



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.182 OF 2015

(BEFORE D. K. N. MARETE)

JAMES WANGAI MUCHIRI.....CLAIMANT

VERSUS

RAI PLYWOODS (K) LTD.....RESPONDENT

JUDGEMENT

This matter was brought to court by way of a memorandum of claim dated 10th July, 2015. The issue in dispute is therein cited as;

Breach of contract of employment.

The respondent in a Reply to Memorandum of Claim dated 10th February, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times to this suit, he was employed by the respondent as a Machine Operator, the employment having commenced in 1999. He earned a salary of Kshs. 17,624.00.

The claimant's further case is that it was the term of his employment contract that he would serve a permanent and pensionable term alongside other allowances and benefits that come with this position. The respondent, however, without notice, terminated his services in March, 2015, all this to his detriment. It is his further averment that this termination was ill intended, tainted with illegality, a breach of terms and conditions of employment, null and void and a contravention of the principles of natural justice as hereunder;

- i. *Failing to give the claimant a proper notice as the claimant's termination of employment.*
- ii. *Abruptly, unfairly and un-procedurally terminating the claimant employment.*
- iii. *Violating the terms of the contract of employment.*
- iv. *Violating the contract of employment contrary to the employment legislation.*
- v. *The decision to terminate the claimant employment was arbitrary.*

His further case is that the termination was unlawful, unfair, unprocedural and not in terms with the rules

of natural justice and equity and prays as follows;

- a. *A Declaration that the action of termination of the claimant was malicious, unsubstantiated, unlawful and unprocedural.*
- b. *An award as per the assessment of the Labour Officer dated 19th June, 2015 of Kshs.467,845/-.*
- c. *The general damages suffered as a result of the respondent action.*
- d. *An order for payment of due salary for the months when the claimant worked but was not paid.*
- e. *An order that the claimant was being underpaid by the Respondent and therefore be paid lawfully all outstanding appropriate dues.*
- f. *Interest on (b), (d) and (e).*
- g. *Any other relief as this Honourable court may deem fit to grant.*

The respondent in opposition to the claim denies the same and contends that the claimant on termination was issued with a dismissal notice and subjected to a fair hearing before such dismissal. The dismissal was therefore fair, lawful and

procedural and occurred due to his misconduct and breach of terms of employment as follows;

- i. *Stealing company property.*
- ii. *Forging company documents.*
- iii. *Allocating himself work not assigned.*
- iv. *Corhasing other employees.*
- v. *Failure to report on duty.*
- vi. *Reporting to duty while under the influence of intoxicating substances.*
- vii. *Failure to perform the duties allocated.*
- viii. *Absenting himself from work.*

She therefore prays that the claim be dismissed with costs.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this cause?

The claimant in support of his claim filed a witness statement dated 10th July, 2015 in which he reiterates his case. He also annexes a letter of dismissal dated 28th May, 2015, a demand letter dated 26th June, 2015, various pay advice

slips, a letter of calculation of terminal dues by the Eldoret Branch Secretary of Kenya Union of Commercial Food & Allied Workers and a membership card of the union. This is besides a list of

documents all in support of his claim.

The claimant further filed his written submissions dated 22nd February, 2016 in

which he reiterates his case and relies on Section 35 (1) (c) to buttress a case of service pay. It is his further submission that the ground of termination, namely misconduct and forgery was explained by himself and in any event, no warning had been issued prior to termination.

The respondent in opposition files his written submissions dated 15th February, 2016 which brings out the following as issues for determination;

1. *Whether there were sufficient reasons to warrant termination of the claimant.*
2. *Whether due process was followed in the circumstances.*

It is the respondent's submissions that whereas the claimant merely stated as alleged that his dismissal was unfair and unlawful, she demonstrated a case of fair and lawful termination through documents filed in court. This was a case of absenteeism, reporting late at the work place and abscondment from work.

The respondent also demonstrates a case of procedural fairness in the termination as evidenced by the following letters;

1. *A show cause letter dated 8/10/2014.*
2. *Apology letter from the Claimant dated 9/10/2014.*
3. *Disciplinary committee minutes dated 10/10/2014.*
4. *Dismissal letter dated 23/10/2014.*

This she submits is a compliance with section 47 (5) of the Employment Act rests the burden of proving an unfair termination of employment or wrongful dismissal on the employee, while the burden of justifying the grounds for termination of employment or wrongful dismissal on the employer. Her case for lawful termination is therefore established.

The claimant does not attempt to controvert or in any manner rebut the evidence of contradiction of his case as submitted by the defence. He chooses to entirely remain mum on the subject but overtly reiterate his claim. Even his reply to the respondents response to claim and written submissions do not in any manner address this. These only restates his case.

This is a matter where the test of a balance of probabilities and preponderance of evidence clearly applies. This is because the cases of the parties tend to be one of your case against mine. This court is minded to determine as to where, on a balance of probabilities and even preponderance of evidence this matter would flow. I find that this case tilts towards the defence and hold as such. The claim is therefore dismissed with costs to the respondent.

On such a finding, the other issues for determination are relegated to the periphery and may not apply. That is all.

Delivered, dated and signed this 15th day of April 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Mwanguni instructed by Nyachiro Nyagaka & Company Advocates for the respondent.
2. M/s Karuga instructed by Wanjiku Karuga & Company Advocates for the claimant