



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 1748 OF 2014

GEORGE OMONDI OTIENO.....CLAIMANT

VERSUS

STEEL STRUCTURES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed this suit on 7th October 2014 and he sought determination of a sole issue that he framed as whether the Claimant's dismissal was lawful and fair. He averred that he was employed in April 2008 as a casual worker earning Kshs. 500/- per day equivalent to a net salary of Kshs. 17,910 per month. He stated that despite his pleas to have a copy of the contract of employment the Respondent vehemently refused to produce the same. The Claimant averred that he was forced to work continuously without any annual leave being given to him. He stated that on or about 8th August 2014, the loading clerk informed the head of department that certain doors had been over sprayed and the Claimant was summoned to the head of department's office and instructed to remove his overall and was dismissed from employment. The Claimant stated that the head of department advised the Claimant that the terminal dues would be sent to him in due course but the sums were not sent. The Claimant asserted that the Respondent declined to give him a contract of service and failed to form a disciplinary hearing to hear the Claimant's case and afford the Claimant an opportunity to defend himself. The Claimant submitted that his terminal dues amounting to Kshs. 555,220/- made up of 12 month's salary for unfair dismissal – Kshs. 214,920/-, 1 month salary in lieu of notice – Kshs. 17,920/-, unpaid annual leave from 2008 to 2014 – Kshs. 75,222/-, house allowance for the years 2008 to 2014 – Kshs. 193,428/-, and gratuity – Kshs. 53,730/-. The Claimant thus sought a declaration that the Respondent's action in dismissing the Claimant from employment was unlawful and unfair. The Claimant prayed for the sums claimed to be awarded as well as a certificate of service, costs of the suit and interest on the awarded sums at court rates.

2. The Respondent filed its memorandum of reply on 9th December 2014 and averred that the Claimant was employed as a casual but denied that the Claimant earned Kshs. 17,910/- net salary. The Respondent denied that the Claimant ever requested for a copy of the contract of employment and an itemized payslip as alleged in the claim. The Respondent denied that it forced the Claimant to work continuously without annual leave and averred that the Claimant was a casual employee who could be deployed and employed when the Respondent needed his services. The Respondent denied it dismissed the Claimant and stated that the Claimant deserted duty and in the alternative averred that if the Claimant's employment was terminated by the Respondent then the termination was occasioned by the Claimant being absent without leave or lawful cause from the place appointed for the performance of his work. The Respondent denied that the Claimant carried out his duties with due dispatch and diligence and denied that the Claimant gave notice of intention to sue.

