



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 259 OF 2015

(Before D. K. N. Marete)

DUNCAN MBARIRE.....CLAIMANT

VERSUS

NAIROBI AVIATION COLLEGE LIMITED.....RESPONDENT

JUDGMENT

This matter was originated by way of a Memorandum of Claim dated 4th November, 2015. The issue in dispute are herein cited as;

- a) *Whether the Claimant was unlawfully, unprocedurally and unfairly terminated from employment by the Respondent.*
- b) *Whether the Claimant is entitled to compensation for unlawful, unprocedural and unfair termination from the employment as prayed for in the Memorandum of Claim.*
- c) *Whether the Claimant is entitled to an award of a certificate of service.*
- d) *Who should pay costs and interest of the suit?*

The matter is not defended, or at all. This is despite service to the respondent.

The claimant's case is that he was employed by the respondent as a cleaner on 1st September, 2011. Due to his industry, he was promoted to a watchman in September, 2013. His standing salary was kshs.6,000.00 but this was increased to kshs.7,000.00 in 2012 and kshs.8,000.00 in 2013 and up to kshs.9,000.00 in 2014 up to the date of unfair termination on 9th September, 2015.

It is the claimant's further case that he served dedicatedly, unsavory and without any warning on lawful working in his records to the date of unlawful termination. The claimant's other case is that sometimes in April, 2015 he was given some private clearing work by the respondents Principal, Eldoret Campus which work was out of his scope of work. He accomplished the assignment and was paid in cash leaving an outstanding balance of Kshs.3,000.00. It is his case that his termination was as a consequence of his demand for his Kshs.3,000.00 balance of unpaid dues. This is as follows;

7. Section 41 of the Employment Act, 2007 provides that when an employee intends to dismiss or terminate the employment of an employee from among other reasons misconduct, it must explain to the employee in a language he/she 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 precisely the reasons for his termination from employment.

8. Section 43 of the employment Act 2007 provides that any claim arising out of termination of a contract, the employee shall be required to proof the reason or reasons for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

9. Section 45 (2) of the Employment Act 2007 provides that an unfair termination occurs when the employer fails to proof that:

- a) The reason for termination is valid.
- b) The reason for the termination is a fair reason(s)
- c) The employment was terminated in accordance with fair procedure.

12. The Claimant further avers that the termination was unlawful, unfair and or illegal on the following grounds:

a) The Respondent terminate^d Claimant's employment without following the laid down procedures in the Employment Act and his Employment Contract.

b) The Respondent dismissed the Claimant without proofing that the reason for the termination was valid.

c) The Respondent did not give the claimant termination notice as required under section 35 (b) of the Employment act.

d) The Respondent denied the Claimant his lawful leave days contrary to the Employment Act.

e) The Respondent failed to give the claimant certificate of service as required under section 51 of the Employment Act.

f) The Respondent underpaid the Claimant contrary to the law.

g) The Respondent failed to pay the Claimant his house allowance and/or provide him with a house as per section 31 of the Employment Act.

h) The Respondent failed to regulate the Claimant's working hours as required under section 27 (1) of the Employment Act.

I) 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.

j) The Respondent breach the Claimant's contract of employment.

The claimant therefore presents a case for unlawful termination and prays as follows;

- I) *One month pay lieu of notice*
- Basic + House allowance*
- $10107 + 1516$ *Kshs.11,623.05/-*
- ii) *Compensation for unfair termination*
- (Section 49 (c) of the Employment Act*
- $11623.05 \times 12 \text{ months}$ *Kshs.139,476.6/-*
- iii) *Leave dues for the entire period*
- 1 Month salary x years worked*
- $11,623.05 \times 4 \text{ years}$ *Kshs.46,492.2/-*
- iv) *Service pay*
- 15% 1 year salary x years worked*
- $13,9476.6 \times 15\% \times 4 \text{ years}$ *Kshs.83.685.96/-*
- v) *House allowance for the entire*
- period worked*
- 15% of basic salary x months worked*
- $1.516 \times 48 \text{ months}$ *Kshs.72.768/-*
- vi) *Rest days (192 days)*
- $(11.623.05 - 30) \times 8 \times 192$
- Kshs.9,298.44/-*
- vii) *9 days for August, 2015* *Kshs.3,486.92/-*
- viii) *Overtime:*
- a. *September, 2011 – September, 2013*
- Worked from 7.30 a.m – 7.00 p.m = Overtime 2 hours 30 minutes per day*
- Total 828 hours*
- b. *September, 2013 to December, 2014*
- Worked from 7.50 a.m 8 p.m=Overtime 3 hours 10 minutes per day*
- Total 1395 hours*
- c. *January, 2015 to 9th September, 2015*
- Worked from 7.45 a.m – 7.00 p.m + Overtime 2 hours 15 minutes per day*

