



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAKURU

CAUSE NO. 333 OF 2013

ANTONY JAYUGA EGOSANGWA.....CLAIMANT

v

KEN KNIT KENYA LIMITED.....RESPONDENT

JUDGMENT

1. Antony Jayuga Egosangwa (Claimant) served Ken Knit Kenya Ltd (Respondent) until 14 February 2011 when he was dismissed through a letter dated 15 February 2011. The dismissal letter made reference to section 44(c) of the Employment Act. The dismissal letter further informed the Claimant that he would be paid days worked up to 14 February 2011, any prorata leave and gratuity benefit.
2. The Claimant was dissatisfied and he reported a dispute to the Ministry of Labour. The dispute remained unresolved despite the intervention of the District Labour Officer, Eldoret.
3. On 17 October 2013, the Claimant instituted legal proceedings against the Respondent alleging *illegal* and *unlawful* termination and seeking various remedies.
4. The Respondent filed a Response on 25 November 2013, causing the Claimant to file a Reply to the Response on 5 December 2013. The Cause was heard on 22 October 2014.

Claimant's case

5. The Claimant was engaged formally by the Respondent on 21 January 2004 as a Willow Machine Operator through a letter of appointment dated same date (in evidence Claimant testified that he was employed on 2 September 2001).
6. On the termination, the Claimant testified that on 3 November 2010, he received a letter from the Respondent giving him 3 months to improve on his productivity and general conduct. Before the 3 months lapsed he was transferred to another department (January 2011).
7. On 15 February 2011, he stated that he was issued with a termination letter and told verbally that he was being dismissed for refusing a transfer. The dismissal letter itself did not give the reasons.
8. The Claimant stated that there were no valid reasons to terminate his services and that he had received several warning letters in the past in regard to absenteeism and poor productivity and that at time of dismissal he was earning Kshs 8,160/-.

9. In cross examination, the Claimant confirmed that according to the wage sheets shown to him, he was paid all gratuity

10. The Claimant is seeking the remedies set out in the Memorandum of Claim.

Respondent's case

11. The Respondent called its Human Resources Manager, Rebecca Cheluget. She joined the Respondent in 2010 and produced records relating to the Claimant. She stated that according to the records, the Claimant was employed on 21 January 2004 and worked until 14 February 2011.

12. On the termination, she testified that the Claimant was dismissed pursuant to section 44(4) (c) of the Employment Act, 2007 due to low productivity and the termination was lawful.

13. The witness also stated that previously, the Claimant had been issued with warning letters (which had expired) over absenteeism and low productivity and that daily targets were set according to the machine types.

14. On the process followed, the witness stated that the Claimant was given a fair hearing which was conducted orally.

15. On contractual and statutory entitlements, the witness stated that the Claimant was getting gratuity on a yearly basis and that the Respondent does not owe the Claimant any dues.

16. The Claimant filed his written submissions on 28 October 2014. Respondent's submissions were filed on 6 November 2014.

Issues for determination

17. The case under consideration is presented as one of unfair termination. The issues arising therefore are, whether the termination was unfair and if so appropriate remedies. Some remedies normally are contractual or statutory and do not turn on the unfairness of the termination.

18. Before dealing with the identified issues, the Court must make a finding as to when the employment relationship commenced.

When employment relationship commenced

19. According to the testimony of the Claimant, he was employed by the Respondent on 2 September 2001. However, the letter of appointment he produced was dated 21 January 2004.

20. The Respondent case is that the date of employment was 21 January 2004.

21. Considering the testimony and the documentary evidence, the Court finds that the formal commencement of an employment relationship for purposes of the suit at hand was 21 January 2004.

Whether termination was unfair

Burden upon an employee

22. In a complaint of unfair termination, an employee has an initial burden to discharge before an employer is required to discharge its burden. The burden on the employee is of a very low threshold and it is set out in section 47(5) of the Employment Act, 2007.