3. The Respondent filed a list of documents on 21st June 2016 and included in the bundle the minutes of a meeting of 8th August 2014, copies of weekly reports on casuals, casual employment wage list, copy of CBA and copy of memo by Claimant dated 8th August 2014.
4. The Claimant was heard on 27th June 2016 and he testified that he was employed by the Respondent from 2008 and was a casual labourer and was not given a contract though he had sought one. He stated that he was paid Kshs. 597/- which was 17,910/- a month and that he was paid through the account he held at Equity Bank. He stated that the Respondent also paid the NSSF and NHIF dues but no house allowance was paid. The Claimant testified that there was no meeting held prior to his dismissal and that he did not sign the minutes exhibited by the Respondent. He admitted writing the memo dated 8th August 2014 to the Respondent and stated that the Respondent paid him for days worked though it was 2 weeks later. The Claimant sought compensation, notice pay, annual leave pay, house allowance and gratuity. He also sought a certificate of service, costs and interest.
5. He was questioned by Mr. Anyoka for the Respondent and testified that he was employed as a casual and was a casual until the date of termination. He stated that on 8th August 2014 he was not the one spraying but was transferring the items sprayed. He testified that he was told by the storeman that there instructions not to issue him with new material for covering the doors. He stated he was called to an office where the supervisor, Stephen Mutai and others making a total of 5 people were present. He testified that he was told by the supervisor that he had become too familiar as if he had married the supervisor's sister and was told to leave. He stated that when he got to the gate he was blocked and told to return and explain in writing why he had not covered the items well. He testified that he reported the incident to the labour office and when asked about the letter to the labour office he declined to answer questions on the letter. He stated that there was no payment to the union and that he was a member of NSSF. He denied that he was asked to give an explanation and failed to.
6. In re-exam by his lawyer Mr. Gomba, he testified that he was dismissed and sought help from Labour and the Respondent failed to attend meetings at labour. He was referred to the CBA and stated that he never saw the CBA or a payslip and that he did not know if he was paid a house allowance.
7. The Respondent called Enos Opeywo who testified that he was the supervisor in the paint section and that he had worked there from 2004 and was still there in 2008. He stated that he knew the Claimant, a casual employee of the Respondent and that the Claimant would work when there was work. He stated that the Claimant worked as a casual until 2012 when he was confirmed as an employee. He stated that he was the Claimant's supervisor and assigned the Claimant duties each day. He testified that the Claimant had the responsibility to stack the items and ensure they do not get smudged or over sprayed. He stated that on 8th, there were doors which had been painted and there were doors that were to be delivered. When he went to check on the doors he found that the doors had another colour on it and it had to be repainted. He testified that he asked the Claimant why the Claimant had not covered the doors and the Claimant remained mum. He reported to his boss Mr. Kitavi who summoned the Claimant and the Claimant admitted being at fault. He stated that the shop steward, Stephen, Kitavi, himself and the Claimant were present at the meeting and the Claimant was given opportunity to explain what had happened and that the Claimant admitted that he had not covered the doors. He testified that the shop steward sought forgiveness of the Claimant and the Claimant was asked to write an apology letter but the letter the Claimant was to write was not apologetic and he asked the Claimant to write an apology letter but the Claimant left the premises and walked away. He stated that the minutes of the meeting were recorded by Mr. Mutai. He testified that the CBA guided payments and there was a sum for housing incorporated in the pay.
8. In cross-examination by the Claimant's lawyer Mr. Gomba, he testified that the Claimant was employed in October 2012 and that in 2008 the Claimant was a casual. He stated that the Claimant should have a contract and that he could not agree that there was no contract. He testified that the Claimant was given tasks and on 8th August 2012 the Claimant was to stack items that had been painted. He stated that the Claimant was summoned and asked to give an explanation at the disciplinary meeting. He admitted that no notice or agenda of the meeting was given. He stated that the over spray was 2 days prior to the

delivery date of 8th August 2014 and that the Claimant was not dismissed but that the Claimant just left. He testified that the Claimant had no prior warnings and was unapologetic when asked to write an apology letter. He stated that the Claimant was not dismissed and that the averments in the reply to claim were in the alternative and without prejudice.

9. In re-examination, he testified that he was employed in 2004 while the Claimant was employed in 20008 as a casual. He stated that there was a process for discipline and thought that the employees had CBA and that the shop steward gives employees briefs.

10. The Claimant filed submissions on 8th July 2016 while the Respondent filed submissions on 18th July 2016. The Claimant submitted that the Respondent's head of department sacked the Claimant and that the Claimant could not walk away from a job he had served the Respondent faithfully. The Claimant stated that the Respondent did not have a valid reason to terminate the employee. He cited the case of **David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR** where the judge held that Section 43 of the Employment Act has placed a statutory obligation upon the employer to prove that the reasons for terminating the services of an employee while on the other hand Section 45 of the Act requires an employer to prove that the reasons for terminating are valid and fair reasons. The Claimant submitted that the Respondent did not have a valid reason and the fact that the Claimant had never had any complaint for 6 years of service shows the termination to be unfair. The Claimant submitted that even if the termination was substantively fair, the onus was on the Respondent to prove that the termination was procedurally fair as well. The Claimant cited Section 41 of the Employment Act and stated that the Claimant was never given a chance to be heard prior to being terminated. The Claimant quoted the dicta of Radido J. in the case of **David Gichana Omuya v Mombasa Maize Millers (supra)**. The Claimant submitted that he was entitled to the prayers sought as the Respondent had not shown that there was house allowance paid or that NSSF dues were remitted. The Claimant thus sought 12 months, compensation for unfair termination, the leave pay due, gratuity, payment of one month's salary in lieu of notice, costs of the suit and interest thereon at court rates.

