



**Amwoga v Mbogo & another (Cause 1393 of 2018)
[2023] KEELRC 1911 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1911 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1393 OF 2018
NZIOKI WA MAKAU, J
JULY 6, 2023**

BETWEEN

HENRY JESIJERI AMWOGA CLAIMANT

AND

BENARD WERU MBOGO 1ST RESPONDENT

AMSTA TRADING CO. LIMITED 2ND RESPONDENT

JUDGMENT

1. In the Statement of Claim dated September 19, 2018, the Claimant prayed for judgment against the Respondents for:
 - a. A declaration that the termination of the Claimant's employment by the Respondent was unlawful;
 - b. Outstanding salary being Kshs 40,000;
 - c. Unpaid leave days being Kshs 238,000;
 - d. One-month salary in lieu of notice being Kshs 20,000;
 - e. Gratuity payment being Kshs 196,154;
 - f. Damages for unlawful termination being Kshs 240,000;
 - g. Costs;
 - h. Interest; and
 - i. Any other relief the court may deem fit to grant.



2. The Claimant averred that the 1st Respondent initially employed him in 2004 as a Manager of his matatu business and that he drove, 'conducted', managed and traded several motor vehicles/matatus on behalf of the 1st Respondent. That later on, the 1st Respondent incorporated the 2nd Respondent Company and changed business to real estate business and he was then transferred to work as a Foreman in various properties, including the property known as Mwengenyee/ Saika Plot No A1, at a monthly gross pay of Kshs 20,000/-. That his commitment and enterprise led to the Respondent retaining him for over 14 years to work in different capacities within the Respondents' various businesses. Further, that his employment history with the Respondents had been without any incident of misconduct.
3. It was the Claimant's averment that the Respondent arbitrarily, unlawfully and maliciously terminated his services on or about January 20, 2018 without justifiable cause, by inter alia not issuing him with a termination letter and not according him an opportunity to be heard and defend himself or following due procedure of the law. He further averred that at the time of the purported termination, the Respondent failed to pay him salary in lieu of notice and other benefits and that it also ignored, neglected and/or refused to make good his demand for the Claim.
4. In his Witness Statement, the Claimant stated that he was made Foreman of all the buildings the Respondents built and that he would be instrumental in identifying property and overseeing construction, including purchasing construction materials and ensuring the 'fundis' are paid. He asserted that the Respondents never communicated any intentions to disengage his services prior to the termination and that he never received any warning letter in the 14 years he was employed by the Respondent.
5. In response, the Respondents averred in their Memorandum of Reply dated February 26, 2019 that the Claimant has never been an employee of either Respondent and that his Statement of Claim as drawn and filed is bad in law. Subsequently, that they could not have therefore fired someone who has never been their employee. The Respondents thus denied having breached the law and prayed for the Claimant's case to be dismissed with cost.
6. The Claimant's Reply dated February 27, 2019 was to the effect a reiteration of his averments in his Statement of Claim, which he averred disclosed reasonable cause of action against the Respondents. He prayed for the Memorandum of Reply to be struck out and judgment entered against the Respondents as prayed in the Statement of Claim.

Evidence

7. The Claimant testified that he used to work for the 1st Respondent as a Farmer on his farm for the period 2007 to 2009 and that it was in 2010 when the 1st Respondent made him a manager for his transport business vehicles. That after working in that capacity for two years, he was then made a Site Construction Manager from 2012 to 2018 for flats situated at Kayole Saika and Kahawa Wendani. Moreover, that he was also on site when there was construction on the 1st Respondent's plots at Ruai. He asserted that the Respondents would be lying if they said they did not know him as he had evidence showing receipt of funds for payments at site from the 1st Respondent and his wife Elizabeth. He further testified that he earned Kshs 5,000/- while working at the farm, Kshs 10,000/- as Transport Manager, and Kshs 20,000/- at the end of his service. That he used to be paid in cash and when the 1st Respondent was not in, his wife would pay him the cash.
8. It was the Claimant's testimony that after an accident involving the Respondent's lorry KBN 632N in Oloitoktok in 2015, he was given a warning. He further stated that NHIF and NSSF were not paid



and that he never used to go on leave or for off days as the vehicles were used on a daily basis and that he only went once when he was given 2 days to attend a funeral.

9. Neither the Respondent's representatives nor its Counsel attended the hearing and upon close of the Claimant's case, he filed his submissions as hereunder.

