



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 683 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th June 2016)

JOEL MAITHYA CLAIMANT

VERSUS

SAJ CERAMICS LIMITED..... RESPONDENT

JUDGMENT

1. The Claimant filed this Statement of Claim herein dated 18th April 2012 on the 24th of April 2012 through the firm of Kilonzo & Company Advocates. The Claimant seeks the following orders:

a. **Reinstatement**

b. **Alternatively, Kshs. 936,397.20 particularized as:**

a. **Terminal benefits = (Kshs. 21,477 x ½ x 10 months) = Kshs.107,385.00**

b. **House Allowance (Kshs. 21,477 x 15/100 x 120 months) = Kshs. 386,586.00**

c. **Payment in lieu of leave for the 12 years the Claimant worked (Kshs. 21,477/30 x 21 x 12 months) = Kshs. 120,271.20**

d. **Three months salary in lieu of notice (Kshs. 21,477.00 x 3 months) = Kshs. 64, 431.00**

e. **Damages for unfair dismissal (Kshs. 21,477.00 x 2 months) =Kshs. 257,724.00**

- c. *Interest on (b) from 20th August 2011 until payment in full*
- d. *Costs of the Claim*
- e. *Any other relief that the Honorable Court may deem fit to grant*

Facts

2. The Claimant was employed as an Assistant Warehouse In charge by the Respondent from the 18th of December 2000 until the 20th of August 2011.
3. On the 22nd of August 2011, the Respondent wrote him a letter terminating his employment with effect from 20th August 2011 and accused him of failing to take instructions from his seniors on several occasions.
4. The Claimant alleges that these allegations were not true and he has never received any written or verbal warning or charge on the said allegations.
5. The Claimant avers that the Respondent did not explain to him reasons as to why he was considering terminating him, nor did he inform him of his failure to take instructions from his superiors or identify which seniors they were referring to. The Claimant states that he was not given the opportunity to have a fellow employee with him on the 18th of August 2011, was not allowed to make any representation nor was he given a proper opportunity to defend himself.
6. For those reasons, the Claimant alleges that he was unfairly terminated, due process was not followed and his dismissal did not adhere to any law.
7. The Respondent filed a Statement of defence dated 20th June 2012 and filed on the same day. In it, the Respondent admits that the Claimant was their employee but denies the claims of unfair termination.
8. The Respondent avers that he warned the Claimant severally on his acts of gross misconduct but this was to no avail.
9. The Respondent claims that he paid the Claimant his house allowance and that he took leave as and when it was due. He further states that re-instatement if ordered is an option but that the monetary claim ought not to be granted as terminal benefits were paid and all other dues were paid and acknowledged by the defendant.

Claimant's submissions

10. In his submissions the Claimant states that his termination went against Section 45 (1) of the Employment Act 2012 as he was not given reasons for his termination. The reason that they purported to give him was not a fair one, was not related to the employees capacity nor was it based on the operational requirements of the employer. He further states that his termination was not in accordance with fair procedure.
11. He further submit that Section 41 of the Employment Act provides that an employer must explain to an employee the reasons for terminating him and that he can have another employee present during the explanation but neither option was presented to him. He states that there were no notices adduced to show the warnings of the misconduct alleged which is in contravention of Section 43 of the Employment Act.
12. To support his case the Claimant relies on the Case of **Sarah Wanyaga Muchiri vs Henry Kathii & another (2014) eKLR** which he submits touches on the test for determining fairness in termination. The case found that:

“Section 45(1) provides that no employer shall terminate the employment of an employee unfairly. Subsection (2) of the same section states that a termination of employment is unfair if the employer fails to prove (a) the reason for termination is valid (b) the reason for termination is fair reason related to the employees conduct, capacity or compatibility or based on operational requirements of the employer and (c) the employment was terminated in accordance with fair procedure”.

13. The Claimant further submits that the Respondent claim that this was a summary dismissal is contradicted by the payment of one months salary in lieu of notice.

14. The Claimant further submits that he was a permanent employee of the Respondent and that casual employment which was his initial engagement can be converted to permanent employment under Section 37 of the Employment Act where a causal employee:

- a. ***Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or***
- b. ***Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and Section 35(1) (c) shall apply to that contract of service.***

15. He submits that it had been over 3 months since his employment with the Respondent started and despite his continued service, the Employer failed to provide a written contract as is required in Section 9 (1) of the Act.

