



REPUBLIC OF KENYA

Industrial Court of Kenya

Civil Suit 143 of 2011

EVERLYN OKWAROCLAIMANT

VERSUS

FULCHAND KESHAVJI SHAH BOOKSHOP LTD.....RESPONDENT

JUDGEMENT.

This matter proceeded before Hon. Justice. Kosgey who has since left the Court. I have gone through the proceedings that were short and clear and reached the conclusion that doing justice to the parties and for purposes of expediting resolution of the dispute I should prepare the award based on the proceedings recorded by my predecessor.

By a memorandum of claim filed on 9th February, 2011, the claimant alleged that her services were wrongfully terminated by the respondent. She states that prior to her termination, she diligently served the respondent for 10 years as General Clerk. Her salary at the point of alleged wrongful termination was Kshs. 11,000 per month.

The respondent though served and appointed Counsel to act, did not file any response to the claim despite seeking several adjournments to do so. The claim therefore proceeded on the basis of the claimant's claim as filed. The respondent's counsel however had the opportunity to cross examine the claimant.

In her testimony, the claimant stated that on the material day when she reported to work, the respondent called all staff including her and asked them to go out as they had something to discuss. When the respondent returned he ordered her to leave. She stated that she was not given any termination letter nor paid her dues. The claimant therefore sought the intervention of the honourable court to declare her termination unlawful and order the respondent to pay her damages for unlawful termination of employment. The claimant further prays that the court orders the respondent to pay her terminal dues.

The Claimant's letter of employment dated 7th July, 2009 (annexture EO-1) states that the claimant was employed as a General Clerk with a base salary of Kshs. 11,000 per month payable in arrears. The claimant was also entitled to 21 days leave per year.

On termination, the contract provided that other than on grounds of misconduct the contract was terminable by claimant giving one month's notice. The contract curiously does not provide for payment the length of notice to be given by the employer in the event of termination on his part on grounds other than misconduct. It further does not provide for payment in lieu of notice. This omission is however cured by sections 35 and 36 of the Employment Act, 2007 since the Act provides for statutory minimum terms and conditions of employment which the respondent cannot contract out of. The court will therefore read in these provisions as if they were incorporated in the claimant's letter of employment.

Section 35 provides in the relevant part that:

35. (1) 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—

(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.

Section 36 provides that:

36. Either of the parties to a contract of service to which section 35 (5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.

No evidence was tabled before the court at the trial to controvert the claimant's contention that she was dismissed without notice. She refuted the suggestion by counsel for the respondent that she absconded from duty.

The burden of proof that a proper termination notice was given or that the claimant absconded from duty lies with the respondent who however did not attend court to rebut the claimant's assertions nor offer any witness in that regard. The court therefore believes the claimant's testimony and finds that she was terminated from employment without a written notice as required by law.

Having so found, the next question I have to grapple with is: what heads of remedies are available to an employee who has been wrongfully terminated and how are they assessed?

Section 50 of the Employment Act, 2007 provides:

50. In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Industrial Court shall be guided by the provisions of section 49.

Section 49 of the Employment Act, 2007 provides:

49. (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract.; or

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

(2) Any payments made by the employer under this section shall be subject to statutory deductions.

(3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—

(a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or

(b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

(a) the wishes of the employee;

(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

(c) the practicability of recommending reinstatement or reengagement.

(d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

(e) the employee's length of service with the employer;

(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

(g) the opportunities available to the employee for securing comparable or suitable employment with another employer;

(h) the value of any severance payable by law;

(i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

(j) any expenses reasonable incurred by the employee as a consequence of the termination;

(k) any conduct of the employee which to any extent caused or contributed to the termination;

(l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

(m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.

Some of the cardinal principles captured by the foregoing provisions of the Employment Act are the employee's length of service with the employer; reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination and the opportunities available to the employee for securing comparable or suitable employment with another employer.

These principles form the key pillars for the protection of the rights of an employee against unjustified infringement by the employer who in most cases has an upper hand in an employment contract. This protection is necessary especially when one considers the fact that the employee spends the bulk of his or her time in the service of the employer leaving very little time of his or her own to engage in other means of livelihood which again is prohibited in majority of employment contracts.

Justice Ojwang captures this scenario more poignantly in case of **Menginya Salim Murgani v Kenya Revenue Authority HCCC No. Civil Case 1139 of 2002** reported in **2008 e-KLR** when he states that:

“In so far as the employee spends the bulk of his or her time in the service of the employer, little or no livelihood, in most cases, is earned by the employee outside the framework of the employment relationship. Of this fact, this Court takes judicial notice; and it must then be considered that the status quo of the employment relationship, inherently vests in the employee both normal rights, and legitimate expectations.”

The sentiments by the distinguished scholar/Judge are quite to the point especially when one considers that unemployment is quite rampant in the country especially in the lower cadres as the claimant. Securing alternative employment can become quite challenging. It therefore behoves an employer who engages the services of an employee to act fairly and exercise the right to bring this relationship to an end in a responsible manner and in accordance with the law. It is my finding that dismissing the claimant without giving her any notice was unlawful and unfair to her and exposed her to the difficult task of securing a new job and injuring her livelihood.

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

Section 45(1) provides that no employer shall terminate the employment of an employee unfairly and under subsection (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.

As stated earlier, the respondent did not attend court to justify the termination of the claimant's services therefore on a balance of probabilities the claimant's uncontroverted allegations that she was sent away without any written notice is the only information the court has on the issue and is inclined to believe her testimony.

Having so said, the issue I must deal with at this stage is: What heads of compensation should I award the claimant? As cited hereinbefore, in deciding what heads of compensation payable, the court is guided by the provisions of section 49 of the Employment Act. This section gives power to the court in assessing compensation payable to take into account among others; the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under the Act or his contract of service. It further empowers the Court to give the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

If the claimant had been regularly terminated, she was entitled to one month's notice or pay in lieu thereof. Since no such notice was given as the court found earlier, I award the claimant one month's pay under this head.

Section 35(5) provides that an employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

Section 35(1)(c) provides in relevant part that:

35. (1) 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—

(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.

The claimant's contract falls under this head and considering the mandatory wording of subsection 5 of this section the claimant is entitled to this head of compensation.

The practice in this Court and its predecessor has been to award 15 days salary for each year of completed service. I will therefore award the claimant 15 days salary for each year of completed service.

In summary the court awards the claimant the sum of Kshs. 147,000/- made up as follows:

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|----|---|---------|
| 1. | One month's salary in lieu of notice | 11,000 |
| 2. | Salary for fifteen days worked in October, 2010 | 366 |
| 3. | Service pay for each year of completed service | |
| | 366 x 10 | 3,660 |
| 4. | Damages for unfair termination of employment | 132,000 |
| 5. | The claimant will have cost of the suit at court rates. | |

Dated at Nairobi this day of 2012

Jo Abuodha

Judge

Delivered in open Court on 26th day of October 2012

In the presence of for claimant

And for the respondent.