



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.189 OF 2015

(Before D. K. N. Marete)

JOSEPH KAITANO IKOBWA.....CLAIMANT

VERSUS

KHETIA GARMENT LIMITED.....RESPONDENT

JUDGMENT

This matter was brought to court by way of a Memorandum of Claim dated 11th July, 2015. The issues in dispute therein are;

- 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;*
- d. *Whether the claimant is entitled to an award of compensation for breach of contract and*
- e. *Who should pay costs of the suit;*

The respondent in the Respondent's Statement of Defence denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times prior to this suit, he was employed by the respondent as a general labourer at its Eldoret shop with effect from 13th August, 2010 and his earnings as at the time of unfair termination was Kshs. 7500.00. He served with diligence and loyalty until the 10th July, 2013 when the respondent unlawfully, unfairly and unprocedurally terminated his employment and refused to pay his terminal dues.

It is the claimants further case that in the cause of duty, he was ordered by the respondent to accompany a driver as a turn boy as they went out on a duty of sales. On this day, they collected Kshs. 395,000.00 which amount the claimant confirmed before handing the same to the respondent. The respondent then directed him to pick a book for signing from the front of the shop and on return, the respondent then reported that the amount fell short by Kshs.13,000.00. The respondent maintained a deduction of the

disputed amount from his salary but he rejected and therefore the termination.

He claims;

i. *One month pay in lieu of notice*

Basic salary *Kshs. 7915.90/=*

ii. *Severance pay*

15 days x yrs worked x basic/30 days

15 days x 2yrs x 7915.90/30 *Kshs. 7915.90/=*

iii. *Leave dues*

2yrs leave dues

2 months basic salary

7915.90 x 2 months *Kshs. 15831.8/=*

iv. *Unpaid rest days*

4 days x months worked x basic + hse allow/30days

4 days x 20 months x 7915.90/30 days *Kshs.24275/=*

v. *Unpaid public holiday*

11 days per yr x yrs worked x basic/30 days

Kshs. 5343/=

11 days x 2yrs x 7915.90 + 14187/30 days *Kshs. 5805/=*

vi. *Underpayment of wages*

i. *Legal notice no.98 of 1st May, 2010 to April 2011*

Basic + hse allowance – current pay x months worked

622132 – 5000 x 8 months *Kshs. 17224/=*

ii. *Legal notice no.64 of 1st May, 2011 to April 2012*

Basic + hse allowance – current pay x months worked

6999 + 1049.85 – 7500 x 12 months *Kshs. 6586.2/=*

iii. *Legal notice No. 70 of 1st May, 2012 to April 2013*

Basic + house allowance – current pay

7915.90 + 1187 – 7500 x 12 months

vii. *Compensating for unfair termination*

Gross pay x12 months

9103.29 x 12 months

Kshs. 19239.48/=

TOTAL

Kshs.214,032.76/=

He in the penultimate prays for;

- a. *Declaration that the dismissal was unlawful, unprocedural and unfair in the circumstance the claimant is entitled to compensation as prayed for in paragraph 13 above;*
- b. *The sum of Kshs.214,032.76/= as set out at paragraph 13 above.*
- c. *Cost of this suit and interests on (b) and (d) above at court rates from time of filing the suit until payment in full.*
- d. *A certificate of service as per section 51 of the Employment Act.*
- e. *Any other further and better relief the Honourable Court may deem just and fit to grant.*

The respondent in defence denies the claim and avers that indeed, she was not the employer of the claimant and therefore he has no cause of action against herself. The respondent further threatens to file a preliminary objection in defence and also seeks leave of court to enjoin a third party to these proceedings. She therefore prays that the matter be dismissed with costs.

The issues for determination in the circumstances came out as follows;

1. Was the claimant an employee of the respondent?
2. Was the claimants dismissal from employment by the respondent wrongfully, unfair and unlawful?
3. Is the claimant entitled to the relief sought?
4. Is the claimant entitled to a certificate of service from the respondent?
5. Who bears the costs of the claim?

The claimant in his written submissions reiterates his case. In answer to the 1st issue for determination, the claimant submits that it is the employers duty to proffer evidence of employment or employment contract under Section 10 of the Employment Act, 2007. In the circumstance of this case, the employer did not cause the drawing of a written contract and therefore in the circumstances of contradictory statements on the terms of the contract, the employees statement takes sway. There was no challenge or contradiction of the evidence of the claimant by the respondent and therefore the claimants version takes the day.

Again, on the 1st issue for determination: whether the claimant was or was not an employee of the respondent, the parties take antagonistic positions. The claimant in support of his employment by the respondent annexes his membership card for KUCFAW which indicates that he was employed by the respondent as a General Labourer. He also produces and annexes a copy of his identity card that tallies his name to the particulars of the document in support of this position. In further evidence, the claimant annexes his letter of application for a job as a general labourer with the respondent dated 21st July, 2010 and a demand letter to the respondent detailing his claim all at pages 7 and 8 of the claim. All these are not denied, dented or controverted by the respondent.

