



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAKURU

CAUSE NO. 311 OF 2013

SAMWEL NYARANGI TOMBE.....CLAIMANT

v

KEN KNIT KENYA LIMITED.....RESPONDENT

JUDGMENT

1. Samwel Nyarangi Tombe (Claimant) sued Ken Knit Kenya Ltd (Respondent) on 16 September 2013 alleging unfair/unlawful termination of employment and seeking various reliefs.
2. The Respondent filed a Response on 3 October 2013 and on 10 October 2013, the Claimant filed a Reply to Response. The Respondent filed its Documents on 11 February 2015.
3. The Cause was heard on 12 February 2015, and the Claimant filed his submissions on 18 February 2015. Respondent's submissions were filed on 10 March 2015.
4. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Claimant deserted work or was dismissed, if dismissal, whether it was unfair and appropriate relief.*

Whether Claimant deserted

5. The Claimant pleaded and testified that he was dismissed on 12 December 2011, but was not given a letter of dismissal. He denied that he absconded from work.
6. In cross examination, the Claimant stated that he was issued with an improvement notice dated 7 December 2011.
7. The Respondent in its pleading did not plead that the Claimant deserted duty. Its defence was rather that the Claimant's employment was terminated lawfully and in compliance with the law.
8. The Respondent's Human Resources Manager who testified on its behalf stated that the Claimant was dismissed for failing to report to work. She stated that the Claimant was given a written dismissal letter but she did not produce a copy in Court.
9. The Respondent did not plead or lead any evidence as to the last day the Claimant was at work.
10. Considering that the Respondent did not plead the issue of desertion in its Response and the testimony

of its witness did not disclose the date of desertion, the Court finds that the Claimant did not desert duty but was dismissed.

Whether dismissal was unfair

Procedural fairness

11. Section 41 of the Employment Act, 2007 requires an employer to inform an employee of the reasons for termination of employment and thereafter afford the employee an opportunity to make representations.

12. The Claimant's testimony was that he was dismissed when he reported to work on 12 December 2011, and that he was not heard before the dismissal.

13. In cross examination, the Claimant admitted that he had received a warning over a broken needle and an improvement notice dated 7 December 2011. But he was not cross examined on whether a hearing was held.

14. The Respondent's witness stated that the Claimant was summarily dismissed for not reporting on duty and that the dismissal was fair. The witness did not refer to any hearing in examination in chief. It is only in cross examination that she stated that the Claimant was explained to the reasons for dismissal in the presence of the Head Clerk and *Administration*.

15. The witness also filed a witness statement in which she stated that the Claimant was dismissed after disappearing from work for 2 months without notice and that he was issued with a show cause letter on 10 January 2012.

16. The Respondent did not produce any attendance records either. Even the purported date of desertion was not disclosed.

17. Under the statutory framework governing employment, it is the responsibility of the employer to demonstrate that it complied with the requirements of procedural fairness.

18. In the case under consideration, the Court was not informed **who** informed the Claimant of the reasons for his dismissal, **when** he was informed. A copy of the show cause letter issued to the Claimant was not produced though the witness statement indicated it was appendix 4. No such letter was attached to the statement.

19. Where the hearing contemplated by section 41 of the Employment Act is not documented, an employer should at least disclose who informed an employee of the dismissal reasons, when he was informed and who heard him.

20. This was not done and the Court finds that the Respondent has failed to demonstrate that it complied with the statutory requirements of procedural fairness and therefore the dismissal of the Claimant was procedurally unfair.

21. With the conclusion reached it is not necessary to discuss substantive fairness of the dismissal.

Appropriate remedies

Pay in lieu of Notice

22. The Claimant sought Kshs 24,486/- being 3 months pay in lieu of notice.

23. The letter of appointment produced in Court provided for determination of the relationship by giving one calendar month notice or pay in lieu thereof.

24. This provision is in line with the statutory minimum period in section 35 of the Employment Act, 2007.

25. It is not disputed that the Claimant's full and final settlement dues included one month pay in lieu of notice and therefore this relief is unwarranted.

Compensation

26. Under this head, the Claimant sought Kshs 97,944/- being the maximum compensation.

27. Compensation pursuant to section 49(1) of the Employment Act, 2007 is a discretionary remedy. The Court ought to consider any, some or all of the factors enumerated in section 49(4) of the Act.

28. The Claimant was employed in 2005, and left in 2012 after about 7 years.

29. Considering the length of service, the Court would award the equivalent of 8 months gross wages as compensation.

Gratuity

30. The Claimant sought gratuity of Kshs 32,640/-. He did not lay any contractual basis for an entitlement to gratuity.

31. If by gratuity he meant service pay provided for in section 35(5) of the Employment Act, 2007, he is not entitled by virtue of the fact that his pay slip show he was a contributor to the National Social Security Fund.

Certificate of Service

32. This is a statutory right and the Claimant is entitled to be issued with one by the Respondent

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. 8 months wages as compensation Kshs 65,296/-

34. The relief for gratuity is dismissed.

35. Respondent should issue Claimant with a Certificate of Service within 7 days.

36. Claimant to have costs of the Cause.

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

