



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 310 OF 2013

GODFREY GAITAN ODIANGA.....CLAIMANT

v

KEN KNIT KENYA LIMITED..... RESPONDENT

JUDGMENT

1. Godfrey Gaitan Odianga (Claimant) was employed by Ken Knit Kenya Ltd (Respondent) as a Machine Operator. The date of employment is disputed but he was issued with a formal contract of employment dated 22 October 1996.
2. On 16 September 2013, the Claimant commenced legal proceedings against the Respondent alleging unlawful/unfair termination of employment and seeking notice pay, compensation for unfair termination and gratuity all totalling Kshs 204,030/-.
3. The Respondent filed a Response on 3 October 2013. On 12 March 2014, the Respondent witness statement and documents.
4. The Cause was heard on 11 February 2015. The Claimant filed his submissions on 18 February 2015 while the Respondent filed submissions on 10 March 2015.
5. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *when the Claimant was employed by the Respondent, whether termination of Claimant's employment was unfair and appropriate remedies.*

Commencement of employment

6. The commencement date of employment is material for purposes of calculation of gratuity should the Court find the Claimant is entitled to gratuity.
7. The Claimant did not plead the date of the commencement of his employment with the Respondent. In testimony, he stated that he was employed in October 1994, but was given a written contract dated 22 October 1996.
8. The Respondent through its Human Resources Manager testified that the Claimant was employed in 1996.
9. Because of the failure by the Claimant to plead the date of commencement of employment and in light of his admission that he signed a written contract effective 22 October 1996, the Court finds the effective legal date of employment as 22 October 1996.

Whether termination of employment was unfair

Procedural fairness

10. The Claimant's pleaded case was that he was not accorded an opportunity to be heard or given notice of termination of employment before his dismissal on 22 December 2011.

11. In evidence he stated that he was dismissed on 21 March 2011. He stated that on the material day, the Respondent's security officer told him to go and see the Personnel Officer.
12. The Personnel Officer then told him that he was being dismissed for having shouted at the Respondent's Director during a meeting attended by union representatives on 19 March 2011, showed him a dismissal letter, and after which he was removed by security guards.
13. The Claimant stated that no hearing was held prior to the dismissal, he was not given any warning or notice of dismissal and that he made a report to the Labour Office and the Labour Office wrote to the Respondent on 29 March 2011.
14. Rebecca Chelugot, the Respondent's Human Resources Manager testified that she attended the meeting of 19 March 2011, and that she saw the Claimant shout at the Respondent's Director.
15. In examination in chief the witness did not disclose whether the Claimant was informed of the reasons contemplated for his dismissal and whether he was afforded an opportunity to be heard.
16. In cross examination, she stated that it is the Director who made the decision to have the Claimant dismissed.
17. Under section 41 of the Employment Act, 2007 it is the employer's burden to show it complied with the procedural fairness safeguards before dismissing an employee.
18. In the instant case, the Respondent did not disclose who informed the Claimant of the allegations against him. The Court was also not informed who chaired/led or was present during the hearing where the Claimant was afforded an opportunity to be heard except that it is the Director who took the decision to dismiss the Claimant. The Court was not even told when the hearing took place or the venue.
19. In the view of the Court, where the hearing is not documented through show cause letters and minutes, an employer should at least disclose **what** allegations were raised against an employee, **who** informed the employee of the allegations, **when** the employee was informed, **who** chaired or was present during the hearing and **when** the hearing took place.
20. The Respondent in this case has woefully failed to demonstrate that it complied with the statutory procedural fairness requirements and the Court therefore finds that the dismissal of the Claimant was procedurally unfair.
21. Compliance with the requirements of section 41 of the Employment Act, 2007 is mandatory where the employee is being dismissed for *misconduct, poor performance or physical incapacity*.
22. With the finding, it is not necessary for the Court to discuss whether the Respondent has proved the reasons for the dismissal (section 43 of the Employment Act, 2007) or that the reasons were fair and valid (section 45 of the Employment Act, 2007).

Appropriate remedies

3 months pay in lieu of notice

23. The Claimant sought Kshs 24,486/- being 3 months pay in lieu of notice.
24. He did not lay any contractual foundation for 3 months pay in lieu of notice as opposed to the 1 month provided for in the letter of appointment.
25. The Court would therefore find that he was entitled to the statutory minimum 1 month pay in lieu of notice.
26. The Claimant produced his pay slip for February 2011 and his basic salary at time of dismissal was Kshs 7,112/-. He is entitled to an equivalent as pay in lieu of notice.

Compensation

27. The Claimant sought the maximum 12 months gross wages as compensation. He quantified the same as Kshs 97,944/-.
28. Compensation is a discretionary though one of the primary remedies for unfair termination of employment. The Court's discretion is fettered by the factors set out in section 49(4) of the Employment Act, 2007.
29. The Claimant served the Respondent for about 15 years. Considering the length of service, the Court would award him the maximum compensation assessed as Kshs 97,944/- (based on the gross salary).

Gratuity

30. Under this head of claim, the Claimant sought Kshs 81,600/-. No contractual or statutory basis for this relief was disclosed.
31. If by gratuity the Claimant meant service pay by dint of section 35(5) & (6) of the Employment Act, 2007, he would not be entitled to the same because according to his pay slip, he was a contributor to the National Social Security Fund.

Certificate of Service

32. A Certificate of Service is a statutory entitlement of an employee and the Respondent is under a legal duty to issue the Claimant with one.

Conclusion and Orders

33. The Court finds and holds that the dismissal of the Claimant was procedurally unfair and awards him and orders the Respondent to pay him

- | | |
|---------------------------------------|---------------|
| a. 1 month pay in lieu of Notice | Kshs 7,112/- |
| b. 12 months gross wages compensation | Kshs 97,944/- |

| | |
|-------|-----------------------|
| TOTAL | Kshs 105,056/- |
|-------|-----------------------|

34. The claim for gratuity is dismissed.
35. The Respondent to issue the Claimant with a Certificate of Service.
36. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 10th day of April 2015.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Orina instructed by Manyoni Orina & Co. Advocates

For Respondent Ms. Lusweti instructed by Kitiwa & Co. Advocates