Ndome v Welfast (K) Limited (Cause 359 of 2017)
[2023] KEELRC 373 (KLR) (13 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 373 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 359 OF 2017

JK GAKERI, J

FEBRUARY 13, 2023

BETWEEN

FRANCIS KIBAKI NDOME ..... CLAIMANT

AND

WELFAST (K) LIMITED ..... RESPONDENT

JUDGMENT

1. The claimant initiated this claim vide a memorandum of claim filed on February 21, 2017 alleging unfair termination of employment and non-payment of terminal dues and compensatory damages.

2. The Claimant avers that he was employed by the Respondent as a Machine Operator on January 11, 2005 at Kshs 19,205/= per month and worked diligently and continuously until January 4, 2016 when after reporting to the work place, he was requested to go home and would be recalled. That when he followed up on February 2, 2016, one Mr Indra Patel, the Respondent's Director informed him that his services were no longer needed. The Claimant avered that two of his colleagues had been recalled.

3. The claimant prays for;

    i. A declaration that termination of the claimant from employment was unlawful, unfair and inhumane.

    ii. A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.

    iii. One month's salary in lieu of notice, Kshs 19,205/=.

    iv. Service pay for months not remitted, Kshs 28,807/= (15/30 X Kshs 19,205 X 3 years, 3 months).

    v. Damages for wrongful and unfair dismissal for 12 months, Kshs 230,460/=.

vi. Interest on amount claimed.

vii. Costs of the suit plus interest thereon.

Respondent's case

4. In its response filed on April 7, 2017, the Respondent avered that it employed the Claimant on March 11, 2015 as a general worker to perform such duties as assigned by the employer at Kshs 19,205/= per month.

5. That before the Claimant left in December 2015, he was reminded that his services were no longer required and had been notified in November but he presented himself in January 2016 having received all his dues.

6. The Respondent stated that the Claimant had had a warning for chewing tobacco and being intoxicated at the work place but did not hinder the warning and his contract was not extended on expiry, on December 31, 2015 and all his dues were paid via letter dated December 24, 2015.

7. That the Respondent deducted and remitted statutory dues as required and termination of the contract of service was fair and proper in the circumstances.

Claimant's evidence

8. In his evidence-in-chief in court, the Claimant admitted that he signed the employment contract in March 2015 and it was to end in March 2016. He then stated that it was a contract from January to December.

9. He denied having chewed tobacco at work or having received a warning letter.

10. He stated that he signed the letter dated May 15, 2015 under duress and was not given notice of lapsing of the contract.

11. He denied having received final dues but admitted having been paid a bonus of Kshs 8,000/= but disputed the amount paid.

12. On cross-examination, the Claimant stated that he had no evidence to show that he was engaged in 2005.

13. It was his testimony that the contract had a wrong date and he was not given a copy by the Respondent. He acknowledged his salary vouchers on record and confirmed he had signed all of them.

14. The witness confirmed that in December 2015, he was paid Kshs 36,421/=.

15. He further confirmed that he was a member of the NSSF and contributions were made till December 2015.

16. The witness admitted that he was employed on March 11, 2015.

17. On re-examination, the Claimant testified that contracts were introduced in 2008 and were annual and he had worked for 9 months.

Respondent's evidence

18. On cross-examination, RWI confirmed that the Claimant's employment was supposed to end in December 2015 but admitted that the contract on record had no end date and was annual. He admitted

that he had no evidence to prove that he had notified the Claimant that his contract would end at the end of 2015 and there was no meeting.

19. He testified that the extra amount paid to the Claimant was his dues.

20. It was his testimony that he did not force the Claimant to sign the document.

21. On re-examination, the witness stated that the contract was only valid for 2015 and the Claimant's conduct was not taken into consideration in the non-renewal of contract.

22. The witness testified that the Claimant authored and signed the apology letter.

Claimant's Submissions

23. The Claimant's counsel addressed issues of termination of employment, reason(s) for termination, process and reliefs.

24. On termination of employment, it was urged that the Claimant was neither informed, how, when and why his employment was terminated after serving for 9 months only and the contract had no expiry date.

25. Counsel urged that the Claimant had not been issued with a warning or show cause letter and none was provided. It was submitted that the Respondent was in breach of Sections 43, 45 and 41 of the *Employment Act, 2007*.

26. Reliance was made on the decisions in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR and *Francis Mbugua Boro v Smartchip Dynamics Ltd* (2017) eKLR to reinforce the submission that a termination of employment must be substantively justifiable and procedurally fair.

