



IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 581 OF 2013

(Before D.K.N. Marete)

FRANCIS MUTINDA NYAE.....CLAIMANT

Versus

DPL FESTIVE LIMITED.....RESPONDENT

JUDGEMENT

This matter came to court vide an undated Statement of Claim filed on 23rd April, 2013. The issues in dispute are therein cited as;

1. Unfair and Unlawful Termination
2. Refusal To Pay Terminal Benefits
3. Refusal to Issue Certificate of Service.

This suit is not defended, or at all. The respondent has not entered appearance or even appeared in court to prosecute the matter and defence despite service and several overtures and opportunity by the court to do the same.

The matter severally came to court until the 17th February, 2014 when the claimant proposed that the matter be disposed of by way of written submissions by the parties.

The claimant's case is that at all material time to this claim, he was employed by the respondent as a casual employee on general duties with effect from March, 2008. On or about 27th February, 2013, the respondents Operations Manager, one, Rakesh terminated the claimant's services on claims that he had been paid twice his days wages. The claimant denies this.

The claimant was never afforded an opportunity to defend himself and that the Operations Manager was both accuser and judge. He was at that time resident of Mariguini Slums in South B and met his rent from his pay as no house allowance was made. He deems this termination unlawful. He also submits that despite demand and notice of intention to sue, the respondent has not yielded therefore necessitating this claim.

He prays as follows;

1. *Declaration that the Respondent's termination of the Claimant was both unfair and unlawful.*

2. An order that the Respondent does forth:-

a. Issue the Claimant with a Certificate of Service.

b. Pay the Claimant:-

i. Two month salary in lieu of Notice (414 x 30 x 2)

Ksh.24,840.00

ii. Salary in lieu of leave (414 x 30 x 8) Ksh.99,360.00

iii. Compensation for unlawful dismissal

(414 x 30 x 12)

Ksh.149,040.00

iv. Service pay (414 x 30 x 8 x 15/30days) Ksh.49,680.00

v. House allowance

(15% of 414 x 30 x 96months)

Ksh.178,848.00

TOTAL

Ksh.501,768.00

3. Cost of the Suit.

4. Interest at commercial rate on prayers 2(b) and 3 above from the filing of the claim, until payment in full.

5. Any other Relief as this Honourable Court may deem just and fit to grant.

The claimant, in his written submissions dated 19th March, 2014 reiterates his claim and the factual basis of the same. He further submits that he had been working for the respondent for 8 consecutive years without leave for a wage of Ksh.414.00 a day.

The claimant further submits that the matter remains unopposed despite service to the respondent. He thus puts it,

8. *The claim is unopposed, the Respondent having deemed it fit not to do so, despite being duly served with the Summons and the Statement of Claim, as well as several Hearing and Mention Notices upon Your Lordships wise direction, when this matter severally came up before you, as the record together with Returns/Affidavits of Service may indeed affirm.*

The issues for determination in this matter therefore are;

1. Was the claimant a casual employee?

2. Was the termination of the employment of the claimant wrongful, unfair and unlawful?

3. Is the claimant entitled to the relief sought?

4. Who bears the costs of this cause?

The 1st issue for consideration is whether the claimant was or was not a casual employee. This subject is covered by S.37(1) of the Employment Act, 2007 which works in concert with S.35(1) as follows;

S. 37 (1),

Notwithstanding any provisions of this Act, where a casual employee

- a. *Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or*
- b. *Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more,*

the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

Section 35(1) provides as follows;

A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be –

- a. *where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;*
 - (b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or*
- c. *where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.*

These therefore confer the claimant's permanency in employment. I therefore find and hold the claimant was in law a permanent employee of the respondent. This is due to his eight (8) years continuous service to the respondent as a casual worker.

The 2nd issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant avers and submits that the respondent's Operations Manager terminated his services on 27th February, 2011 without ceremony. He further submits that this was without observation of the due process for lawful termination of employment.

The law on termination of employment is encapsulated under S.35-50 of the Employment Act, 2007. Section 45 dictates what constitutes to unfair termination whereas Section 41 provides for the issue of notice before termination on grounds of misconduct. These are as follows;

45.(1) *No employee 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 employees 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.

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to

complain that he has been unfairly terminated.

where-

(4) A termination of employment shall be unfair for the purposes of this Part

a. the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-

a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

e. the existence of any previous warning letters issued to the employee.

Section 41 provides as follows;

41. (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.

Section 43 mandates employers to give reasons for termination of employment failure of which renders the termination unfair.

Section 43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

The claimant was merely routed out of employment by the respondent's Operations Manager without any

explanation as to the reasons for termination. He was not afforded an opportunity to be heard. The termination of the claimant's employment in due disregard of form and process by the respondent was therefore wrongful, unfair and unlawful and I hold as such.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is. Having traversed the second test, the claimant rightly becomes eligible to relief. I therefore award relief and order as follows;

1. (i) One month's salary in lieu of notice-

$$\text{Ksh.414} \times 30 = \text{Ksh.12,420.00}$$

(ii) Salary in lieu of leave-Ksh.12,420 x 8 = Ksh.99,360.00

(iii) 8 months compensation for unlawful

termination of employment = Ksh.99,360.00

iv. House Allowance = $15/100 \times 12,420.00 \times 8 \times 12$

$$= \text{Ksh.178,848.00}$$

v. Service Pay-Ksh.12,420 x $15/30$ x 8 = Ksh.49,680.00

TOTAL Ksh.439,668.00

2. I declare that the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful.

3. That the respondent be and is hereby ordered to issue the claimant with a certificate of service within 30 days of these orders of court.

4. That the costs of this claim shall be borne by the respondent.

Delivered, dated and signed the 16th day of July, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Mr. Shijenje instructed by Diro & Company Advocates for the Claimant.

2. No appearance for the Respondent