Kamau v Transit Company Limited (Cause 274 of 2020) [2024] KEELRC 1815 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1815 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 274 OF 2020

J RIKA, J

JULY 12, 2024

BETWEEN

JOHN WAINAINA KAMAU ..... CLAIMANT

AND

TRANSIT COMPANY LIMITED ..... RESPONDENT

JUDGMENT

Court Assistant: Emmanuel Kiprono

Kiarie Joshua & Company Advocates for the Claimant

B.M. Mung'ata & Company Advocates for the Respondent

1. The Claimant filed his Statement of Claim on 2nd July 2020.
2. The font size used, in printing of his Statement of Claim, is quite small, and almost illegible.
3. He avers that he was employed by the Respondent as a Plant Operator.
4. He earned a net monthly salary of Kshs. 100,000.
5. He worked for the Respondent, for about 35 years; he was dismissed by the Respondent's Director, on 28th August 2019; he was paid his August 2019 salary late; he was recalled; and continued to work at various quarries operated by the Respondent.
6. He was however denied his salary for September, October, November and December 2019, as well as that of January 2020.
7. He avers that withholding of his salary was wrongful, unfair and amounts to unfair labour practice.

8. He prays for: declaration that withholding of his salary is unfair and unlawful; arrears of salary and annual leave at Kshs. 645,000; compensatory damages equivalent of 12 months' salary at Kshs. 1,200,000; costs; and interest.

9. The Respondent filed its Statement of Response and Counterclaim, dated 24th August 2020. It is denied that the Claimant was employed by the Respondent as a Plant Operator, for 35 years, on a monthly salary of Kshs. 100,000.

10. It is the position of the Respondent that the Claimant was employed by the Respondent as a Mechanic, beginning January 2019, at a daily rate of Kshs. 3,076. He worked for 26 days in August 2019, and thereafter, absconded. The Respondent made futile attempts to contact him.

11. He was assigned the Respondent's motor vehicle KBQ 221 J to facilitate him in performing his duties. He retained the motor vehicle upon absconding. The Respondent was compelled to find alternative means of transportation at a cost of Kshs. 5,000 per day, for 96 days.

12. The Respondent Counterclaims for orders, compelling the Claimant to release the Respondent's motor vehicle, and for payment of damages totaling Kshs. 432,000, costs and interest.

13. The Claimant filed a Reply to the Statement of Response and Response to the Counterclaim, dated 11th December 2020. He reiterates his averments, and denies the Counterclaim. He had been assigned a pick-up motor vehicle by the Respondent, for ease of his movement from one quarry to the other. He pleads that he used the motor vehicle in the course of work.

14. The Claimant gave evidence and closed his case, on 20th January 2023. The Respondent's case was scheduled to be heard on 22nd September 2023, when hearing was adjourned over the appointment of new Counsel by the Respondent. It was rescheduled for 2nd February 2024, when neither the Respondent nor its new Counsel appeared before the Court. The case for the Respondent was closed. The Claim was last mentioned on 8th March 2024, when the Claimant confirmed filing and service of his Submissions.

15. He testified that he was employed by the Respondent as a Senior Plant Mechanic in 1986. The Respondent was at the time, known as Mugoya Limited.

16. He was alleged by the Respondent to have incited other Employees, and dismissed on 28th August 2019. He was denied his salary for the month, and was not issued a letter of dismissal. He sought the intervention of the Labour Office, Athi River.

17. The Director James Isabirye Mugoya, recalled the Claimant in November 2019. He had not been paid terminal benefits, at the time of termination. His salary was Kshs. 100,000. It was inconsistently paid. Isabirye alleged that, the Claimant was absent on certain dates. He was deducted salary for the dates he was alleged to be absent. He never went on annual leave. The Respondent was involved in road construction.

18. The Claimant was not warned for anything. He did not receive any letter asking him to show cause. He had been supplied a pick-up vehicle, to assist him move around construction sites. He maintained Respondent's machines, in these sites.

19. The Claimant adopted his witness statement and documents on record, as his evidence-in-chief.

20. Cross-examined, he told the Court that he joined the Respondent in 2009. He left in 2014, and returned in 2017-2019.Cumulatively, he worked for 7 years.

21. He was paid salary for July 2019. He was recalled in November 2019. He was not paid salary for November 2019. He wrote a letter demanding payment of salary for 4 months. He used to leave and return to employment, because the Director would apologize and recall him. He retained the Respondent's motor vehicle so as to be paid his arrears of salary. It was forcibly retrieved from him, by the Respondent, with the aid of the Police. He did not know if someone else was employed in his place. The letter from the Labour Office indicates that the Claimant worked for 7 months, and that he was employed by the Respondent in 2019.

The Court Finds: -

22. There is no evidence adduced by the Respondent to support the Counterclaim. The Counterclaim cannot stand, and is dismissed from the outset.

23. The prayer for Kshs. 1,200,000 in compensatory damages, made by the Claimant is rather ambiguous. He does not plead compensation for unfair termination. He does not plead that his contract was unfairly terminated. Throughout his evidence, he did not make clear when or how he finally left employment. He just focused his evidence on his multiple departures from employment, and his frequent reincarnations. He does not state when and how he finally left employment. The remedy of payment of equivalent of 12 months' salary is a statutory remedy, founded on the law of unfair termination, under Section 49 of the *Employment Act*. Compensation is awarded on proof of unfair termination. What is the Claimant's prayer for compensatory damages based on?

24. It is not payable for abrupt loss of income and trauma, for withholding of the salary, as pleaded at paragraph 10 of the Statement of Claim. The Claimant did not justify the grant of compensation equivalent to 12 months' salary. He neither pleaded, nor established that his contract was unfairly terminated. The prayer is declined.

25. He testified that he left employment in August 2019. He was recalled in November 2019. He was paid salary for August 2019 late, but was not paid salary for November 2019. He was not in employment, in September, October and December 2019, and offered no evidence to establish that he worked in January, February and March 2020.

26. He did not establish his prayer for annual leave, which is unspecified. He was given to frequent departures and returns at the workplace, and it is difficult for him to establish a case for unutilized leave. He appears to have enjoyed an informal and friendly relationship with the Director James Isabirye, which went on for many years. Their relationship was frequently ended, and soon retrieved. The Claimant saw no need of a written contract. He walked in and out of the employment relationship recurrently.

27. The employer-employee relationship, appears to have been tainted, by the friendship between the Claimant and the Respondent's Director.

28. The Court can only grant him arrears of salary for November 2019 - at Kshs. 100,000.

29. He is granted costs, and interest at court rate, till payment is made in full.

In sum, it is ordered: -

a. The Counterclaim is declined.

b. The Respondent shall pay to the Claimant salary arrears at Kshs. 100,000.

c. Costs to the Claimant.

d. Interest grated at court rate, from the date of Judgment till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6 [2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 12TH DAY OF JULY 2024.

JAMES RIKA

JUDGE