



REPUBLIC OF KENYA



KENYA LAW
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Gichobi v Jiangxi Transportation Engineering Group Ltd & 2 others (Cause E041 of 2021) [2023] KEELRC 3481 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 3481 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E041 OF 2021
ON MAKAU, J
APRIL 27, 2023

BETWEEN

JOHN KINYUA GICHOBI CLAIMANT

AND

JIANGXI TRANSPORTION ENGINEERING GROUP LTD ... 1ST RESPONDENT

**THIRD ENGINEERING BUREAU OF CHINA CITY CONSTRUCTION
GROUP 2ND RESPONDENT**

VICTORIA ENGINEERING CO. LIMITED 3RD RESPONDENT

JUDGMENT

1. The claimant brought this suit alleging that he was employed by the respondent from 28th October, 2018 to 21st February 2021 when his services were unfairly terminated without being given any reason for the same, and without being heard. The termination was also described as cruel and inhuman because the claimant was abandoned in the bush on a rainy chilly night after the Tipper he was driving was driven away by his supervisor. The suit seeks the following reliefs:-
 - a. Payment for underpayment for the period between 28th October 2018 to 11th November, 2020 when he was paid Kshs.1000/- per day instead of Kshs.1,725/- under the law. (A period of 25 months (650 days) Kshs.471,250.00
 - b. Compensation for the Sundays and Public holidays worked when he was entitled to trice his daily pay but was paid Kshs.2000/- instead of Kshs.3,450/-. (There were 108 Sundays and 18 public holidays totaling to 126 days.) Kshs.182,700.00
 - c. A monthly salary equal to 20% of his monthly basic pay (Kshs.44,850/-) for the 25 months worked, the total house allowance due in Lodwar was Kshs.8,970/- Kshs.224,250.00



- d. Monies he worked for at Kenol/Sagana when he worked for 34 days before he was unfairly and unlawfully terminated. He was paid Kshs.800 per day instead of Kshs.1,725/-.
The total unpaid sum is therefore Kshs.31,450.00
 - e. The four Sundays where he was paid Kshs.1,600/- per day instead of Kshs.3,450/-.
The total unpaid sum is therefore Kshs.7,400.00
 - f. House allowance due to him for the 1 month at Kenol/Kutus is Kshs.8,970.00
 - g. The 1 month's notice or 1 month salary in lieu for Notice Kshs.45,500.00
 - h. Compensation due to your unfair labour practices which violate Article 41 of [the constitution](#) of Kenya our client lost the months of November 2020 and December 2020.
The amount for the two months is Kshs.91,000.00
 - i. Damages for unfair termination. He seeks for 12 months salary. Kshs.546,000.00
 - j. The unpaid NSSF remissions for 3 months @ Kshs.2,160/- Kshs.6,480.00
 - k. Travel allowance for 2 years @ Kshs.6,000/- Kshs. 12,000.00
Total Kshs.1,627,000.00
2. The respondents filed a joint defence through the law firm of Karweru & Company Advocates on 21st September, 2021 but later they filed separate defences on 10th December 2021 through the firm of Omusolo Mungai & Co.Advocates. The four defences are still on record but the law firm of Karweru & Company Advocates ceased acting for the respondents on 21st September 2021.
 3. The gist of the defence filed is that the respondents are separate legal entities; that the 1st and 2nd Respondents employed the claimant during different periods; that the 2nd Respondent employed claimant in Lodwar from 2018 to November 2020 when his services ended and then he secured employment from the 1st respondent in Kenol-Sagana project where he worked from 17th January 2021 to 21st February 2021. The respondents averred that the suit lacks merits and should be dismissed with costs.

Evidence

4. The claimant testified as CW1. He adopted his written statements dated 8th July 2021 and 10th June 2022. Further he produced 8 documents and exhibits.
5. In brief, CW1 stated that he started working for the 1st Respondent in Lodwar before being transferred to Kenol-Sagana road on 11th November 2020. He stated that he left Lodwa after the project of road construction ended.
6. He explained that he was interviewed before joining the new project as an employee. On 20th February 2021, he was on night shift and he took over a Tipper from a day shift driver but no fueling was done. The foreman just told him to head to a bush near Kakuzi where murrum was being carried. On arrival, he found a supervisor Mr.Sang of Chinese extraction who ordered him to surrender the Tipper keys and then drove off the Tipper leaving the claimant in bush.
7. The claimant further stated that the Tipper was allocated to another driver and it was fueled 186 litres. As a result of the above matters, he went to the office where he was accused of siphoning fuel from the Tipper. A case was done and he called his witness. He also showed screenshots of photos he took