11. The Respondent on its part submitted that the Claimant was a casual employee who was employed when work was available and that since 8th August 2014 he has not reported to his place of work and therefore any allegations of termination are untrue. The Respondent submitted that its witness Mr. Opeywa, the supervisor of the Claimant, had stated in his witness statement that the Claimant was advised to write an apology letter but instead wrote a vague and unapologetic letter and thereafter absconded work. The Respondent submitted that the Claimant's dismissal was lawful and fair both in substance and procedure. The Respondent relied on provisions of Section 44(3)(e) and submitted that an employee (sic) is justified in summarily dismissing an employee from his employment if an employee willfully neglects to perform any work which he has a duty to perform or if he carelessly and improperly performs any work which from its nature was his duty under his contract to have performed carefully and properly. The Respondent submitted that the Claimant had failed to perform his duties properly leading to the over spray of stacked doors and leading to loss for the Respondent. The Respondent submitted that the Claimant having committed a breach under Section 44(3)(e) of the Employment Act was therefore not entitled to notice. The Respondent asserted that the Claimant had not reported to his place of work and thus had absconded and was not thus neither entitled to nor available for notice. The Respondent also submitted that the Claimant was not entitled to annual leave except for the period from October 2012, when he was confirmed as a regular employee, until August 2014, a period of 19 months. The Respondent submitted that he can only therefore be paid Kshs. 24,626.25/- for the leave dues. The Respondent submitted that the Employment Act did not make it mandatory for employers to provide gratuity for employees and that the Claimant's claim for gratuity was misconceived and without legal basis. The Respondent submitted that it had discharged its obligation by showing the termination was fair and lawful both in substance and procedure. The Respondent thus urged the Claimant's suit be dismissed as the Claimant had not shown that he had taken any step or attempt to pursue the dispute with the labour office and therefore cannot claim any benefit out of the same. The Respondent submitted that the Claimant is not entitled to costs and therefore the parties should bear their own costs.

12. The claim was on termination and the Claimant asserted that he was unfairly and unprocedurally dismissed from employment while the Respondent asserted that the Claimant deserted employment. The

Claimant's case was that he was not given an opportunity to defend himself against accusations that he had performed his tasks carelessly and without regard to the directions of the Respondent. He denied that he was given an opportunity to be heard. The Respondent on its part asserted that the Claimant had been tasked to stack doors and ensure none was exposed to the paint being applied on other products and that the Claimant did not stack the doors properly leading to a re-spraying and delay in delivery of doors to a client. The Respondent asserted that the Claimant was called into a disciplinary meeting and asked to explain and on entreaty by the shop steward the employer granted the Claimant an opportunity to apologize and resume work which the Claimant declined by walking out of the premises and never returned. The evidence of the Respondent's witness clarified that the Claimant had been a regular employee of the Respondent and was therefore not a casual from October 2012. In the view of the Court, the payments ascribed to the Claimant from October 2012 as a casual were improper given the concession that the Claimant was no longer a casual. The Claimant was entitled to a contract of employment as such regular employee. Under Section 74 of the Employment Act, it is the duty of an employer to keep records. No record was availed of the Claimant's new employment status post October 2012. In my view, the failure to reduce the contract in writing meant that the Claimant was not given a contract binding him to terms and conditions of service. In the case, there was a stacking of doors and the Respondent asserts that the Claimant performed the tasks poorly in terms of Section 44(3)(e) of the Employment Act. The poor performance of tasks by an employee are grounds for dismissal. Under Section 41 there is provision as follows:-

41.(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.

13. In the case of **Gichana v Mombasa Maize Millers** (*supra*) my brother Radido J., at various sections of the judgment, acquitted himself thus:-

Section 41 of the Employment Act requires an employer to notify and explain to an employee in a language the employee understands of the reasons it is considering for terminating the services of the employee. The employer is also under an obligation to hear and consider any representations which the employee may make before taking the decision to terminate an employee.

During the process the employee is entitled to have a fellow employee present and if a union member, a shop floor union representative.

