



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.213 OF 2015

(Before D. K. N. Marete)

DANIEL KIPLAGAT KIPKEIBUTCLAIMANT

VERSUS

SMEP DEPOSIT TAKINGMICRO FINANCE LIMITED.....RESPONDENT

JUDGMENT

This matter was brought to court by way of a Memorandum of Claim dated 22nd July, 2015. The issues in dispute are therein 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 employment as prayed for in this Memorandum of Claim.*
- c) *Whether the Claimant is entitled to an award of a certificate of service.*
- d) *Whether the Claimant is entitled to payment for breach of contract and,*
- e) *Who should pay costs and interest of the suit.*

The respondent vide a Defence dated 5th October, 2015 denies the claim and prays the same be dismissed with costs to herself.

The claimant's case is that at all material times prior to this suit, he was employed by the respondent on contractual terms as an ICT assistant with effect from 1st

January, 2008. The respondent renewed his contract on 23rd March, 2011 due to his industry and diligence and this was further renewed on 8th March, 2012 for 3 (three) years ending on 22nd March, 2015. He earned a salary of Kshs.48,000.00 as at the time of unfair termination of employment.

It is the claimant's further case that he served with loyalty, diligence and full dedication until 23rd June,

2014 when he was unfairly, unprocedurally and unlawfully terminated on allegations of desertion of duty. This is denied.

The claimant avers that on 14th June, 2015, he was unwell and went to see a doctor and on 21st June 2015, which was a Saturday, his health deteriorated whereupon he orally sought permission to seek medical attention at Eldoret. He puts it as follows;

“The claimant further avers that on 14th June, 2015 he was not feeling well and went to visit a doctor and that on 21st June, 2015 which was a Saturday at around 12 noon his state of health became worse and he orally sought permission and went to see a doctor at Eldoret Hospital. That on Sunday, 22nd, June, 2015 was his off day and as such he was not to report on duty. That on 20th June, 2015 it was a Friday and he was on duty the entire day. That the claimant was given a dismissal letter in the morning of Monday, 23rd June, 2015 without being heard or given an opportunity to dispute the allegation cited in the dismissal letter.”

It is the claimant's other case that his summary dismissal was illegal and in contravention of S.41, 44 and 45 of the Employment Act, 2007.

7. Section 41 (1) of the employment Act provides that an employer shall before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to an employee in language the employee understands, the reasons for termination 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 intended dismissal.

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

9. Section 45 (2) provides that a termination of employment by an employer is unfair the employer fails to prove:-

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

He prays as follows;

- a. *Declaration that the dismissal was unlawful, unprocedural and unfair in the circumstance the claimant is entitled to compensation as prayed for in paragraph 11 above.*
- b. *The sum of Kshs. 1,955,880/- as set out at paragraph 12 above.*
- c. *Cost of this suit and interests 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 and*
- e. *Any other further and better relief the Honourable Court may deem just and fit to grant.*

The respondent generally denies the claim and particularly denies that the claimant served with loyalty,

diligence and full dedication until 23rd June, 2014 as presented. She also denies unlawful, unfair and unprocedural termination. She further denies the claimant's entitlement to terminal benefits as claimed.

The issues for determination before me;

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 1st issue for determination is whether the termination of the employment of the claimant was unfair, wrongful and unlawful. The claimant in his written submissions dated 1st February, 2016 reiterates his claim and case. He formulates a case of unfair and unprocedural termination on the following grounds:-

- a) *The Respondent terminated Claimant's employment without following the laid down procedures in the Employment Act;*
- b) *The Claimant was not issued with notices and letters to show cause prior to his termination;*
- c) *The Respondent terminated the claimant's employment without proving that the reason for the termination was valid;*
- d) *The Respondent failed to regulate the Employee's working hours of the Claimant. The Claimant worked overtime with no pay contrary to section 27 (1) of the employment Act;*
- e) *The Respondent failed to pay the Claimant his 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.*
- f) *The Claimant breached the contract of employment. The Claimant's last contract of employment commenced on 23rd March, 2012 and was to end on 23rd March, 2015.*
- g) *The Respondent failed to pay the Claimant his lawful leave dues contrary to the section 28 (1) of the Employment Act;*
- h) *The Respondent did not act in accordance with justice and equity in terminating his employment contrary to section 45 of the Employment Act.*
- i) *The Respondent did not accord the Claimant the opportunity to be heard before terminating his employment contrary to Employment Act and rules of natural justice;*
- j) *The Respondent failed to pay service pay to the Claimant contrary to section 35 (5) of the Employment Act.*
- k) *The Respondent failed/neglected to give the Claimant certificate of service as required under section 51 of the Employment Act.*

The respondent disagrees with a case for unlawful termination but that the termination was lawful and a consequence of gross misconduct which was procedurally communicated to the claimant vide a letter dated 23rd June, 2014. She further relies on S.47 (3) of the Employment Act, 2007.

