



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.212 OF 2015

(Before D. K. N. Marete)

JOHN BUNDE OIRO.....CLAIMANT

VERSUS

WELLS FARGO LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 22nd July, 2015. The issues in dispute are therein listed 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 certificate of service.*
- d) Who should pay costs and interest of the suit;*

This matter is not defended, or at all. The respondent despite service of summons and memorandum of claim did not enter appearance or defend the claim.

The claimant's case is that at all material times to this case, he was employed on permanent terms by the respondent as a Security Guard. This was with effect from the 19th June, 2006. At the time of unfair termination he earned a salary of Kshs. 10,116.00.

The claimant's further case is that he served the respondent with loyalty, diligence and full dedication until the 22nd October, 2013 when he was wrongfully, unprocedurally and unlawfully terminated of his services as employee. The respondent also refused to pay his terminal benefits. He claims that his services were wrongfully, unfairly and without lawful justification terminated by the respondent on allegation that on 17th October, 2013 the claimant absconded his duties and left with a motorbike, carrying and dropping passengers. The claimant avers that the said allegations are not true and that the same were not subjected to fair and proper hearing as by law requires.

The claimant avers that this was unlawful, illegal, unfair contrary to S. 41 (1), 44(4) and 45 (2) and 43 of the Employment Act, 2007 as follows;

7. Section 41 (c) 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 submits that the respondent failed to explain to the claimant the reason for termination from employment contrary the aforesaid provision of the Employment Act.

8. Section 43 (1) of the Employment Act imposes a mandatory obligation on the employer to proof reason or reasons for termination failure to which the termination of employment is unfair within the meaning of Section 45 of the Employment Act.

Section 45 (2) of the Employment Act states that an unfair termination occurs when the employer failed to proof:-

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

It is the claimant's case that the respondent failed to discharge the obligation imposed upon him by the aforesaid provisions of the Employment Act and therefore his dismissal is unfair.

His further case is that the respondent was in contravention of S. 45 of the Employment Act, 2007 in that the termination was not in accordance with justice and equity and also was a violation of Article 41 of the Constitution of Kenya, 2010 that provides for fair labour practices for all. This is as follows;

- a) The respondent terminated the claimant's employment without following the laid down procedure in the Employment Act.*
- b) The respondent did not give the claimant termination notice as provided under Section 35 of the Employment Act.*
- c) The respondent dismissed the claimant without proving that the reason for the termination was valid.*
- d) The respondent failed to pay leave allowance to the claimant contrary to the Section 28 (1) of the Employment Act.*
- e) The respondent failed to pay service gratuity to the claimant contrary to Section 35 (5) of the Employment Act.*
- f) 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.*
- g) The respondent never explained to the claimant the reasons for termination as required under Section 41 (1) of the Employment Act.*
- h) The respondent did not act in accordance with justice and equity in terminating employment contrary to Section 45 of the Employment Act.*
- i) No warning notices were ever issued to the claimant for breach of duty.*

He claims as follows;

i. One month pay lieu of Notice

Basic + Hse allowance

10116 + 1518

Kshs. 11,634

ii. Service Gratuity

18 days x yrs worked x basic + Hse all/26 days

18 days x 7 yrs x 10116/30 days

Kshs. 49,023/-

iii. Leave dues

21 days x yrs worked x basic/30 days

21 days x 2 yrs x 11634/26 days

Kshs.18793.38/-

iv. Compensation for unfair termination

Gross pay x 12 months

11624x 12 months

Kshs. 139,058/-

TOTAL

KSHS. 219,058/-

In the penultimate he prays as follows;

a) Declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstance the claimant is entitled to compensation as prayed in paragraph 11 above.

b) The sum of Kshs. 219,-058/- as set out at paragraph 11 above.

c) Cost of this suit and interests at court rates from time of filing the suit until payment in full and.

d) Any other further and better relief the Honourable Court may deem just and fit to grant.

As aforesaid, this matter is not defended. The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of the claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submissions relies on his witness statement and memorandum of claim in reiteration of his case. Evaluation of evidence and law applicable clearly indicates that procedural aspects of termination were flouted. This is because the allegations against the claimant were heard and satisfactorily determined at the respondent's Eldoret office only for the claimant to be sent away on 22nd October, 2013 without any explanation. Attempts by the claimant to establish the position of his employment were not forthcoming until the 22nd April, 2014

when he was served with a dismissal letter dated 20th October, 2013. This was six (6) months down the line. I therefore find a case of unlawful termination and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having found a case of unlawful termination of employment as above, the claimant is entitled to the relief sought.

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

i. A declaration be and is hereby issued declaring the termination of employment of the claimant was unprocedural, unfair, wrongful and unlawful.

ii. One (1) month salary in lieu of notice - Kshs.10,116.00

iii. Six (6) months salary as compensation

of unlawful termination of employment - Kshs. 60,096.00

TOTAL - Kshs.70,212.00

iv. That the respondent be and is hereby ordered to issue a certificate of service to the claimant within thirty (30) days of this judgement of court.

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

Delivered, dated and signed this 16th day of June 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Co.Advocates for the claimant.

2. No appearance for the respondent.