



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 111 OF 2013

JUSTUS MBAYA.....CLAIMANT

- VERSUS -

RIVATEX EAST AFRICA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 13th June, 2014)

JUDGMENT

The claimant filed the memorandum of claim on 05.06.2013 through Mirugi Kariuki & Company Advocates. The Claimant prayed for judgment against the respondent for:

- a. **Payment of one month's salary in lieu of notice.**
- b. **Payment of terminal benefits owing to the claimant.**
- c. **General damages equivalent to one year salary for unlawful and unfair dismissal.**
- d. **Issuance of certificate of service by the respondent.**
- e. **Interest on all the above at commercial rates prevailing from time to time till payment in full.**
- f. **Costs of this suit.**

The respondent filed the defence to the claim on 4.07.2013 through Kalya & Company Advocates. The respondent prayed that the claimant's claim be dismissed with costs. A reply to defence was filed on 23.07.2013.

The claimant was employed by the respondent on 5.01.2009 as an electrical foreman in the respondent's engineering department. He was confirmed in employment on 19.05.2009 and promoted to Acting Assistant Engineer by the letter dated 26.01.2010.

The claimant worked and discharged his duties until 14.02.2012 when he received a suspension by way of the internal memorandum from the Human Resource office. The memorandum conveyed to the claimant that the respondent's management was concerned with the way the claimant had been handling electric faults leading to unnecessary delays and fall in production. It was further conveyed that for failing to carry out his duties as expected, the management had decided to suspend the claimant without pay for a period of one month. The suspension was effective 15.02.2012 to 20.03.2012. The memorandum directed the claimant to report to the personnel officer on 21.03.2012 and he was asked to handover the entire respondent's property to the immediate supervisor before leaving the mill.

The claimant testified that he had been on annual leave between 1.01.2012 to 25.01.2012. His further evidence was that there was no major breakdown except on 14.02.2011 when a spinning machine had a clutch problem and he rectified it by 11.00 am.

The claimant further testified that he complied with the suspension letter and handed over as directed. On 21.03.2012, he reported at work upon the expiry of the period of suspension. He had a medical report prescribing rest following an accident while riding his motor cycle on 17.02.2012. The claimant was therefore told to go home and to report back on 22.03.2012. On 22.03.2012, the claimant was locked out and told to wait at the visitor's room outside the respondent's gate. Shortly thereafter, the secretary to the personnel officer came and handed him the termination internal memo dated 20.03.2012. The memo informed the claimant that due to downscaling and on-going reorganisation of the company's operations, it had become imperative that the claimant's services be terminated with effect from 21.03.2012. The letter stated that the claimant would be paid one month's salary in lieu of notice as stipulated in the letter of appointment. The memo also thanked the claimant for the services he rendered during his stay with the respondent.

The respondent did not call a witness but opted to rely on the pleadings and documents on record.

The issues for determination are whether the termination was fair and whether the claimant is entitled to the remedies as prayed for.

The respondent suspended the claimant on account of alleged poor performance. In the opinion of the court, in view of such allegations, the respondent was obligated to proceed under **section 41 of the Employment Act, 2007**. Instead, the respondent in terminating the claimant, alleged downscaling suggesting redundancy under section 40 of the Act. It is the opinion of the court that the respondent was obligated to be clear and to act in good faith in invoking the reason for termination and proceeding in accordance with the relevant and prescribe statutory procedure.

It is the further opinion of the court that wavering by the respondent on the reason for termination rendered the reason invalid as envisaged under **sections 45(2) and 43 of the Act** so that the court finds that the termination was unfair in the circumstances. The court further holds that the reason for termination dictates the procedure to be invoked by the employer in the termination proceedings so that, like in the present case, where the reason is clouded with uncertainty, it is difficult to make a finding that there was due process of law or fairness. Accordingly, the court finds that the termination was unfair both in substance and procedure.

The court has considered the claimant's evidence and all the material on record. The court finds that the respondent acted in unexplained and most unfair manner in terminating the claimant who had diligently served and earned his promotions. The claimant had a great expectation for a long career with the respondent and did not contribute to his termination in any way. The court finds that the maximum 12 months gross salaries at Kshs.20,600.00 per month making **Kshs.247,200.00** will serve the ends of justice. The claimant will be paid that amount less Kshs.88,000.00 he admitted to have received from the respondent as the unexplained final terminal pay.

The 2nd issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes the following findings:

- a. As the termination was unfair, the court finds that the claimant is entitled to payment of one month's salary being **Kshs.20,600.00** in lieu of notice under section 35 of the Employment Act, 2007.
- b. The claimant is entitled to issuance of certificate of service by the respondent in accordance with section 51 of the Act.
- c. As the claimant has succeeded in the claims, the court finds that he is entitled to the costs of the suit.

In conclusion, judgment is entered for the claimant against the respondent for:

1. A declaration that the respondent's termination of the claimant's employment was unfair.
2. The respondent to pay the respondent **Kshs.179,800.00** by 1.7.2014, in default, interest to be payable at court rates from the date of the judgment till full payment.
3. The respondent to deliver to the claimant the certificate of service by 1.7.2014.
4. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday 13th June, 2014**.

BYRAM ONGAYA

JUDGE