salary of Kshs.9,400.00 on any incrementals thereof.

It is the respondent's further case that the claimant's service was not diligent as claimed and that his career in service was littered with warnings and suspensions before his ultimate dismissal. This dismissal was fair, lawful, procedural and in accordance with the law and procedure on termination of employment.

The respondent's other case is that the claim was dismissed as a consequence of gross misconduct as follows;

*a) Absenting himself from work*

*b) Failure to report to duty*

*c) Leaving the work place untidy and dirty*

*d) Smoking in the work place*

*e) Allocating himself duties*

*f) Found in possession of overalls which had been allegedly stolen.*

*g) Leaving the work place without leave/permission*

*h) Failure to perform the duties allocated.*

*i) Found carrying pallets belonging to the company without permission.*

The respondent therefore rests a case of lawful dismissal that was in tandem with the tenets of justice and equity. She therefore denies the claim of terminal dues on the midst of a fair termination as pleaded. She also denies a violation of Sections 41(1), 44(4) and 45(2), Employment Act, 2007 and puts the claimant in strict proof thereof.

It is the respondent's penultimate case that the claim is unmeritorious and an abuse of the process of court which should be dismissed with costs.

This matter came to court severally until the 27th July, 2016 when the parties agreed on a determination 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 his written submissions dated 17th August, 2016 reiterates his case of unlawful termination. This is as follows;

*The claimant pursuant to paragraph 11 of the memorandum of claim states that her termination of employment by the respondent was unlawful, unfair and illegal on the grounds that;*

- a) The respondents did not give the claimant termination notice as provided by section 35(1)(b) (c) & 36 of the Employment Act, 2007.*
- b) The respondent dismissed the claimant without proofing that the reason for the termination was valid as provided under section 43 and 45 of the employment act 2007.*
- c) The respondent denied the claimant her lawful leave days contrary to section 28(1) the employment act 2007 and the claimant's contract of employment.*
- d) The respondent terminated the claimant's employment without following the procedure laid down in the employment act, especially procedures laid down in section 45 and 41 of the employment act.*
- e) The respondent failed to give the claimant certificate of service as required under section 51 or the employment act.*
- f) The respondent failed to pay the claimant her 12 months wages for loss of employment as provided under section 15 (c) of the Labour Institution Act and section 49(c) of the Employment Act.*
- g) The respondent did not act in accordance to justice and equity as provided by section 45(2) and 4(b) of the Employment Act.*

The claimant further sought to rely on Section 8 of the Employment Act, 2007 which provides that;

*“The provisions of this Act shall apply to oral and written contracts”*

*The claimant's contract of writing was reduced down to writing as per the letter of employment stated thereon. Section 9(2) provides that:-*

*“An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with sub-section (3)”*

*That requirement was clearly complied with by the respondent.*

The claimant also sought to rely on Section 45 of the Employment Act, 2007 which 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 the termination is valid*

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

*(i) Related to the employee's conduct, capacity of compatibility; or*

*(ii) Based on the operational requirements of the employer.*

*c) that the employment was terminated in accordance with fair procedure*

It is his submission that the respondent did not fulfill these legal provisions and therefore rendered the termination unlawful.

The claimant further sought to rely on the authority of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR** where the honourable 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.”*

Further,

*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.*

Again,

*In the case of Kenya Petroleum Oil Workers Union v Kenya Petroleum Refineries Ltd (2013) eKLR Justice Radido summarized 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.*

He further relied on the authority of **Kabengi Mugo V Syngenta East Africa Limited Industrial Cause Number 1476 of 2011** where the honorable court held that;

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

In the case of **Donald Odeke V Fidelity Security Limited Industrial Cause Number 1998 of 2011; (2011) LLR 277** where the honorable 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.”*

In this the claimant concludes his case for unlawful and unprocedural termination of employment.

The respondent in her written submissions enlists a case of lawful dismissal on the following grounds;

- a) Absenting himself from work*
- b) Failure to report to duty*
- c) Leaving the work place untidy and dirty*
- d) Smoking in the work place*
- e) Allocating himself duties*
- f) Found in possession of overalls which had been allegedly stolen.*
- g) Leaving the work place without leave/permission*
- h) Failure to perform the duties allocated.*

These annexures demonstrate a case of misconduct on the part of the claimant in relation to his employment and workplace. This is further supported by the respondent’s submissions as follows;

*“The claimant herein absconded duty and this is evidenced by the attendance sheet. This was a gross misconduct on the part of the claimant. If your honour peruses the list of documents filed by the respondent dated 13<sup>th</sup> July, 2016 and 18<sup>th</sup> July, 2016 it indicates that the claimant has been suspended and warned on several occasions. It is our humble submissions that the claimant was involved in gross misconduct activities sufficient enough to warrant his dismissal.”*

The respondent further submits compliance with Section 41(1) Employment Act, 2007 in that the claimant was awarded an open opportunity as is evidenced by the list of documents dated 13th July, 2016 and 18th July, 2016.

She in the penultimate seeks to rely on Section 47 (5) of the Employment Act, 2007 which burdens the parties to an employment contract to prove or disapprove unfair termination of employment as follows;

*“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.”*

The respondent’s case overwhelms that of the claimant in the circumstances. I therefore find a case of lawful 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 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. Nyachiro instructed by Nyachiro Nyagaka & Company Advocates for the Respondent.