



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 126 OF 2014**

**ALPHONSE OYUGI OCHIENG ..... CLAIMANT**

**VERSUS**

**CIRCLES CATERERS ..... 1<sup>ST</sup> RESPONDENT**

**KENNEDY IDWASI ..... 2<sup>ND</sup> RESPONDENT**

Mr. Kadere for claimant

Mrs Muchiri for respondents

**JUDGMENT**

**1.** The claimant seeks compensation for unlawful and unfair termination of employment and payment of terminal benefits including:

- (i) One month's salary in lieu of notice.
- (ii) Severance pay for five (5) years.
- (iii) Payment in lieu of leave.
- (iv) Salary under-payment for four (4) years.
- (v) Fourteen (14) days salary from January 2014; and
- (vi) Overtime for nine (9) hours per week for four (4) years.

**2.** The claimant pleads in the memorandum of claim filed on 4<sup>th</sup> February 2014 that he was employed verbally by the respondent as a tailor with effect from 1<sup>st</sup> August 2007 and worked continuously until 15<sup>th</sup> January 2014, when he was dismissed without payment of terminal benefits, notice, reason, warning or hearing. That the dismissal was wrongful and unfair and he seeks compensation and payment of terminal benefits.

**3.** The claimant testified under oath in support of the particulars of claim. He told the court that the 2<sup>nd</sup>

respondent is the director of the 1<sup>st</sup> respondent who employed and dismissed him. He testified that on 12<sup>th</sup> January 2014, he came to work late. That he had previous agreement with the 2<sup>nd</sup> respondent that on the 2<sup>nd</sup> Sunday of the month, he would be attending a board meeting of his church. That he was a seventh day Adventist, and therefore he got off days on Saturdays and worked on Sundays. The claimant had sought to be allowed to report late on every 2<sup>nd</sup> Sunday of the month in writing.

4. The claimant applied to go on leave in February 2014. He filled the leave forms and submitted it to the respondent. The leave form was not returned, but instead, a letter of termination was served on him. In the letter the respondent alleges that the claimant was away from duty on 29<sup>th</sup> December 2013 and 12<sup>th</sup> January 2014 without official leave in spite of three previous warning letters and several verbal warnings.

5. The termination of employment was to take effect immediately on the date of the letter dated 15<sup>th</sup> January 2014. The termination was said to be 'summary' hence no notice or any terminal benefits were offered to the claimant.

6. The claimant's union wrote a letter of demand to the respondent seeking payment of terminal benefits. The same was not heeded hence the suit.

## **Response**

7. The respondents filed a memorandum of response to the claim on 9<sup>th</sup> October 2014. The employment of the claimant is denied by the respondent.

8. The respondents aver that the claimant was an independent contractor working in and sharing the 1<sup>st</sup> respondent's premises. The particulars of dismissal and the claims made against the respondents are therefore denied by the respondents. The respondents pray the suit be dismissed with costs to the respondents.

9. The respondent called Kennedy Idwasi to testify on their behalf. He told the court that he was employed as events organizer for the 1<sup>st</sup> respondent. That the claimant agreed with the respondents to repair linen and other clothing materials used in events. That this was done on the basis of a piece work, contract and therefore, the claimant performed duties as and when there were clothes to be tailored. That when there was no tailoring work, the claimant did manual work for the respondents. That this arrangement was verbal and as such there was no letter of appointment or written contract between the parties.

10. That the claimant performed various tasks during low season and his main problem was absenteeism and reporting to work late.

11. The witness referred to list of documents filed by the respondents on 4<sup>th</sup> December 2015. In the bundle was a letter dated 23<sup>rd</sup> October 2013 addressed to the claimant alleging that the claimant was absent from work on Monday 23<sup>rd</sup> October 2013 without official leave contrary to laid down rules and regulations. The claimant was asked to make an explanation.

12. A written letter dated 1<sup>st</sup> October 2013, written to the claimant to the effect that on 27<sup>th</sup> October 2013, he reported on duty late, at 1 p.m. and claimant was asked to explain.

13. A third letter also dated 23<sup>rd</sup> October 2013 written to the claimant alleges that on undated Monday in October 2013, he failed to report to work and was asked to show cause why disciplinary action should not be taken against the claimant.

14. By a letter dated 23<sup>rd</sup> October 2013, the 2<sup>nd</sup> respondent wrote a warning letter to the claimant in which respondent acknowledges receipt of claimant's explanation dated the 2<sup>nd</sup> October 2013 and asked

the claimant to call the office whenever he was unable to attend office due to illness or otherwise and that the respondent had recommended a particular hospital which the claimant was supposed to attend for treatment.

15. The claimant was then dismissed on 15<sup>th</sup> January 2014 for failure to attend work on 29<sup>th</sup> December 2013 and 12<sup>th</sup> January 2014.

### **Analysis**

16. The claimant admitted being late to work on 29<sup>th</sup> December 2013 and 12<sup>th</sup> January 2014. The claimant explained that he had reported to work on 29<sup>th</sup> December 2013 but was supposed to be on Christmas leave. That they were supposed to report back on 31<sup>st</sup> December 2013. That on 12<sup>th</sup> January 2014, the claimant had attended a church board meeting as had been agreed upon with the respondent in writing. That is why he came late.

17. The claimant denies having received any of the notices to show cause, nor did he receive any of the warning letters produced by the respondent.

18. The evidence by the RW1, contradicts the pleadings by the respondent in material respects in that, whereas the respondents deny having employed the claimant verbally from 1<sup>st</sup> August 2007 stating that the claimant was an independent contractor, RW1 in his sworn testimony states that the claimant worked continuously for the respondents in that he worked as a tailor for the respondents ordinarily and would do manual work for the respondents during the low season.