- on the gauge and speedometer. After giving the evidence, the Chinese told him to go home and wait for a decision.
8. The hearing was conducted by Mr. Ilevé who was paying wages in the company and no warning letter or termination letter was given to him. He contended that he served all the three respondents who were working in the same road and they also paid his salary and contributing his NSSF contributions. Mr. Wang and Sang were the managers of the companies. However, he clarified that he joined the 1st respondent from 14th December 2020 after an interview and worked until 21st February, 2021 when he was suspended until further notice.
 9. He stated that while working in Lodwar, his salary was Kshs.1000.00 per day, but it was an underpayment. When he worked on public holidays he was paid Kshs.2000.00 per day. He was given leave after every 3 months but without leave travelling allowance. He was also not paid any medical allowances. Further NSSF was not remitted for 7 months. Consequently, he prayed for the reliefs sought.
 10. On cross-examination, he maintained that he started working for the 1st respondent on 14th December 2020 but later signed the written contract dated 17th January, 2021. The contract was for Kenol-Sagana road and his salary was Kshs.800.00 per day inclusive of housing. He was also entitled to travelling allowance but he never demanded because the employer would tell him that he was bringing politics to work. There was no sick leave provided.
 11. The claimant reiterated that on 21st February 2021, Mr. Ilevé told him that he stole fuel from the Tipper and directed him to go home and wait. No dismissal letter was given to him.
 12. He reiterated further that he was employed by the 2nd Respondent on 26th October 2018 until 11th November 2020 when he sought transfer to Kenol-Sagana road but the company told him that work at Lodwar had ended and gave him a termination letter. However, he contended that the same managers moved to Kenol-Sagana road and the vehicles were same save for the stickers which were changed. He admitted that he never signed any contract with the 3rd Respondent but reiterated that 3rd Respondent contributed NSSF dues for him.
 13. Upon re-examination, the claimant confirmed that he left Lodwar after work ended. He then went to Kenol-Sagana after Mr. Wang told the workers that there was another road construction from Kenol-Sagana road. He further confirmed that he was told to go home until further notice after accusation that he stole fuel from a Tipper. He denied the alleged theft of fuel and maintained that on the material day he took over the Tipper from another driver and no verification was done about how much fuel was in the Tipper.
 14. The respondent called one witness, Mr. Elphas Okiya Kangu, 1st respondent's HR Officer who testified as CW1. He adopted his written statement dated 21st February, 2022 and produced bundle of documents filed by the respondents on 24th February, 2022. In brief, he stated that the 1st respondent employed the claimant on 17th January 2021, under 5 months contract but worked until 20th February 2021 when his services were summarily terminated in accordance with his contract of employment.
 15. He testified that the contract provided for probation period during which the conduct of the claimant was found wanting. He absented himself from work, he disobeyed instructions from supervisors and stole employers' property. On 20th February 2021, his supervisor did routine check on the fuel meter of the vehicle assigned to the claimant and found the fuel below the expected amount as per the records. When asked to explain the matter, the claimant failed to give satisfactory explanation and the supervisor took over the truck and the keys for investigations.



16. Thereafter the claimant failed to give a plausible explanation about the fuel short fall and the employer served him with seven (7) days termination notice as per the contract of employment. He denied that the claimant was abandoned on the road and contended that the claimant failed to request for transport back to the site. He denied that the claimants was dismissed unfairly and maintained that the separation was done lawfully as per the contract of employment.
17. On cross examination, he reiterated that the claimant was employed by the 1st respondent on 17th January 2021. However he admitted that the Bank statement filed by the claimant indicated that there was payment made to him in 2020. He contended that the claimant was a casual employee that time.
18. He further contended that the claimant was issued with a warning letter on 10th January 2021 and he signed on it but clarified that he was not dismissed for that offence of theft. He confirmed that there was no evidence of the claimant stealing fuel only that the supervisor did a routine check and found the fuel consumption was not aligned with the distance covered. Only the claimant's Tipper had that problem. Consequently, it was concluded that the fuel had been siphoned.
19. RW1 admitted that he did not know how much fuel was given to the vehicle that day. He further admitted that the vehicle was with another driver driving the day shift. He further admitted that he had no evidence to prove that the vehicle was refueled before the claimant took it over for the night shift.
20. He further testified that the claimant was invited to appear before a disciplinary committee but he declined.
21. He reiterated that the respondents are separate legal entities but he failed to tell whether the 3 respondents contributed NSSF dues for the claimant.
22. On re-examination, RW1 testified that a letter was written inviting the claimant for disciplinary hearing but the hearing took place in his absence. Thereafter he was notified of the decision through a phone call. At that time the claimant's employer was the 1st respondent only.

Submissions

23. The respondents submitted that the claimant has not proved continuous employment by the respondent from October 2018 to February 2021. It was contended that the respondents are separate legal entities and the claimant was employed by the 1st and 2nd respondent during different periods.
24. Further it was submitted that the claimant has not proved that he was ever employed by the 3rd respondent. He also never proved that the two entered into any contract of service in which the 3rd respondent paid the claimant remuneration for work done.
25. As regards termination of the claimant's employment by the 2nd Respondent, it was submitted that the termination was due to completion of the project being undertaken at Lodwar. Further it was submitted that the termination by the 1st respondent was due to violation of the terms of the contract of employment by the claimant. The termination was fair because the claimant was given the reason and was accorded opportunity to defend himself but declined.
26. Finally the respondents submitted that the reliefs sought are not merited and prayed for suit to be dismissed with costs.