16. The Claimant submits that he is entitled to leave days and housing allowance from 11th September 2000, as the Respondent only adduced evidence of these allowances being paid in 2009, 2010, and 2011 only and not those of the other years which is what he seeks. Reasonable accommodation was not provided in lieu of this payment.

17. The Claimant further submits that he is entitled to his certificate of service which has not been provided.

18. In conclusion and for the forgoing reasons he prays for the claim to be granted as prayed.

19. The Respondent did not file written submissions but he did present a witness in Court.

20. The Respondent’s witness, Wycliffe Kimoi, is a senior Accountant in the Respondent’s organization. He testified that he was employed by the Respondent since 1995 and that the Claimant was known to him. He testified that the Claimant was paid his allowances on the pay slips he produced in Court from 2009 to 2011. Evidence of payments on the years that the Claimant seeks was not sought. He further stated that the Employer had faithfully and dutifully deducted and remitted the Claimant’s NHIF and NSSF dues.

21. He further testified that he was present at the disciplinary hearing on the 18th of August 2011, and that the Claimant refused to reconcile with the allegations which was his duty.

22. He testified that the Claimant was given verbal warnings which led to his summary dismissal in 2011. He further testified that he was paid one months salary in lieu of notice.

23. Having considered the evidence from both parties and the submissions filed herein, the issues for determination are as follows:

1. ***Whether there were valid reasons for the dismissal of the Claimant.***
2. ***Whether the Claimant was subjected to due process before dismissal.***
3. ***What remedies if any to grant in the circumstances.***

24. On the 1st issue, Claimant though employed by the Respondent was never issued with an employment letter but Appendix A and B are proof of this employment relationship. Appendix C is the termination letter and it only refers to a discussion the Respondents had with the Claimant and state that he had failed to take instructions from his seniors on several occasions.

25. His services were then terminated with effect from 20th August 2011. Details of the instructions which Claimant refused to take and from who in particular are not listed. This is the same evidence the Respondents relied upon in Court and they don't state the exact instructions and from who the Claimant refused to take.

26. Section 43 of Employment Act states as follows:

"(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".

27. The law as above provides that reasons of termination must be proved. It is not clear really from evidence adduced what Claimant really did or omitted to do that led to his termination. It is therefore clear that the Respondent did not have a valid reason to warrant termination of the Claimant.

28. On the 2nd issue, there is no evidence that due process was ever followed before Claimant was terminated. The process envisaged is provided under Section 41 of Employment Act, 2007 which states as follows:

"(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".

29. The Respondent only refer to a discussion he had with the Claimant which does not qualify to be a disciplinary hearing under Section 41 of Employment Act and I therefore find that due process was not followed before Claimant was dismissed.

30. I therefore find that Claimant was unlawfully and unfairly dismissed by virtue of Section 45(2) of Employment Act which states as follows:

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.

31. On the last issue, the Claimant avers that he worked for Respondent for 12 years. The Respondent states that Claimant worked for Respondent since year 2000 as a casual but as a permanent employee from 2009. That notwithstanding the Claimant served Respondent from year 2000 and by virtue of Section 37 of Employment Act his casual employment was converted to permanent term after he served even in 2009 for over 3 months.

32. The cumulative period is therefore 12 years. His salary was 21,477/= per month. There is no evidence he was paid house allowance which he is also entitled to by virtue of Section 31 of Employment Act.

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

1. **1 months salary in lieu of notice** = 21,477/=.
2. **House allowance for 12 years** = $15\% \times 12,477 \times 12 \times 12 = 463,903.2$
3. **Leave allowance being 15% of 21,477 x 12 x 12** = 463,903/=
4. **Service pay for 12 years being $\frac{1}{2} \times 12 \times 21,477$** = 128,862/=
5. **12 months salary for unfair termination**= $12 \times 21,477 = 257,724/=$

TOTAL = 1,335,869.2/=

6. **Plus costs.**
7. **Certificate of Service.**

Read in open Court this 30th day of June, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kahiu holding brief for Mr. Ndolo for Claimant – Present

No appearance for Respondent – Absent