The requirements of section 41 of the Act have long pedigree in administrative/public law and are usually referred to as the rule of natural justice. In employment law and practice, it is called procedural fairness.

And later:-

Compliance with the procedural fairness outlined in section 41 of the Employment Act is not a mechanical rote process where an employer is expected to keep a check list. The essentials are to notify an employee of the charges or reasons being contemplated to terminate his services in a language the employee understands, giving him an opportunity to prepare and respond to the charges either in person or colleague/ union representative or considering his representations.

14. The import of the dicta of the learned judge is that the employer must accord an employee a modicum of hearing before the dismissal. In this case, the Respondent asserts a disciplinary meeting was held that afternoon after the incident of poor stacking. No record was availed of the Respondent notifying the

Claimant of the intended hearing and the only item that the Respondent availed was the document it purported were minutes of the meeting. The same are stated to have been signed by the Claimant. Whereas the Claimant has denied that he signed the document, there is indication that he was called back from the gate as he left and asked to write in response to the allegations made against him. In my view, this suggests that there was some attempt to hear the Claimant. However, the attempt seems to have fallen woefully short of the dictates of the law. As observed, the procedural fairness is not supposed to be a mechanical rote. Instead there could be adaptations to suit the work environment. In a bank for instance, the employer may not want a thieving employee to hang around as the employee is taken through the steps of notification and thereafter disciplinary hearing. In my considered view, a suspension in that circumstance is permitted. In the Claimant's job, there was sufficient time to given the employee a notification of a hearing in the afternoon or the next morning as the incident took place at 9.00am. There should have been that opportunity properly accorded to the employee to enable him give his defence make the determination to dismiss pass muster. The fact that the employer abridged the process and instead made a mockery of procedure, the dismissal was therefore unlawful and unfair. The Claimant was earning a basic pay of about Kshs. 22,200/- a month if the rate applied by the Respondent on the leave dues calculation is taken being Kshs. 740/- per day. This sum was exclusive of house allowance which is calculated at the rate of 15% of basic pay. The salary per month would therefore be Kshs. 25,530/-. The Claimant was entitled to notice before termination which would be compensated by way of salary in lieu of notice. The Claimant as a casual employee was not entitled to leave but from October 2012 till termination in August 2014 was entitled to leave. For the 19 months, the Respondent has calculated the dues as Kshs. 24,626.25. As the Respondent did not show that the Claimant was a contributor to NSSF or another retirement benefits scheme, the Respondent is obliged to pay service which is calculated as 15 days for each completed year of service. The Claimant has effectively been in regular employ for 19 months and therefore can only claim service for one year being Kshs. 12,765/-. The dismissal was unfair and the Court is required prior to granting any award under Section 49 of the Employment Act to consider a slew of factors. Under Section 49 some of the considerations relate to post termination issues such as the ability of the employee to secure alternative employment, whether the Respondent issued an employee with a certificate of service and the conduct of the employee. The Claimant's dismissal was not stated to have had altercations or a fight as he left employment on that fateful day in August 2014 but instead the Respondent declined to issue a certificate of service. The Claimant even reported the dispute to the labour office and the Respondent having stated the reasons for the impasse between it and the Claimant did not make any effort to resolve the matter by at least issuing the certificate of employment. In my view the Claimant would be entitled to compensation but for a period of 6 months given the duration of service and the mode of his termination. The Claimant would also be entitled to costs of the suit.

15. In the final analysis, having found that the termination was unprocedural and unfair, I enter judgment for the Claimant as follows:-

- i. One month salary in lieu of notice Kshs. 25,530/-
- ii. Leave dues Kshs. 24,626.25.
- iii. Service Kshs. 12,765/-
- iv. Compensation for unfair termination Kshs. 153,180/-
- v. Costs of the suit.
- vi. Sums in i), ii), iii) and iv) be subject to statutory deductions in terms of Section 49 of the Employment Act.
- vii. Interest on i), ii), iii) and iv) above at Court rates from date of judgment till payment in full.
- viii. Certificate of service in terms of Section 51 of the Employment Act.

Orders accordingly.

Dated at Nairobi this 9th day of August 2016

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 24th day of August 2016

Hellen Wasilwa

JUDGE