



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 96 OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 20th August, 2015)

BENARD MUTUNGA KIIO1ST CLAIMANT

CHARLES MUTUKU MBATHA2ND CLAIMANT

VERSUS

KENYA AEROTECH LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimants herein filed their Memorandum of Claim on 28/11/2011 through the firm of B. M. Musyoki Company Advocates alleging unfair termination of their contracts.
2. The Claimants avers that they were employed by the Respondents on diverse dates being 2006 June and April 2010 respectively. Both claimants were mechanics. They served on contract and the 1st Claimant stated that he was initially employed on a one year contract expiring on 31/12/2006. The contract was renewed and other contracts the last being the one that was to expire on 31/12/2010.
3. As for the 2nd Claimant, he was on contract and the last was to end on 31/12/2010.
4. The 1st Claimant avers that on 31/8/2010, his contract was terminated on allegation that he neglected his duties and was rude to senior members of staff. As for 2nd Claimant his contract was terminated on 12/8/2010 for reasons that he was inefficient and careless in the performance of his work.
5. Both Claimants have stated that before the termination, there was no warning or any disciplinary and neither were they paid anything. At the time of termination the Claimants were earning 21,845/= and 15,000/= per month respectively. They seek payment of their dues including for leave and damages for unfair termination.
6. In cross examination, 1st Claimant stated that he worked upto 20/10/2010 but was not paid his October salary.
7. He denies he slept on duty on 13/8/2010 and that machines broke down. He stated that he was not given a hearing nor a warning.

8. The Respondents on the other hand filed their Memorandum of response on 7/6/2011 through the firm of Njenga Muchai & Associates Advocates. They also called one witness to give oral evidence.
9. It is the Respondents case that the 2 Claimants worked for them s mechanics. That 1st Claimant was assigned duty as a standby mechanic at night. However, there was a time there was a problem of the Qatar Cargo flight and the Claimants were sought to come and repair the machines and 1st Claimant was found sleeping. That 2nd Claimant was uncooperative. The 2 were asked to write their statements to the workshop manager. They were then terminated.
10. As for 2nd Claimant, Respondents also aver that he was working on a Conveyor belt and he filled it less fluid than the recommended amount which caused the machine to break down and gear box ceased to work. It is also alleged that on another occasion he was required to fix an injector pump but he didn't do the work properly and the injector pump broke down and company incurred losses. He even wrote a report to this effect. The Respondents aver that the Claimants became a liability to the company and that is why they were terminated.
11. The witness RW1 stated that he is head of Security and part of his work was to investigate accidents. In this case however, he stated that statements were recorded by the HOD who also gave him a verbal report of what happened. In case of the Claimants he agreed that no disciplinary hearing was ever convened. He also stated that in 2009, 1st Claimant had a case of incitement but his contract was renewed in 2009.
12. I have considered the evidence of both parties and submissions filed herein. The issues for determination are as follows:
 1. *Whether there were valid reasons to terminate the services of the Claimant's.*
 2. *Whether due process was followed before Claimants were terminated.*
 3. *Whether Claimant are entitled to remedies sought.*
13. On 1st issues, the reason given by the Respondents for terminating the Claimants services range from negligence of duty, carelessness being uncooperative etc.
14. The Claimants on their part allege that they never committed any offences and neither were they called upon to explain their side of the story. A report about the Claimants negligence is alluded to and about his inefficiency and careless performance of duty. This report we are not told was made after Claimants were heard.
15. It is this court's finding that the reasons if alluded to, did not amount to reasons which can lead to dismissal from duty summarily as in the case of the Claimants.
16. No hearing was also given to the Claimants as envisaged under Section 41 of Employment Act 2007 which states as follows:
 - “(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.”**

17.I find that the termination of the Claimants was unfair and unjustified within the meaning of Section 45 (1) & (2) of Employment Act 2007 which states as follows:

1. *No employer shall terminate the employment of an employee unfairly.*
2. *A termination of employment by an employer is unfair if the employer fails to prove:*
 - a. *that the reason for the termination is valid;*
 - b. *that the reason for the termination is a fair reason:-*
 - i. *related to the employee's conduct, capacity or compatibility; or*
 - ii. *based on the operational requirements of the employer; and*
 - c. *that the employment was terminated in accordance with fair procedure.*

18.I therefore find for Claimants and award them as follows:

1st Claimant

1. *Salary for unexpired period of the contract 75,000/=*
2. *Leave for 1 month = 15,000/=*
3. *3 months salary compensation for unlawful termination = 45,000/=*

TOTAL = 135,000/=

2nd Claimant

1. *Salary for unexpired period = 4 x 20,043 = 80,136/=*
2. *Leave for 1 month = 20,034/=*
3. *3 months salary compensation for unlawful termination = 3 x 20,034 = 60,102/=*

TOTAL = 160,272/=

4. *Each Claimant be issued with a Certificate of Service.*
5. *Respondents to pay costs of this suit.*

Read in open Court this 20th day of August, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Chege holding brief for Njenga for Respondent

Musyoki for Claimant