The respondent in opposition to the claim filed an application by way of Notice of Motion dated 10th August, 2015 seeking the following orders of court;

- I. *This Honourable Court be pleased to grant leave to the defendants/applicants to issue a third party notice to Pemage Security Services Ltd., the former employee of the claimant herein in order to enable the court to justly determine who is liable to the claimants herein.*
- II. *The Honourable Court be pleased to issue directions on the filing and serving of the said Third Party Notice as the end of justice may demand. and grounded on;*
 - a. *That the claimant herein instituted this cause of action seeking damages for unfair termination of employment.*
 - b. *That the said claimant was employed by Pemage Security Services Ltd.*
 - c. *That the said employee was therefore to claim in case of any grievances from Pemage Security Services Ltd.*
 - d. *That the said Pemage Security Services Ltd and Khetia Garments Ltd are two different distinct companies capable of being sued and also to sue.*
 - e. *That from the foregoing it is apparent that the issue related to or concerned with the subject matter of this claim can only be properly determined as between the claimant, the Respondent and the Third party or between any and either of them.*
 - f. *It is in the interest of justice that the orders herein are sought.*
 - g. *That the prayers sought shall not prejudice the claimant's case.*
 - h. *That in the circumstances it is fair and just that this application be allowed in its entirety.*

The respondent further filed third party notice to Pemage Security Services highlighting that the actual employer of the claimant was the third party but in all, this process was not pursued to conclusion, or at all. This not assist her case.

The claimant in his written submissions again engages Section 8 and 9 of the Employment Act, 2007 in that the law covers oral and written contracts and that where the employment is for more than three (3) months the employer is obliged to make a written contract of service. This is as follows;

“Section 8 The provisions of this Act shall apply to oral and written contracts.”

“Section 9 (2) 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).”

The claimant also sought to rely on the authority of **Edward Isedio Mukasia Vs Eldo Supermarket Ltd [2015] eKLR** where this court reiterated the position in law at Section 10 (7), of the Employment Act, 2007 as follows;

“Section 10 (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disapproving an alleged term of employment stipulated in the contract shall be on the employer.”

This mandates the employer to abide by the requirements of Section 10(1) or alternatively undertake the burden of proving or disapproving an alleged term of employment. The respondent does not fulfill this but instead brings out a case of mere denial both in his statement of defence and written submissions. I

therefore find that the claimant's evidence overwhelmingly supports a case of employment by the respondent and hold as such. This disposes of the 1st issue for determination.

The 2nd issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. This is the claimant's case. The claimant sought to rely on the provisions of Section 45(2) and (4) of the Employment Act, 2007 as follows;

45 (2) *“No employer shall terminate the employment of an employee unfairly.*

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 or compatibility; or*
 - ii) *Based on the operational requirements of the employer;*
- c) *That the employment was terminated in accordance with fair procedure.”*

45 (4) (b) *“.....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.”*

This is provided for in Section 45 (2) and 45 (4) (b) the latter of which emphasizes the need for procedural fairness in cases of termination of employment.

The claimant also submitted on the respondent's failure to observe the provisions of Section 41 that dictates procedural fairness. Here, the claimant illustrated this through the authority of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR** where it was 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 termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.

Further, the claimant also sought to rely on the authority of **Alphonse Machanga Mwachanya Vs Operation 680 Limited (2013) eKLR** in which the court summarized the legal requirements of fairness set out under Section 41 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.*

The failure of the respondent to observe the requisite provisions of law and procedure in the termination of the claimants employment leads to a case of wrongful, unfair and unlawful termination of the claimant's employment and I find as such.

The 3rd issue for determination is whether the claimant is entitled to relief sought. He is. Having countered issue numbers I and II above, the claimant is entitled to relief sought.

The 4th issue for determination is whether the claimant is entitled to a certificate of service. To me, this is a non issue. The law provides for a mandatory issue of a certificate of service by the employer on cessation of employment. Section 51 of the Employment Act, 2007 refers. This applies in the circumstances of this case.

As to costs, these follow the event. And this closes the issues for determination.

I therefore, allow the claim, declare and order relief as follows;

- i. A declaration that the termination of the employment of the claimant was wrongful, unfair and unlawful.
- ii. The respondent be and is hereby ordered to issue the claimant with a certificate of service.
- iii. That the Commissioner for labour be and is hereby ordered to, with the involvement of the parties, compute overtime dues payable to the claimant on or before ninety (90) days of this judgment of court.
- iv. One month's pay in lieu of notice Ksh.7500.00.
- v. Leave dues for two (2) years Kshs. 15,000.00
- vi. 8 months compensation for unfair termination of employment;
=7500 x 8 months = Kshs.60,000.00
- TOTAL = Kshs. 82,500.00**
- vii. Mention on the matter shall be on 4th May, 2016 to confirm computation of overtime dues and other directions of court.
- viii. The costs of this claim shall be borne by the respondent.

Delivered, dated and signed this 28th day of January 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the Claimant.
2. Mr. Wanyoni instructed by Kimaru Kiplangat & Company Advocates for the Respondent.