27. Finally, the court was urged to award the claimant 12 months compensation as he had no warning for misconduct.

Respondent's submissions

28. The Respondent's counsel addressed three issues regarding nature of the Claimant's employment with the Respondent, whether the Claimant's employment was terminated by the Respondent and entitlement to the reliefs sought.

29. As to the nature of employment between the parties, counsel submitted that the Claimant was employed under a fixed term contract from 2015 not 2005 as alleged and the Claimant had adduced no evidence to demonstrate when he was employed by the Respondent. That the Respondent's evidence showed the date and nature of employment. Reliance was made on section 107 of the *Evidence Act* to urge that he who alleges must prove the allegations.

30. The court was urged to find that the allegation that the Claimant was employed by the Respondent in January 2005 was unfounded as the Claimant had admitted on cross-examination that he had no evidence and that he had worked for 9 months only and the salary vouchers on record attested to that fact.

31. The decision in *Kipkebe Ltd v Peterson Ondieki Tai* (2016) eKLR was relied upon in support of the submission that he who alleges must prove.

32. It was submitted that the Claimant had failed to adduce evidence by way of payslip, contract, payment slips, correspondence or other document to sufficiently show that he was employed by the Respondent in 2005.

33. As to whether the Claimant's employment was terminated by the Respondent, reliance was made on section 47(5) of the *Employment Act, 2007* and the decision in *Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia* (2021) eKLR to urge that the Claimant had failed to discharge the burden of proof in that there was no termination letter or any other document as evidence of termination.

34. The court was urged to find that the Claimant's contract of employment with the Respondent lapsed by effluxion of time and the Respondent had no obligation to justify the termination.

35. The decisions in *Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Co Ltd & another* (2012) eKLR and *Ruth Gathoni Ngotho – Kariuki v Presbyterian Church of East Africa and Presbyterian Foundation* (2012)eKLR were relied upon to urge that the Respondent had no duty to give reasons for termination of the Claimant's contract by effluxion of time.

36. It was urged that the claimant had failed to prove that he was unfairly and unlawfully terminated from employment.

37. As regards the reliefs sought, the Respondent submitted that since the Claimant's contract of employment lapsed, he was not entitled to the reliefs sought and he was paid terminal dues on December 24, 2015.

38. Reliance was made on the decision in *Stephen M Kitheka v Kevita International Ltd* (2018) eKLR to urge that the Claimant was engaged on a fixed term contract and the claim for 12 months compensation was unreasonable were the court to find that he was unfairly terminated from employment having worked for eight (8) months, a fairly short time.

39. It was submitted that one (1) month salary was sufficient as was the case in *Antony Karanja Wainaina v Adrian Co Ltd* (2019) eKLR where the Claimant had worked for 5 months. The decisions in *Aysha Hafsa Musa v Computer Revolution Ltd* (2021) eKLR and *Gladys Chelimo Bii v Kenya Power and Lighting Co Ltd* (2021) eKLR were also cited to urge the one (1) month salary compensation was sufficient as the prescribed procedure was not followed, in case the court found that termination was unfair.

40. The court was urged to dismiss the suit with costs to the respondent.

Determination

41. The issues for determination are;

    i. When the Claimant was employed by the Respondent and the nature of employment.

    ii. Whether termination of the Claimant's employment was unfair.

    iii. Whether the Claimant is entitled to the reliefs sought.

42. As regards the date of employment, parties cited different dates. While the Claimant avered that he was employed by the Respondent on January 11, 2005 as a machine operator, the Respondent avered that it employed him on March 11, 2015 as a general worker under a written contract of service. The Respondent provided a copy of the contract of service signed by the Claimant on every page dated March 11, 2015. The Claimant on the other hand adduced no evidence of the fact of having been employed on January 11, 2005. He had neither a payslip, voucher, employment card, bank statement nor any other document to associate him with the Respondent from January 11, 2005.

43. Although, he testified that written contracts were introduced in 2008, he had no evidence to establish that allegation.

44. Similarly, his testimony that the contract of service produced by the Respondent had a wrong date, was unsubstantiated.

45. Relatedly, on cross-examination and re-examination, the Claimant confirmed that he had worked for nine (9) months and the Respondent provided salary vouchers for the duration the Claimant had worked and the Claimant admitted having signed all of them.