23. The Claimant was being paid by the month. Pursuant to section 35(1)(c) of the Employment Act, 2007 he was entitled to written notice of at least 28 days or pay in lieu of notice. He was not given written

notice or paid in lieu of notice. The contract also provided for notice or pay in lieu of notice.

24. On the basis of failure to give notice or pay in lieu of notice, the Claimant has demonstrated that the dismissal was unfair meriting the Respondent to be called upon to discharge the burden placed upon employers.

Procedural fairness

25. The Claimant was dismissed for low productivity and alleged absenteeism. Section 41 of the Employment Act, 2007 is therefore directly implicated.

26. The Claimant confirmed receipt of the notice to improve productivity dated 3 November 2010. The notice advised him that failure to improve would lead to disciplinary action.

27. Assuming that there was no improvement on the part of the Claimant, he was put on notice that he would be subjected to disciplinary action.

28. The Respondent's witness testified that an oral disciplinary hearing was conducted. The Court must determine whether this was in compliance with the procedural fairness safeguards of section 41 of the Employment Act, 2007.

29. This Court has previously observed in *Edward Shabaya v K.K. Security Ltd* (2014) eKLR, that

*procedural fairness under section 41 of the Employment Act, 2007 envisages **WHAT, WHEN, WHO** and **HOW** questions which have not been answered. The **What** question relates to what is the employee charged with, the **When** aspect relates to when the hearing will/took place, the **Who** question turns on who heard the disciplinary case and lastly, the **How** question relates to how the hearing took place.*

30. The *WHAT, WHEN, WHO* and *HOW* become particularly germane when an oral disciplinary hearing is held.

31. In the instant case, the Respondent did not disclose *when* the oral hearing took place, *who* chaired or heard the Claimant and *how* the hearing took place.

32. The Court, in this case finds that the Respondent has not demonstrated that it complied with the procedural fairness safeguards of section 41 of the Employment Act, 2007. The dismissal of the Claimant was therefore procedurally unfair.

Substantive fairness

33. With the conclusion reached, it is not necessary for the Court to examine whether the Respondent has proved low productivity and absence as fair and valid reasons for the dismissal.

Appropriate remedies

Three months pay in lieu of Notice

34. The Claimant did not lay any contractual or statutory basis for three months pay in lieu of notice as opposed to the one month provided for in the appointment letter and section 35 of the Employment Act, 2007.

35. The Court would therefore find in favour of the Claimant for one month pay in lieu of notice in the sum of Kshs 8,160/-.

Gratuity payment

36. The Claimant confirmed and documents were produced to show he was getting paid gratuity on a yearly basis. This head of relief is declined.

Compensation for unlawful termination

37. One of the primary remedies for unfair termination is the equivalent of not more than twelve months gross wages. The remedy is discretionary and the factors to consider have been provided.

38. The Claimant served the Respondent for about 7 years. Considering the length of service, the Court would award him the equivalent of 6 months gross wages assessed at Kshs 48,960/-.

Certificate of Service

39. A Certificate of Service is a statutory right. A copy was exhibited. If the Claimant did not collect the original, he should collect it.

Conclusion and Orders

40. The Court finds that the Respondent did not comply with section 41 of the Employment Act, 2007 and so holds the dismissal of the Claimant was procedurally unfair.

41. The Court awards and orders the Respondent to pay the Claimant

| | |
|---------------------------------------|----------------------|
| i. One month salary in lieu of Notice | Kshs 8,160/- |
| ii. 6 month gross wages compensation | Kshs 48,960/- |
| TOTAL | Kshs 57,120/- |

42. The relief for gratuity payment is dismissed.

43. Claimant to have costs of the Cause.

Delivered, dated and signed in open Court in Nakuru on this 14th day of November 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Nyaribo instructed by Manyoni Orina & Co. Advocates

For Respondent Mr. Kitiwa instructed by Kitiwa & Co. Advocates