19. The testimony by RW1 clearly shows that the claimant was an employee of the respondents and his only problem was occasional absenteeism and late coming.

20. It is also clear from the documentation produced by the respondents that they regarded the claimant as their employee, hence the letter of summary dismissal given to the claimant dated 15<sup>th</sup> January 2014.

### **Determination**

21. The issues in determination are;

- (i) Whether the claimant was an employee of the respondents or an independent contractor.
- (ii) If the claimant was an employee, whether the summary dismissal was for a valid reason and in terms of a fair procedure.
- (iii) Remedies, if any available to the claimant.

### **Issue i**

22. A party is bound by its own pleadings. The respondents in paragraph 4 & 5 of the statement of response stated categorically that the claimant was not their employee but an independent contractor. These averments are contradicted by RW1, the only witness for the respondent in his sworn testimony.

23. The evidence by RW1 is consistent with that of the claimant that indeed he was an employee of the respondents and worked continuously for the respondents from 1<sup>st</sup> August 2007 to 15<sup>th</sup> January 2014, a period of six (6) years.

24. It is the court's finding that the claimant was a permanent employee of the respondents and was protected by the relevant provisions of the employment Act, 2007 in terms of notice period, other requirements for dismissal and payment of terminal benefits and compensation in respect of unlawful dismissal,

The court so finds.

**Issue (ii)**

25. Having found that the claimant was a permanent employee of the 1<sup>st</sup> respondent the respondents were bound by law to curtail his employment in conformity with the provisions of the Employment Act, 2007.

26. In this regard, the employer must show that it had a valid reason to summarily dismiss the claimant in terms of section 43 of the Act, once the claimant has made a *prima facie* case of wrongful and unfair dismissal in terms of section 47 (5) of the Act.

27. The evidence before court shows that the respondents did not charge the claimant with any misconduct leading to the dismissal. The claimant was therefore not asked to show cause why his employment should not be terminated for the alleged absence on 29<sup>th</sup> December 2013 and 12<sup>th</sup> January 2014.

28. The claimant was not given opportunity therefore as per requirements of section 41 of the Act, to explain his alleged absence and why he ought not to be dismissed for that. The claimant did not get opportunity to call a union representative in the anticipated disciplinary hearing.

29. The claimant has provided a cogent explanation on the events of 29<sup>th</sup> December 2013 and 12<sup>th</sup> January 2014. This explanation was not contradicted by RW1, the only witness for the respondent.

30. Accordingly, it is the court's finding that the claimant has discharged the onus placed on him in terms of section 47 (5) of the Act, to prove on a balance of probability that the summary dismissal was not for a valid reason and it was not effected in terms of a fair procedure within the meaning of section 45 of the Act.

31. The summary dismissal was therefore unlawful and unfair and the claimant is entitled to compensation in terms of section 49 (1) (c) as read with section 49 (4) of the Employment Act, 2007.

32. In this respect, section 49 (1) (c) provides for maximum compensation of twelve (12) months gross salary. In assessing the appropriate compensation the court is guided by section 49 (4) thereof.

33. In the present case, it is the court's finding that, the claimant did not wish to be reinstated to his job. The claimant had served the respondents for about six (6) years. The respondents denied having employed the claimant. The claimant did not contribute to his summary dismissal because no disciplinary hearing was held to prove misconduct against him. The claimant was not paid any terminal benefits set out in the statement of claim.

34. The claimant expected to serve the respondents for a lengthy period to date of retirement.

35. The claimant suffered loss and damage and in the court's view, in light of the aforesaid considerations, is entitled to ten (10) months salary as compensation for the unlawful and unfair summary dismissal.

36. The claimant earned a monthly salary of Kshs.19,093 which was not contested by the respondents in their pleadings or during the oral testimony of RW1.

37. The court therefore awards the claimant  $(19,093 \times 10) =$  Kshs.190,930.00 compensation for the summary dismissal.

**Terminal benefits**

38. With regard to terminal benefits set out under paragraph 11 of the memorandum of claim, it is the

court's finding that the respondents did not in the respondents' memorandum of response to the memorandum of claim, place the contents of paragraph (11) of the memorandum of claim in dispute. RW1 did not also in his sworn testimony directly deny the specific claims made by the claimant under paragraph (11).

**39.** The terminal benefits set out under paragraph (11) have been proved by the claimant on a balance of probability to the extent that they have not been specifically traversed. The claimant reiterated in his sworn testimony and in the letter of demand that he is owed, and was not paid the terminal benefits set out by the respondents.

**40.** Accordingly, the court finds that the respondent is obliged to pay the claimant as follows;

- a) Kshs.190,990.00 compensation.
- b) Kshs.19,093.00 in lieu of one month notice.
- c) Severance pay of Kshs.47,700 (calculated at 15 days salary for five (5) completed years of service, in terms of section 35 (5) of the Act.
- d) Kshs.11,448.00 in lieu of eighteen (18) days untaken leave.
- e) Salary under-payment for four (4) years as follows;
  - i. May 2013 – January 2014 Kshs.72,747.60.
  - ii. May 2012 – May 2013 Kshs.80,969.00.
  - iii. May 2011 – May 2012 Kshs.57,702.00.
  - iv. May 2010 – May 2011 Kshs.55,702.00.
- f) Unpaid salary for fourteen (14) days worked in January 2014 Kshs.8,904.00.
- g) Nine (9) hours overtime per week for five (5) days Kshs.171,720.00.

**Total award Kshs.717.167.00.**

- h) Costs to follow the outcome.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of July, 2016.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**