46. The copy of the NSSF statement dated January 5, 2016 provided by the Claimant reveal that he became a member of the Fund in 1999 having been employed on August 1, 1992. However, the statement has no indication as to who the employer was at any point.

47. Finally, for the entire duration the Claimant alleges to have worked for the Respondent, NSSF contributions were remitted, a fact the Claimant admitted on cross-examination.

48. For the foregoing reasons, the court is in agreement with the Respondent's counsel's submission that the Claimant had not placed sufficient material before the court to prove that he was employed by the Respondent on January 11, 2005. In contrast, the Respondent had tendered credible evidence which the Claimant did not controvert.

49. In the circumstances, it is the finding of the court that the Claimant was employed by the Respondent on March 11, 2015 under a written contract of service.

50. As to the nature of employment, the court is in agreement with the Court of Appeal decision in *Krystalline Salt Ltd v Kweke Mwakala and 67 others* (supra), relied upon by the Respondent that the *Employment Act, 2007* recognizes four main types of contracts of service as contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and casual employment.

51. On this issue, parties have again adopted divergent positions. While the Claimant's Memorandum of Claim made no reference to the duration of the contract other than the fact that he worked continuously from January 11, 2005, the Respondent avered that the Claimant's employment was to end in December 2015 and all his terminal dues were paid as attested to by the letter dated December 24, 2015. The Claimant admitted signing the letter.

52. In his evidence-in-chief, the Claimant testified that the contract was annual and was to end in February 2016 and that his employment was terminated on January 4, 2016 when he reported for the New Year. The fact of reporting in January 2016 was acknowledged by the Respondent.

53. On re-examination, the Claimant testified that the contract of employment had no termination date and the Respondent had not given him a copy, evidence the Respondent did not controvert. He maintained that his contract of employment was due to expire in February 2016.

54. The Respondent's case that Claimant was employed under a fixed term contract is premised on the reasoning that RWI had testified that it was to end in December 2015 and was annual and the Claimant had been notified in November that his services would no longer be required.

55. However, the contract of service on record under the 'Ref: Contract of Employment – 2005' states that the effective date of employment was March 11, 2015, under the terms and conditions outlined thereunder, such as duties, salary, hours of work, annual leave, rest days, suspension, termination and standing orders. The Claimant signed the document on even date.

56. Notably, the contract of service makes no reference to its duration or term. There is no indication whatsoever that the parties intended it to end in December 2015 as alleged by the respondent. Both witnesses were in agreement that the contract of service was supposed to be annual but since the claimant was employed in early March, and with no evidence to the contrary, he expected to serve for one year. At any rate, the contractual document had no expiry date contrary to the respondent's counsel's submissions.

57. The foregoing reason is consistent with the provisions of Section 10(7) of the *Employment Act* that;

> If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in sub-section (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

58. It follows that it was incumbent upon the respondent to prove that the contract of service on record was scheduled to end on December 31, 2015. With the document itself being silent on the duration of the contract other than the year 2015 inserted by hand, it is unclear whether the Claimant was indeed aware that his employment would end at the end of the year.

59. The Respondent's witnesses' allegation that he orally explained to the Claimant that his services would no longer be required in 2016 was unsubstantiated as there was no evidence of subsequent negotiations on the duration of the contract of service.

60. The respondent's witness' evidence that the handwritten "2015" meant that the contract of service was for the year 2015 exclusively is ambiguous. The year has no other context other than with reference to the date of employment.

61. It is trite that at common law, ambiguous clauses in a written contract are construed using the *contra proferentem rule* which means restrictively against the party relying on the clause contra proferentes.

62. For the above stated reasons, it is the finding of the court that the respondent has on a balance of probabilities failed to demonstrate that the claimant's contract of service was a fixed term contract scheduled to end on December 31, 2015.

63. The decisions in *Bernard Wanjohi Muriuki v Kirinyaga Water & Sanitation Co Ltd* (supra) and *Ruth Gathoni Ngotho Kariuki v Presbyterian Church of East Africa and Presbyterian Foundation* (supra) are of little assistance in the instant suit.

64. As regards termination of the Claimant's employment, the Respondent maintained that his contract of service lapsed by effluxion of time while the Claimant contended that his employment was unlawfully terminated.

65. Although the claimant testified that he signed the letter dated December 24, 2015 under the reference

> "Full and Final settlement, on the completion of the contract of the year 2015"

and acknowledged having received dues, the document refers to 2015 only for that year and makes no reference to the end of the contract of service.