Total 580 hours

Total hours overtime for the entire period worked = 2803.50

	2803.50 x 48.431 (hourly rate)	Kshs.135,777.01/-
ix)	Breach of contract 5 months	Kshs.58,115/-
x)	Underpayment of wages	
a)	September 2011 – April 2012	
	Legal notice no.64/2011	
	6999 – 6000=999X8	Kshs.7,992/-
b)	1 st May, 2013 – April 2014	
	Legal Notice No.197/2013	
	9024.15 – 8000=1024.15 x 12	Kshs.10,990.8/-
c)	1 st May, 2013 – April 2014	
	Legal Notice No.197/2013	
	9024.15 – 8000=1024.15 x 12	Kshs.12,289.8/-
d)	1 st May, 2015 – September 2015	
	Legal Notice No.117/2015	
	10107.10 – 9000=1107.10x5	Kshs.5,535/-
	TOTAL CLAIM	Kshs.585,907.73/-

In the penultimate he prays as follows;

- a) Declaration that the Claimant's termination from employment was unlawful, unprocedural and unfair and in the circumstance the Claimant is entitled to compensation as prayed for herein above.
- b) The sum of Kshs.585,907.73/- as set out herein above.
- c) Cost of this suit and interest on at court rates from time of filing suit until payment in full and
- 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 issues for determination therefore are;

1. Whether the termination of the employment of the claimant was wrongful, unfair and unlawful?

2. Is the claimant entitled to the relief sought?

3. Who bears the costs of this cause?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unprocedural. The claimant's case is to this extent. He submits a case of unlawful termination and seeks to rely on the authority of S. 45, of the Employment Act, 2007 as follows;

'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 or compatibility; or

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

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

Again, in 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 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.

He therefore submits that;

... is evident that there was no valid reason given at all over the termination of the claimant from his employment. The Respondent failed to establish a valid reason for the termination of the Claimant's employment as required under Section 45(2) of the Employment Act, 2007. Put another way, there was no substantive justification for the termination of the Claimant's employment.

Further, in the case of **ALPHONCE MACHANGA MWACHANYA VS OPERATION 680 LIMITED [2013] EKLR**, the court 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.

Again, in the case of **NICHOLUS MUASYA KYULA V FARMCHEM LIMITED INDUSTRIAL CAUSE NUMBER 1992 OF 2011; [2012] LLR 235 (ICK)** 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.”

In the case of **KABENGI MUGO V SYNGENTA EAST AFRICA LIMITED INDUSTRIAL CAUSE NUMBER 1476 OF 2011** where the 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.”

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.”

..... in view of the a foregoing, there is no evidence that the Claimant was subjected to either the procedure above, the disciplinary procedure set out in Section 41 of the Employment Act, 2007 or the Respondent's internal disciplinary procedural rules if any at all. The claimant submits that he was not issued with any notices to show cause and neither was he heard prior to termination from employment. Our prayer therefore is that you find the procedure adopted by the Respondent by summarily terminating the Claimant irregular. That the termination of the Claimant's employment was unfair for want of both substantive justification and procedural fairness.

The claimant in his pleadings and written submissions foments a case of unfair termination of employment. The claim is not defended and the respondent therefore does not offer any rebuttal of the issues raised by the claimant. In the circumstances, these pass for the truth. I therefore find a case of wrongful, unfair and unlawful termination of the employment of the claimant by the respondent and hold as such.

On a finding of unlawful termination of employment, the claimant would be entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

- i. That a declaration be and is hereby issued that the dismissal of the claimant by the respondent was unlawful, unprocedural and unfair in the circumstances.
- ii. One month's salary in lieu of notice - Kshs. 9,000.00.
- iii. Six (6) months compensation for unlawful termination of employment Kshs. 9,000.00 x 6 = Kshs 54,000.00.
- iv. Pending wages for 9 days in August, 2015 Kshs. 2,700.00

TOTAL = Kshs. 65,700.00

- v. The respondent be and is hereby ordered to issue a certificate of service to the claimant within fourteen days of these orders of court.

vi. The costs of this claim shall be borne by the respondent.

Delivered, dated and signed this 26th day of May 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimant.
2. Mr. Koech instructed by Koech Chepkurui & Associates, Advocates for the respondent.