Claimant's Submissions

10. According to the Claimant, the issues for determination are as follows:
- i. Whether the Claimant was an employee of the Respondents;
 - ii. Whether the Claimant was unfairly terminated; and
 - iii. Whether the Claimant is entitled to the prayers sought.
11. The Claimant submitted that he had proved to the required standard that he was an employee of the Respondents from 2004 to 2018. That he produced copies of logbooks and TLB Licences for the Respondents' vehicles, Certificate of Incorporation of the 2nd Respondent, purchase slips for construction materials, land allocation certificate for the 2nd Respondent, M-pesa statement showing several transfers to him from the 1st Respondent among others. That these documents could have only come into his possession as an employee of the Respondents. That the Respondents on the other hand had not given any evidence to persuade the Court that he was a stranger to them as alleged in their Response. That the Respondents had also neither denied the authenticity of the documents he had produced nor the circumstances under which he possessed the said documents despite denouncing him. The Claimant urged the Court to find that his story is believable and hold that he was an employee of the Respondent.
12. As to whether he was unfairly terminated, it was the Claimant's submission that he was unfairly terminated from employment simply for demanding his outstanding salary, which was his right. He stated he had testified that the Respondents had not paid his salaries amounting to Kshs 80,000/- and that they indefinitely suspended him when he demanded for payment. That later on, the Respondents reached out to him through a lawyer whom he met and who paid him Kshs 40,000/- with the balance to be paid later. That the Respondents have however never gotten back to him since then and have never paid him the said balance. In addition, the Respondents did not follow the law while terminating his services as he was neither given an opportunity to be heard nor given any explanation for the termination. He submitted that the components for fair opportunity to be heard was defined by the Court of Appeal in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR in the following terms:

“Four elements must thus be discernible for the procedure to pass muster:-

- (i) an explanation of the grounds of termination in a language understood by the employee;
- (ii) the reason for which the employer is considering termination;
- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”



13. Further, that section 43(1) of the Employment Act requires that an employer must prove that the reason for termination of an employee is based on valid, just and legal grounds and if based on allegation of misconduct, then the employer must prove the alleged misconduct. That section 45(2) of the Act further states that a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid. It was the Claimant's submission that the Respondents failed to discharge the burden placed upon them under sections 43(1) and 45(2) to prove any reason for terminating his employment. The Claimant submitted that he had clarified how he was entitled to outstanding salary of Kshs 40,000/- from the initial amount of Kshs 80,000/- paid halfway. He then urged the Court to award him unpaid leave for the 14 years he worked for the Respondent as prayed for in his Claim. He further submitted that he was entitled to a month's salary for being terminated without notice and to gratuity as the Respondent did not remit any payments to NSSF or any pension scheme on his behalf. The Claimant also urged the Court to exercise its discretion towards awarding him maximum compensation and to find that there is sufficient justification for making the maximum award in this case. It was the Claimant's submission that it was clear from his testimony before court that he contributed towards the Respondents' financial growth and therefore deserved to be compensated. Lastly, he urged the Court to award him costs and interest.
14. The Claimant has demonstrated employment with the Respondents and the assertions that he was a stranger to them proved false. The Claimant produced copies of logbooks and TLB Licences for the Respondents' vehicles, Certificate of Incorporation of the 2nd Respondent, purchase slips for construction materials, land allocation certificate for the 2nd Respondent, M-pesa statement showing several transfers to him from the 1st Respondent among others. These documents could have only come into the Claimant's possession as an employee of the Respondents. That disposes of the issue of whether the Claimant was an employee of the Respondents. As to the termination, no evidence was led against the Claimant's litany of complaints. Other than the feeble attempt to distance themselves from the Claimant, the Respondents did nothing to show that there was cause or reason to terminate the Claimant's services. As such, the Respondents having failed to discharge the onus placed on them to demonstrate the termination was for good cause are liable in this regard as well. The Claimant did not show that he sought and was denied leave. No leave application forms were produced and as such the Claimant did not prove he never went on leave. No NSSF or NHIF statements were produced by the Claimant to demonstrate non-payment. He had a burden to demonstrate that no remittances were made on the standard statutory deductions. As such, his claim on this score fails as he did not avail any evidence to show non-payment.
15. In the final analysis, I enter judgment for the Claimant against the Respondents for:-
- a. One month's salary in lieu of notice – Kshs 20,000/-;
 - b. 6 month's salary as compensation for unlawful termination – Kshs 120,000/-;
 - c. Interest on (a) and (b) above at court rates from the date of judgment till payment in full;
 - d. Unpaid salary of Kshs 40,000/-;
 - e. Interest on the sum in (d) above at court rates from date of filing suit till payment in full;
 - f. Costs of the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JULY 2023.

NZIOKI WA MAKAU



JUDGE