“47 (3) The right of the employee to present a complainant under this section shall be in addition to his right to complain to the Employment court on the same issue and the right to complain of any other infringement of his/her statutory rights.”

and submits that it is the onus of the claimant to prove unfair termination.

Further the respondent relies on S. 44 (3) of the Criminal Procedure Code as follows;

“s.44 (3) The provisions of section 219 of the Criminal Procedure Code (Cap 75) shall not apply to any proceedings instituted under this Act for the non-payment of wages to an employee”

The matter came to court variously and on 28th January, 2016 the parties agreed on a disposal of the cause by way of written submissions.

The claimant in his written submissions dated 1st February 2016 substantially reiterated his case for unlawful termination of employment. He seeks to rely on his pleadings and annexures thereto as follows;

- a. *Service contract for the period 23rd March, 2011 to 22nd March 2012.*
- b. *Renewal of contract letter dated 8th March 2012. The same commenced on 23rd March 2012 and was to expire on 22nd March 2015.*
- c. *The human resource manual policies amendment dated 23rd 2013.*
- d. *Payslips for March 2013, February 2013, January 2013, December 2012 and August 2012.*
- e. *The letter on page 19 of the Memorandum of Claim*
- f. *Medical documents*
- g. *Tabulations*
- h. *Demand letter dated 13th July 2015*

The claimant in his written submissions discounts the defence proffered by the respondent as a mere denial which does not disclose any cause of action against him. He dismisses this as largely frivolous and vexatious and not in line with the provisions of paragraph 14 of the Industrial Court (Procedure) Rules, 2010 and Order 2 of the Civil Procedure Rules. He prays that the same be struck out in line with provisions of Order 2 Rule 15 in the Civil Procedure Rules for the following reasons;

- a. *The defence discloses no reasonable cause of action or defence in law;*
- b. *It is scandalous, frivolous and vexatious and*
- c. *That the defence is an otherwise an abuse of the process of the court,*

I agree.

The claimant further submits that;

“The claimant was in employment for more than five years. Section 9 of the Employment Act, 2007 obligates an employer to reduce into writing a contract of service which is for more than three months or number of working days in the aggregate amounting to three or more months. 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).”

Again,

Section 10 (7) of the Employment Act also provides that:

“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 disproving an alleged term of employment stipulated in the contract shall be on the employer.”

He further sought to rely on the authority of **Edward Isedia Mukasia Vs. Eldo Supermarket Limited eKLR (2015)** where this court observed as follows;

“Section 10 (7) of the Employment Act, 2007 binds employers to proof of terms of employment in the event of non production of a written contract of employment in all legal proceedings...”

In answer to the issue as to whether the termination of employment was unlawful, the claimant submits a reliance on Section 45 (1) and (2) of the Employment Act as follows;

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 termination is valid;*
 - (b) That the reason for 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.”*

It is his submission that the termination of the employment of the claimant was unlawfully terminated for lack of compliance with the provisions of the law above cited.

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

Again, S. 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.”

It is the claimant’s case that there was no valid reason for termination and therefore a clear absence of a substantive justification for the termination. The provisions of S. 45 (4) (b) remain unmet in the circumstances. The termination fell short of the tenets of justice and equity.

Further, the claimant sought to rely on the authority of **Alphonse Machanga Mwachanya Vs Operation 680 Limited (2013) eKLR**, the court summarized the legal fairness requirements for termination of employment on grounds of misconduct (including gross misconduct) poor performance or

physical incapacity as 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 understand 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 explanation 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.*

This again was not articulated in the process of termination.

The claimant further sought to rely on the authority of **Nicholus Muasya Kyula V FarmChem Limited Industrial Cause Number 1992 of 2011; (2012) LLR 235 (ICK)** where 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.”

The respondent in defence of her case files an escapist defence. I only fall short of striking it out for being a non defence. The submissions by the respondent do not help the case either. The claimant’s case spells out a clear case of failure to comply with the legal requirements of a lawful termination of employment. I therefore find that the termination of employment of the claimant was wrongful, unfair and unlawful and find as such.

With a finding of a case of unlawful termination of employment, the claimant is entitled to relief sought. This answers the 2nd issue for determination.

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 months salary in lieu of notice - Kshs. 48,000.00.
- iii. Six (6) months compensation for unlawful termination of employment Kshs. 48,000.00 x 6 = Kshs. 288,000.00.

- iv. Pending wages for 20 days in June - Kshs. 32,000.00

- TOTAL = Kshs. 368,000.00

- 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.

This answers all the issues for determination.

Delivered, dated and signed this 17th 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.**