66. The letter is specific to the dues under the 2015 contract exclusively and having found that there was no agreement that the Claimant's contact of service was to end in December 2015, the employment relationship was subsisting in 2016 at least up to the end of February as avered by the Claimant. It is doubtful whether the Respondent's Director, Mr Patel explained to the claimant the import of the

letter dated December 24, 2015 which the respondent authored for the claimant's signature to create the impression that it was authored by the claimant.

67. As adverted to elsewhere in this judgement, the claimant testified that he reported to the work place on January 4, 2016 to render services but was told to proceed home and would be recalled and following up on February 2, 2016, he was notified that his services were no longer required.

68. Puzzlingly, the respondent adduced no evidence to controvert the Claimant's testimony that on January 4th 2016, he was told to go home and would be recalled which he alleges amounted to termination of employment.

69. Section 45(2) of the *Employment Act* provides that for a termination of employment to pass muster, the employer must prove that it had a valid and fair reason or substantive justification and conducted the termination in accordance with a fair procedural or ensured procedural fairness as aptly captured by Linnet Ndolo, J in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR as follows;

> "...For a termination to pass the fairness test, it must show that there was not only substantive justification for the termination but also procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination."

70. Similar sentiments were expressed by the Court of Appeal in *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR.

71. Although the Claimant confirmed on cross-examination that he had no challenges at the work place as alleged by the Respondent, and denied having authored the apology letter dated May 15, 2015, he tendered no evidence on the circumstances in which he signed it to demonstrate duress as alleged.

72. The absence of evidence to show that his signature was procured by threats of violence or actual violence exerted by the Respondent renders the signature binding.

73. Furthermore, RWI testified that the Respondent had sufficient reason not to extend the Claimant's contract of employment which according to the Respondent lapsed on December 31, 2015.

74. Significantly, RWI confirmed on cross-examination that no disciplinary meeting was held.

75. From the foregoing, it is the finding of the court that although the Respondent may have had a reason to terminate the Claimant's employment, it did not comply with the mandatory procedure as prescribed by the provisions of the *Employment Act, 2007*.

76. It is the finding of the court that termination of the claimant's employment was unfair within the meaning of section 45 of the *Employment Act*.

77. As regards the reliefs sought, the court proceeds as follows;

    i. Having found that termination of the claimant's employment was unfair, a declaration to that effect is merited.

    ii. Service pay for the months not remitted (39 months) Kshs 28,807/=

78. Having found that the Claimant was employed by the Respondent on March 11, 2015 and he testified that he was a member of NSSF and contributions were remitted for all the months he worked till December, 2015, the claim for unremitted NSSF contributions is unsustainable.

79. More significantly, the prayer herein is not service pay but unremitted NSSF contributions enforceable under the *National Social Security Fund Act*.

The prayer is dismissed.

iii. One month's salary in lieu of notice, Kshs 19,205/=

80. From the evidence on record, it is evident that the Respondent did not comply with the provisions of Section 35 or 36 of the *Employment Act, 2007* as regards notice or pay in lieu thereof.

The Claimant is thus entitled to one month's salary, Kshs 19,205/=.

iv. 12 months compensation for unfair dismissal from employment, Kshs 230,460/=

81. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to compensation in accordance with provisions of Section 49 (1)(c) of the *Employment Act*.

82. In determining the quantum of compensation, the court has taken into account the following;

i. The Claimant was an employee of the Respondent from March 11, 2015 to January 4, 2016, a duration of about 10 months.

ii. The Claimant signed the letter dated May 15, 2015 implicating him in the chewing of tobacco during office hours.

iii. The Claimant wished to continue working for the Respondent as evidenced by the follow-up on February 2, 2016.

iv. Neither the Claimant nor the Respondent explained the sum of Kshs 8,000/= paid to the Claimant in December, 2015 over and above his salary.

83. In the circumstances, the court is satisfied that the equivalent of two (2) month's salary is fair, Kshs 38,410/=.

84. In conclusion, judgment is entered for the claimant as against the respondent in the following terms;

a. Declaration that termination of the claimant's employment by the respondent was unfair and unlawful.

b. One month's salary in lieu of notice, Kshs 19,205/=.

c. Equivalent of two (2) month's salary compensation.

Total Kshs 57,615/=

d. Costs of this suit.

e. Interest at court rates from the date of judgement till payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF FEBRUARY 2023.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE