



**REPUBLIC OF KENYA**

**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 236 OF 2015**

***(Before D. K. N. Marete)***

**JOSEPH WAWERU NJURURI.....CLAIMANT**

**VERSUS**

**KIRSAM ENTERPRISES LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter is brought to court by way of a Memorandum of Claim dated 3<sup>rd</sup> September, 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 the employment as prayed for in this memorandum of claim.*
- c) Whether the claimant is entitled to payment for breach of contract and*
- d) Who should pay costs and interests of the suit.*

The respondent in a Reply to Memorandum of Claim dated 18th January, 2016 denies the claim and prays that the same be dismissed with costs. The claimant's case is that from 1st April, 2012 he was employed by the respondent as a labourer. He earned Kshs. 2,400 per month. His duties included selling gas to customers and banking. He served the respondent with diligence, loyalty and competently until 20th May, 2015 when he was unprocedurally, unlawfully, orally terminated from service without pay of terminal benefits. This was done on making a demand for his leave, overtime pay and salary increment. At the time of termination, he was underpaid and earned Kshs. 4800.00 per month. It is the claimant's further case that all through his stint of service, he was not granted leave, house allowance, and overtime despite incessant demand for the same. This is as follows;

- 8. The claimant submits that the respondent terminated his services without following the right procedure laid down in the Employment Act.*
- 9. The claimant violated Section 41 (c) of the Employment Act, the same provides that when an employer 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 contends that the respondent never explained to him the reasons for intended dismissal.

10. Article 43 (1) of the Employment Act 2007 provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

11. Section 45 (2) of the Employment Act 2007 provides that an unfair termination occurs when the employer fails to prove that:

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

It is the claimant's case that the termination of employment by the respondent was unfair as it violated the requirements of the above section of the Employment Act.

12. Section 44(4) of the Employment Act lists matters which amount to gross misconduct and which entitles 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 termination of his services.

He claims terminal benefits as follows;

1. One month pay lieu of Notice

$10107.10 + 516.00$  Kshs.11623.10/-

2. 3 years leave

$21 \times 3 = 63$  days  $\times 10107.10/30$  Kshs.21224.90/-

3. 3 years service

$15 \times 10107.10 \times 3/30$  Kshs.15160.65/-

4. Underpayment

i) April 2012 =  $6999 + 104.85 = 8048.85$

$600 \times 4$  wks =  $2400$   $2400/5648.85$  Kshs.5648.85/-

ii) May 2012  $\pm$  April 2013

$7915.90 + 1187.385 = 9103.285$

$$600 \times 4 \text{ wks} = 2400$$

$$9103.85 - 2400 = 6703.285 \times 1 \text{ Kshs.}80493.42/-$$

*(iii) May 2013 ± April 2014*

$$9024.15 + 1352.6225 = 10377.7725$$

$$1200 \times 4 \text{ weeks} = 4800.00$$

$$10377.7725 - 4800 = 55577.7725 \times 12 \text{ Kshs.}66933.27/-$$

*(iv) May 2014 ± April 2015*

$$1200 \times 4 \text{ weeks} = 4800.00$$

$$11623 - 4800 = \text{Kshs.}6823.165/-$$

*(v) May 2014 – April 2015*

$$1200 \times 4 \text{ weeks} = 4800.00$$

$$11623 - 4800 = \text{Kshs.}6823.165/-$$

*5. Days worked in June 2015 = 1st ± 20th June*

$$10107.10/336.90 \times 20 \text{ days} \text{ Kshs.}6738.06/-$$

*6. House allowance*

$$10107.10 \times 15/100 \text{ Kshs.}1516.065/-$$

*7. 12 months compensation for unfair termination*

$$10107.10 + 1516.165 \times 12 \text{ Kshs.} 139477.98/-$$

*14. The claimant avers that the termination was illegal, unjustified, unprocedural, unfair and/or unlawful on the following grounds;*

*i. The respondent did not give the claimant termination notice as required under Section 35 (b) of the Employment Act.*

*ii. The respondent failed to pay leave allowances to the claimant contrary to Section 28 (1) of the Employment Act.*

- iii. *The respondent terminated the claimant's employment without proving that the reason for the termination was valid.*
- iv. *The respondent terminated claimant's employment without following the laid down procedure in the Employment Act.*
- v. *The respondent did not act in accordance with justice and equity in terminating claimant's services contrary to Section 45 of the Employment Act.*
- vi. *The respondent did not give the claimant an opportunity to be heard before terminating his services contrary to Section 44 of the Employment Act.*
- vii. *The respondent failed to pay the claimant his 12 months wages for loss of employment as provided under section 15 (c) of the Labour Institutions Act and Section 49 (c) of the Employment Act.*
- viii. *The respondent did not give the claimant a written contract of service as required under the Employment Act.*
- ix. *The respondent failed/neglected to give the claimant certificate of service as required under section 51 of the Employment Act.*
- x. *The respondent did not pay the claimant house allowance contrary to the provisions of Employment Act.*
- xi. *The respondent failed to regulate the employee's working hours as required under Section 27 (1) of the employment act. The claimant worked overtime without pay.*
- xii. *The respondent did not give the claimant a written contract of service as required under the employment act.*

He prays as follows;

- a) *Declaration that the claimant's termination from employment was unlawful, unprocedural and unfair.*
- b) *The sum of Kshs. 422,518,737/as set out herein above.*
- c) *Cost of this suit and interests at court rates from time of filing the suit until payment in full and*
- d) *A certificate of service as per section 51 of the Employment Act.*
- e) *Any other further and better relief the Honourable Court may deem just and fit to grant.*

The respondent's case is a denial that the claimant was ever its employee and further

- i. *That the claimant was never an employee of the Respondent as alleged.*
- ii. *That no contract of employment exists or ever existed between the claimant and the respondent.*
- iii. *That if the claimant was ever employed by the respondent; he would have received his monthly NSSF payments as it is obligated to its employees.*

She denies the totality of the claim and avers that the same is vexatious, frivolous and lacks merit and should be dismissed with costs. The matter came to court variously until the 30th May, 2016 when the parties agreed on a disposal by way of written submissions. The issues for determination therefore are;

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

The 1st issue for determination is whether the claimant was indeed an employee of the respondent. The claimant in his written submissions seeks to rely on the following provisions of the Employment Act, 2007 in support of his case;

*Section 2 of the Employment Act defines a contract of service to mean: “An agreement, whether oral or in writing and whether expressed or implied to employ or to serve as an employee for a period of time.....”*

*Section 7 of the Employment Act provides that: “ no person shall be employed under a contract of service except in accordance with the provisions of this Act.”*

*Section 8 of the Employment Act provides that “The provision of this act shall apply ot oral and written contracts”*

*Section 9 (2) of the Employment Act 2007 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 by the employee in accordance with sub section (i)”*

*Section 10 (7) of the Employment Act categorically states that: “If in any legal proceeding, an employer fails to produce a written contract or the written particulars prescribed in subsection (1) then the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”*

He further seeks to rely on the authority of **Edward Isedia Mukasia Vs. Eldo Supermarket Limited** where this court held that;

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

Further, the claimant sought to rely on the case of **Meschak Kiio Ikulume v Prime Fuels Limited Industrial Cause number 196 of 2013** where the court observed as follows;

*“In proceedings before the Industrial Court, parties are not always equal as employees do not keep records, a responsibility placed on employers. This is further due to the fact that some claims have statutory foundations on what the employees are entitled to as of right as per the Constitutional provision in article 41 on the right to fair labour practices.*

He therefore submitted that it is the duty of the employer to keep employment records including hours of work and produce the same legal proceedings. There is no known practice or policy within the employment relationship requiring employees to keep records of attendances and hours/days worked. The claimant further seeks to rely on the authority of **Walter Ogal Onuro Vs. Teachers Service Commission (2013) eKLR** where the Court observed as follows;

*“For a termination of Employment to pass the fairness test, there must be both substantive satisfaction and procedural fairness. Substantive justification has to do with the establishment of a valid reason for termination while procedural fairness addresses procedure.”*

The claimant further sought to rely on Section 41 (1) of the Employment Act 2007, subject to section 42 (1) in verbatim, as follows;

*“When an employer 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 employer shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation”*

The respondent never did nor attempted to explain to the claimant the reason for the said termination from employment.

This is further illustrated in the authority of **Alphonse Machanga Mwachanya Vs Operation 680 Limited (2013) eKLR**, where the court summarized the legal fairness requirements 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 understands 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 explanations 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.*

The respondent in opposition to the claim and written submissions denies the existence of an employment contract or even that the claimant served the annexures to the claim to herself. It is her case that the claim is not demonstrated and proven and therefore should not stand. The claimant's in support of his claim annexes the following documents to the claim;

1. A demand letter to the respondent dated 4th August, 2015 by J. Amachika Ojuok, Branch Secretary, KUCFAW.
2. A demand letter dated 4th August, 2015 from the claimant's advocates.
3. A demand letter dated 17th July, 2015 from the Branch Secretary KUCFAW.
4. A demand letter dated 6th July, 2015 from the Branch Secretary KUCFAW.
5. A demand letter dated 20th May, 2015 demanding salary increase by the Branch Secretary KUCFAW.
6. A letter dated 6th January, 2015 demanding salary increment by the claimant.

These to me are indicators of an employment contract *inter partes*. There is no shade of evidence or allegation that they were concocted by the claimant to facilitate his case.

On a test of a preponderance of evidence and balance of probability, this matter tilts in favour of the claimant. This resonates with the submissions of the claimant on the applicable law. I therefore find a case of unlawful termination of the employment of the claimant by the respondent and hold as such.

On a finding of unlawful termination the claimant becomes entitled to the relief sought.

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

i. One (1) month's pay in lieu of notice =Kshs. 4,800.00

ii. Six (6) months compensation for unlawful termination of employment

6 x 48000 = Kshs. 28,800.00

**TOTAL = Kshs. 33,600.00**

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

Delivered, dated and signed this 19th day of July 2016.

**D.K.Njagi Marete**

**JUDGE**

Appearances

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

2. Miss Kamau instructed by Kamau Lagat & Company Advocates for the respondent.