



**Lumbete v Moto Gari Limited (Cause 2143 of 2016)
[2023] KEELRC 1710 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1710 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2143 OF 2016
MN NDUMA, J
JULY 6, 2023**

BETWEEN

WARREN LUMBETE CLAIMANT

AND

MOTO GARI LIMITED RESPONDENT

JUDGMENT

1. The claimant filed suit on October 18, 2016 seeking the following reliefs:-
 - (a) Issue the Claimant with an acceptable certificate of service.
 - (b) Pay the Claimant:-
 - (i) 1 month salary in lieu of notice, Kshs 35,968.00.
 - (ii) 1 month salary in lieu of leave
Kshs 35,968.00.
 - (iii) Unpaid salary for 10 days in August, 2016 Kshs 11,989.30.
 - (iv) 12 months' salary as compensation for unlawful termination (35,968.00 x 12) Kshs 431,616.00/=
 - (v) Severance pay Kshs (18/30 x 35,968.00 x 2 years) 43,161.60/=.
 - (vi) Costs of the suit.
 - (vii) Interest on 1(b) (i) to (vi) herein above at Commercial rate from date of filing suit until payment in full.



2. CW1 testified that he was employed by the respondent on March 3, 2014 and on or about January 20, 2015 he was assigned to drive expatriates from Tullow oil. The contract was for one year, renewable.
3. That on or about March 2016, the contract was renewed.
4. The claimant was paid Kshs 35,000 per month. The contract of January 23, 2015 is attached to the Statement of Claim and produced by the claimant before Court.
5. The claimant told the Court that his contract of service was terminated by one Peris Abayo the Human Resource Manager verbally. That she told the claimant that he would be moved from expatriate service to driving a taxi. That when the claimant protested, Peris got annoyed and chased the claimant away and told him to take the company where he wanted.
6. That he reported a dispute with the Ministry of Labour and also instructed his advocates to write a demand letter to the respondent dated September 26, 2016.
7. CW1 testified that the verbal termination occurred on August 10, 2016. CW1 testified that the taxi service was on 24 hours service and the salary was about 13,000 only. CW1 stated that he did not take up the new job and claims to be granted the reliefs sought including compensation for the unlawful termination, one month's salary in lieu of notice; one month salary in lieu of leave days not taken, 10 days unpaid salary for the month of August, 2016; severance pay for 2 years served; certificate of service; interest and costs.
8. CW1 stated under cross-examination that he transported the children of one Mr. Fredrick Briens, an expatriate at Tullow Oil for about one year. That the respondent had separate offices with Tullow but he had seen M/s Peris come to the Tullow offices from time to time. That the Tullow contract was different from the Taxi one hence the protestation on the deployment and wanted to be paid terminal benefits for the existing contract before starting a new one with Taxi services but Peris got annoyed and terminated his services.
9. RW1 Calolyne Njeri Ngure, produced the new contract for the claimant dated March 18, 2016. She told the Court that she was the Human Resource Manager of the respondent. That the claimant was a driver of an expatriate at Tullow Oil. That in July, 2016, the fleet coordinator at Tullow Oil wrote an email that the claimant had not worked for an entire month despite being paid a full salary.
10. That in August, 2016, the Claimant came to the office of the respondent requesting to take a full month leave. The request was declined because he had exhausted his leave days and had not worked the whole month of July.
11. That upon declining to give the claimant the leave, he went to the Labour office and lodged a complaint against the respondent and this claim stating that his employment had been terminated wrongly.
12. That RW1 went to the labour office and denied the respondent had terminated the employment of the claimant. That the claimant then filed this suit. The respondent denies the claim in total and prays that it be dismissed with costs.
13. The parties filed written submissions and the issues for determination are:-
 - (i) Whether the respondent terminated the employment of the claimant or the claimant absconded service.
 - (ii) Whether the claimant is entitled to the reliefs sought, if his employment was terminated by the respondent as alleged.



14. In terms of section 107 and 108 of the *Evidence Act*, Cap. 80 Laws of Kenya, the claimant bears the onus of proving that his employment was terminated by the respondent and in terms of Section 47(5) of the *Employment Act, 2007*, demonstrate *prima facie* that the said termination was wrongful.
15. The employer then assumes the onus of rebuttal by proving on a balance of probabilities that the claimant absconded work and that the said termination did not take place as alleged or at all.
16. Upon a careful evaluation of the evidence adduced by CW1 vis a vis that by RW1, the Court finds the evidence adduced by RW1 more credible than that adduced by CW1 as to what actually took place on August 10, 2016.
17. The Court is satisfied that the respondent had intended to deploy the claimant to other services of driving Taxi instead of being a Chauffeur to the Expatriate officer. Deployment was a prerogative of the employer provided the employment of the claimant continued in terms of the contract of employment. The Court finds that the claimant has failed to discharge his onus in terms of Sections 107 and 108 of the *Evidence Act* Cap. 80 Laws of Kenya as read with Section 47(5) of the *Employment Act*. The Court finds that the claim that the respondent terminated the employment of the claimant lacks merit and the same is dismissed.

Terminal Benefits

18. With regard to the claims for payment of various terminal benefits, it is not in dispute that the claimant stopped working on March 10, 2016. There is no evidence that the respondent paid the salary for the claimant for the 10 days worked in the month of March, 2016.
19. The claimant absconded work and so he is not entitled to payment in lieu of notice. The claim for payment in lieu of one month notice is dismissed. The respondent did not demonstrate that it had granted the claimant annual leave in the period 2015/2016. The Court awards the claimant Kshs 35,968 in lieu of one month leave.
20. The respondent did not also demonstrate that it paid National Social Security Fund (NSSF) in respect of the claimant nor had any other pension for the claimant. The Court awards the claimant terminal gratuity calculated at 15 days salary for the two (2) years' service by the claimant in the sum of Kshs 35,968.
21. The claimant is also entitled to grant of Certificate of Service and the Court so orders.
22. In the final analysis, judgment is entered in favour of the claimant against the respondent as follows:-
 - (a) Arrear salary Kshs 11,989.
 - (b) In lieu of leave Kshs.35,968.
 - (c) Terminal gratuity Kshs 35,968.
Total award Kshs 83,925.
 - (d) Interest at Court rates from date of judgment till payment in full.
 - (e) Respondent to provide Certificate of Service to the claimant within 30 days of the judgment.
 - (f) Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 6TH DAY OF JULY, 2023.

MATHEWS N. NDUMA



JUDGE

Appearances

Mr. Shijeje for claimant

Mr. Mburu for Respondent

Ekale: Court Assistant