Determinations

27. The issues for determination are:-



- a. Whether the claimant was employed by all the three respondents from October 2018 to February, 2021.
- b. Whether the respondents dismissed the claimant from service unfairly.
- c. Whether the claimant is entitled to the reliefs sought.

Employee of 3 Respondents

28. The claimant has only produced two contracts of employment as exhibits. The first was signed between him and the 2nd respondent dated 17th August 2020 and the second one dated 17th January 2021 was signed between him and the 1st respondent. No contract was produced as exhibit to prove that claimant was hired by the 3rd respondent. The allegation that the 3rd respondent contributed NSSF for him has not been substantiated and even if it had, that is not sufficient ground to infer that the two parties were in an employer-employee contract.

Unfair termination

29. Section 45 of the *Employment Act* provides that:-

- “(1) No employer 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 employee’s 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.”

30. In this case the claimant admitted that his contract of service at Lodwar ended after the project being undertaken by the 2nd respondent ended. He was therefore not unfairly dismissed. I have also made a finding of fact that he was never employed by the 3rd respondent and therefore the issue of unfair termination does not arise against the said respondents.

31. The foregoing leave us with the termination by the 1st respondent which was done for alleged siphoning of fuel from the Tipper assigned to the claimant. The claimant has denied the alleged offence and maintained that the tipper was not fueled when he took it over. Further, the amount of fuel in the vehicle was not verified before he took it over from the day shift driver.

32. The Respondent’s case is that the vehicle was supposed to have been refueled for night shift before the claimant took over and when the supervisor did a routine check of the vehicles, only the claimant’s vehicle was found with fuel below the expected amount considering the distance covered. However, RW1 did not have any evidence to prove that, indeed the vehicle was refueled before the claimant took over.



33. I have considered the evidence before the court, I have found that the 1st respondent has failed to establish that the claimant siphoned fuel from the vehicle he was assigned to drive. There is no direct evidence and the allegation by the employer is based on circumstantial evidence. However, the said evidence is a shaky ground because the supervisor Mr.Sang never testified before this court to highlight to the court the basis of his allegation that claimant siphoned fuel from the vehicle.
34. There is no evidence of how much fuel was given to the vehicle and how much was missing when the routine check was done by the supervisor. That gap in the defence evidence corroborates the claimant's case that the vehicle was not refueled when he took it over from the day shift driver and the amount of fuel in the tank was never verified. This situation leads me to a finding that the respondent has failed to prove on a balance of probability that the reason cited for terminating the claimant's services was valid and fair as required by section 45 (2) of the Act.
35. The second factor of fairness to consider is whether a fair procedure was followed before terminating the claimant's employment contract. The claimant admitted in his evidence that he was heard by Mr. Illeve on the alleged theft of fuel and thereafter he was suspended pending the outcome of the case. Such admission discharges the employer from the burden of proving that the termination was done in accordance with a fair procedure.
36. Section 43 of the *Employment Act*, provides that when the employer fails to prove the reason for termination, the termination shall be deemed to be unfair within the meaning of section 45 of the Act. That is the position obtaining herein and the court holds that the termination of the claimant's employment was unfair.

Reliefs

37. The claim for underpayment, house allowance between 28th October 2018 and 20th February, 2021 are not based on the contracts signed between the claimant and his employer and therefore they must fail.
38. However, in view of the finding that the termination was unfair, the claimant is entitled to salary in lieu of notice plus compensation for unfair termination pursuant to section 49(1) of the *Employment Act*. The contract provides for one month probation period from 17th January 2021 but the termination occurred on 21st February, 2021 or thereabouts. The claimant had completed his probation period and therefore under section 35 of the *Employment Act* he was entitled to 28 days' notice before the termination.
39. Considering the short period served and also the fact that the unexpired period of the contract of about 4 months, I award the claimant one month salary in lieu of notice plus one salary compensation for unfair termination.
40. The claim for unremitted NSSF deductions for 3 months is declined for lack of evidence to prove that the dues were deducted. Further, the claim for travel allowance is declined for lack of supporting evidence.
41. In conclusion, I enter judgment for the claimant against the 1st respondent in the following terms:-
 - a. Notice.....Kshs.24,000.00
 - b. Compensation.....Kshs.24,000.00

Total Kshs.48,000.00

The award is subject to statutory deductions.



The claim against the 2nd and 3rd respondent is dismissed for lack of merits. Since both sides have somehow succeeded in their respective cases, I condemn no one to pay costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 27TH DAY OF APRIL, 2023.

ONESMUS N MAKAU

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

