



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 384 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 26th January 2016)

MWANIKI JOHNSON MWENDWA.....CLAIMANT

VERSUS

TEXTPLAST INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his memorandum of Claim on 22.3.2013 through the firm of Namada & Company Advocates claiming unfair termination/dismissal and none payment of terminal dues and damages.
2. The Claimant's case is that he was employed by the Respondent on 11.12.2007 as a general labourer and continually worked for Respondent earning a gross salary of 12,000/= per month until 15/4/2010 when he was summarily dismissed. He was simply told that his services were no longer required and he was simply advised to leave the Respondents premises.
3. The Claimant states that he was not offered a hearing or explanation and reasons as to his dismissal and therefore fair practices as envisaged by the Constitution Employment Act 2007 and the general principles of natural justice were not adhered to by the Respondents in their decision to dismiss him.
4. In view of the above the dismissal, the Clamant contends that the dismissal was unlawful, unfair and inhumane and he seeks payment of terminal dues as enumerated in his Statement of Claim. He also seeks for costs of this case plus interest therein.
5. The Claimant attached his payslip for February 2010, showing his basic pay as 10,435/= and house allowance as 1,565/= plus -2007/= as cash deducted from his pay for being absent from duty.
6. The Respondents filed their Memorandum of Reply, counter-claim on 18/4/2013 through the firm of Muri Mwaniki and Wamiti Advocates. They aver that the claimant's employment commenced on 1/1/2008 and not on 11/12/2007 as alleged.
7. It is also their case that Claimant was never dismissed but that he deserted work on 15/4/2010 and thereafter on 8/5/2010 abruptly resigned from work without any notice as per Annexure T1.
8. The Respondents further state that the Claimant is not entitled to earnings sought as he deserted duty and later resigned. They aver that they are willing to pay him his dues if any beige leave for 2009/2010

of Kshs.5,418/= and salary for April Kshs.5,822/=.

9. The Respondents have further counter-claimed for 1 months salary in lieu of notice and they want the Claimant's case dismissed accordingly.

10. I have considered the averments of both parties and submissions filed. I note that in cross examination, the Claimant denied ever resigning from duty and that he ever brought a resignation in May 2010. The issues for determination are:

1. *Whether Claimant resigned or was terminated.*
2. *If he was terminated, whether due process was followed.*
3. *What remedies if any the Claimant is entitled to.*

11. On the 1st issue, of course the Claimant denies ever resigning or submitting any resignation letter in May 2010. He denies the resignation letter submitted as his. In this respect, the onus rests on the Respondent to show that the document is indeed the Claimant's. There is even no reply to this alleged resignation letter acknowledging it. It is therefore this Court's finding that the Claimant was dismissed as he states.

12. On the 2nd issue, due process as envisaged was never followed as provided under Section 41 of Employment Act 2007 which states:

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

13. Under Section 45 (1) & (2) of Employment Act 2007:

1. *No employer shall terminate the employment of an employee unfairly.*
2. *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 or compatibility; or*
 - ii. *based on the operational requirements of the employer; and*
 - c. *that the employment was terminated in accordance with fair procedure.*

14. The Respondent has not established the reasons for the termination and the process followed and so I find this termination unlawful and unjustified.

15. I therefore find for the Claimant and award him as follows:

1. ***1 months salary in lieu of notice = 11,330/= being leave days and April salary admitted by the Respondent.***

2. *12 months salary as damages for unlawful termination = 12 x 12,000 = 144,000/=*

TOTAL = 155,330/=

3. *Less statutory deductions.*

4. *The Claimant shall be issued with a Certificate of Service.*

5. *Respondents will pay costs of this suit and interest at Court rates with effect from date of this Judgment.*

Read in open Court this 26th day of January, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wathome for Claimant

Kalu for Respondent