



IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1387 OF 2011

(Before Hon. Lady Justice Hellen S. Wasilwa on 22nd June 2016)

MICHAEL MBUGUA KARIUKI CLAIMANT

VERSUS

ENG. A. S. KITOLOLO

T/A KITOLOLO CONSULTANTS ENGINEERS RESPONDENT

JUDGMENT

1. The Claim herein was filed on 11th of August 2011, where the Claimant alleges that his dismissal was unfair, it was done without taking into consideration proper termination procedure and that he was denied an opportunity to be heard.
2. The Claimant prays for judgment against the Respondent for:
 - a. *The Claimant's dismissal be declared wrongful and unfair.*
 - b. *The Claimant be paid his terminal dues which are:*

One month's salary in Lieu of Notice Kshs 18,000.00

Unpaid leave for 7 years Kshs 72,000.00

Service for 6 years

(15 days per year worked) Kshs 30,000.00

Admitted Gratuity Kshs 14,000.00

12 Months Compensation

For unfair termination Kshs 216,000.00

Total Amount Due Kshs 350,000.00

- c. The Respondent be ordered to compensate the Claimant for wrongful dismissal at the equivalent of twelve (12) months gross salary.
- d. The Honourable Court do issue such orders and give direction as it may deem fit to meet the ends of justice.
- e. The Respondent do pay the Costs of this Claim
- f. Interest on the above at Court rates.

Facts of the Case

3. The Claimant was employed by the Respondent as an Office Assistant at a basic salary of Kshs 10,000.00 per month on or about the 12th of July 2009. On the 30th of October 2008, he was promoted to the position of Engineering Technician (Trainee) at a salary of Kshs 18,000.00 per month. His terms and conditions of employment changes in July of 2009 without the payment of his terminal dues and he way now employed under yearly contract.
4. His served diligently and faithfully until 20th April 2011 when the Respondent unlawfully terminated his services without notice, while he was sick and away from work, a fact known to the Respondent. He further claims his dismissal was in bad faith, as he was never given an opportunity to be heard. He sought reinstatement or payment of his terminal dues without success and was informed via letter that he should collect Kshs.14,000.00 being his terminal dues and sign a discharge letter.
5. The Respondent filed a memorandum of Response dated 7th September 2011 where they admit that the Claimant was in their employ but deny each and every allegation contained in the Memorandum of Claim.
6. They aver that the Claimant was paid 25% gratuity at the conversion of his initial contract save for Kshs 14,000.00 which he has to date failed to collect.
7. They further state that the Claimant voluntarily signed up to a new contract in July 2009 and by so doing and receiving Kshs 40,000/= in gratuity, he accepted terms of a new contract.
8. The Respondent avers that the termination came after the Claimant was away from work for one month in March of 2011 and that he was never given a notice, letter or medical report on the Claimant's alleged illness that would have explained his absence from work. He asked the Claimant on several occasions to come and explain his absence but he did not do so, nor did he contact the employer to give proper reasons for his absence. It is because of the foregoing reasons that the Respondent terminated his employment.
9. The Respondent avers that he did not hear from the Respondent until a demand for terminal dues was sent and is yet to see evidence of his medical condition at the time he was away.
10. The Respondent further avers that their action was lawful, justified and the only option they had been left with given the position they found themselves in. For the abovementioned reasons, the Respondent prays that the Claimant's suit be dismissed with costs to the Respondent.
11. In their submission the Claimant reiterates the contents of the Memorandum adding that he was not at any time, given a notice before termination of his services, what he got was a text message asking him not to report to work as his services were no longer needed, which cannot amount to proper notice.
12. Moreover, he submits that at the hearing, the Respondent admitted that he owed him a gratuity balance of Kshs.14,000.00. Further they submit that the Respondent argued that the Claimant only

applied for leave once, which is the only one he took in December of 2009.

13. In the Respondents submission, he points out that the Claimant admitted that he was away in the whole of March 2011, and that he did not produce any medical document to support his claim that his absence was occasioned by illness.

14. They further submit that it was because of this absence that the Claimant was terminated, moreover, they relied on the case of **Kenya Shoe and Leather Workers Union vs Fast Track Management Consultant Ltd [2005] eKLR** where her Ladyship M. Mbaru observed:

“When an employee’s claim is based on unfair termination that is countered with a defense of absconding, this court is thus invited to look at the circumstances of such a case more carefully as where an employee is proved to have absconded duty this is tantamount to gross misconduct and the sanction is summary dismissal without notice. This is as outlined under Section 44 of the Employment Act and more particularly as under Paragraphs 44 (4)(a) as read together with (c).

- a. **Without leave or other lawful cause an employee absents himself from place appointed for the performance of his work.**
- b. **An employee willfully neglects to perform any work which it is his duty to perform, or if he is carelessly and improperly performs any work which from its nature it was his duty, under his contract to have performed carefully and properly”.**

15. They submit that the Claimant is not due to one month’s salary in lieu of notice and compensation for unfair termination as he absconded from work which amount to gross misconduct which entitles an employer to dismiss an employee without notice.

16. They further submit that leave days were traditionally taken at the end of the year when the office would close for the holidays for about 17 days and the balance taken within the year, they also state that he was not entitled to service pay as the contract terms which he signed voluntarily did not provide for the same.

17. For the foregoing reasons, they pray that the claim to be dismissed with costs.

18. Having considered the evidence of both parties, the issues for consideration are:

1. ***Whether there were valid reasons to dismiss the Claimant.***
2. ***Whether due process was followed before his dismissal.***
3. ***What remedies if any this Court can grant.***

19. On 1st issue, the Respondents claim that the Claimant absconded duty for 1 month and that is why he was dismissed. The Claimant on his part insists that he was sick and was away for treatment with the knowledge of the Respondent. The Claimant was however not able to show he was away because he was sick. He didn’t produce any medical documents to prove he was sick during the period he was absent.

20. In September 2010, the Claimant had previously been warned of absenteeism from duty and now the Respondent claim he was also absent in March 2011 and this he admitted. The explanation that he was sick is not proved as he didn’t produce any documents to prove the same.

21. It is therefore my finding that the Respondent had a valid reason to terminate his services as provided for under Section 43 of the Employment Act.

1. On the 2nd issue, it is clear that the Claimant was not subjected to due process. He was just terminated vide a letter dated 20.4.2011 and informed he could pick his gratuity balance of

14,000/=. The process envisaged is 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”.

22. Even if the Claimant had been away without permission, he was still entitled to a hearing and this he was denied. I therefore find that he was treated unfairly in his termination.

23. On issue of leave, the Respondent were able to show the Claimant always went on leave in December when their office was closed so his claim for leave is not viable.

24. I therefore award Claimant:

1. **1 months salary in lieu of notice = 18,000/=.**

2. **Admitted gratuity = 14,000/=.**

3. **6 months salary for unfair termination**

= 6 x 18,000 = 108,000/=

TOTAL = 140,000/=

4. **Certificate of Service.**

5. **Costs of this suit.**

Read in open Court this 22nd day of June, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Tolo holding brief for Kabue for Respondents

Kinyanjui holding brief for Gatumuta for Claimant