



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAKURU
CAUSE NO. 624 OF 2014
STEPHEN SAGANA KIPKUT.....CLAIMANT

v

LAMINATE TUBE INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. When this Cause came up for hearing on 4 October 2016, Ms. Kiplagat for the Respondent informed the Court that her witness was out of the country.
2. The Court directed that the Cause would be heard at 10.15am after going through the cause list but when the file was called out at 10.20am, Ms. Kiplagat was not in Court. As she had not informed the Court where she was going, the Court directed the hearing to proceed (Ms. Kiplagat turned up much later when another Cause she was involved in was coming up for hearing).
3. The main issues for determination are, *the law on termination of employment, whether the termination of the employment of Stephen Sagana Kipkut (Claimant) was unfair, whether the Claimant was underpaid and appropriate remedies including dues accruing from the employment relationship.*
4. The Claimant gave sworn testimony, while the Respondent did not call any witness nor was its advocate in Court during the hearing.

The law on termination of employment

5. The general law on termination of employment is codified in the Employment Act, 2007.
6. Section 35 envisage written notice before termination of employment; section 41 require an employer to conduct a hearing (procedural fairness); sections 43 and 45 expect the employer to prove the reasons for termination of employment and that the reasons were fair and valid and section 47(5) set out the initial burdens of proof placed on the parties.

Whether termination of employment was unfair

Procedural fairness

7. The Claimant's testimony that he was not given notice of termination was not controverted nor challenged.

8. The notice ought to be in writing.

9. Although the Respondent contended in its Reply to Memorandum of Claim that the termination was lawful in that due process was followed, it did not file with its pleading any document as required by the Rules of this Court to suggest that the Claimant was notified in writing of the termination of employment.

10. It also did not plead that any hearing as contemplated by section 41 of the Employment Act, 2007, was held.

11. In fact the letter informing the Claimant of the termination of employment sought to found the termination on the contractual provision to terminate by paying one month salary in lieu of notice.

12. In the Court's view, such termination of employment could pass legal muster in the pre-Employment Act, 2007 period.

13. That is so because even in cases of summary dismissal, a hearing is envisaged under section 41(2) of the Employment Act, 2007.

14. The Court therefore finds that the Claimant has demonstrated that an unfair termination of employment occurred because written notice was not issued and that no hearing was held.

15. With the conclusion, there is no need to embark on an inquiry as to whether the Respondent has discharged the obligation placed upon it by sections 43 and 45 of the Employment Act, 2007.

Underpayments

16. The Claimant testified that he was a machine operator and that he was underpaid basic wages by Kshs 2,255/40 and house allowance by Kshs 4,838/30.

17. The legal foundation to the underpayments however was not pleaded nor disclosed during testimony.

18. The Court was not informed whether the underpayments arose out of payments below the prescribed minimum wages, which sector or industry the Respondent was operating in and within which locality.

19. This head of claim is therefore legally and evidentially unsustainable.

Appropriate remedies

1 day wage for November 2013

20. The Claimant is entitled as of right to wages up to date of termination of employment and the Court would find in favour of the Claimant in the sum of Kshs 406/15.

October 2013 wages

21. The Claimant filed a letter dated 1 November 2013 which show that the Respondent had offered to pay the same in computation of final dues and that he acknowledged payment.

1 month pay in lieu of notice

22. The Respondent had agreed to pay the same in its letter dated 1 November 2013 and Claimant acknowledged payment.

Gratuity

23. Respondent had computed Claimant's gratuity as Kshs 34,125/- in its letter of 1 November 2013' and

same was paid.

Underpayments

24. This was not proved and is declined.

Compensation

25. The Claimant served the Respondent for about 15 years and considering the length of service, the Court is of the opinion that the equivalent of the maximum 12 months gross wages would be fair and appropriate (pay slip for June 2011 show gross pay of Kshs 23,768/-).

26. Before concluding, the Court notes that the Claimant tactfully failed to produce as an exhibit the letter dated 1 November 2013 in which he acknowledged receipt of certain terminal dues.

Conclusion and Orders

27. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him and orders the Respondent to pay him

(a) Compensation Kshs 285,216/-

29. The other heads of relief are dismissed as Claimant acknowledged payment.

29. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 11th day of November 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Onyancha instructed by Chepkwony & Co. Advocates

For Respondent Ms. Langat instructed by Kamau Langat & Co. Advocates

Court Assistant Nixon/Daisy