



REPUBLIC OF KENYA



KENYA LAW
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Ondiek v ALS Limited (Cause 714 of 2019)
[2023] KEELRC 2460 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2460 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 714 OF 2019
B ONGAYA, J
OCTOBER 17, 2023

BETWEEN

DENNIS ONJURU ONDIEK CLAIMANT

AND

ALS LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the Memorandum of claim on 24.10.2019 through Julius Juma & Company Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration that his termination was unfair and unlawful for failing to abide with the dictates of the contract of employment and the *Employment Act*.
 - b. Compensation in Kshs. 300,000 in lieu of termination notice
 - c. Compensation in Kshs. 3,600,000 being damages for unfair termination.
 - d. Kshs 100,000 being salary for days worked in July 2019.
 - e. An award of Kshs. 300,000 in lieu of 31 accrued leave days.
 - f. Exemplary damages.
 - g. Certificate of service.
 - h. Costs.
2. The Memorandum of response was filed on 26.11.2019 through Kisilu Wandati & Company Advocates. The respondent prayed that the suit be dismissed with costs.
3. The claimant's case was that he worked for the respondent from June 2010 until 08.07.2019, with a one-year break from April 2015 to June, 2016 due to personal reasons.



4. He was employed as an aircraft maintenance engineer. He states that he returned from outstation, Bunia DRC on 15.03.2019 and started his off days on 18th of the same month until the 02.04.2019. That he applied for a new passport in April and after 3 weeks of waiting, the management specifically the line maintenance manager Mr. Talha Sayyid, started piling pressure on him to produce the new passport.
5. That on 26.04.2019 at around 6.00 am the claimant sent a text message to the base maintenance manager Mr. Hetal Vadgama advising him that he would be going to work late, due to having received a call that his father was unwell and needed medical attention; which he had to organise for. The claimant states that he later went to work at around 10.00 am and requested Mr. Vadgama for permission to attend to his sick father, and the request was approved.
6. Due to his father's illness, he had to take leave from time to time - since the father had numerous appointments with various doctors and was always in and out of hospital. This made it difficult to discharge his duties. The claimant states that he informed all his supervisors about his father's condition.
7. The claimant states that Mr. Sayyid maintained pressure on him to obtain a new passport, and at one time, directed him to find someone to bribe at Nyayo house to fast track the process. In a subsequent meeting, Mr Vadgama and Mr. Sayyid called him into the office and demanded to know why he hadn't found someone to bribe at Nyayo house. The claimant responded that it was against his values and principles to bribe people to obtain services.
8. That from 14.06.2016 he had been working under contracts that were renewable annually, however, in June, 2018 the respondent did not issue the claimant with a contract as expected, but nonetheless he continued to discharge his duties. On 29.05.2019 he was given a contract to sign, backdated to 15.06.2018 and expiring on 14.06.2019, and so it was to expire two weeks after issuance.
9. That the contract expired on 14.06.2019 and the claimant continued to work without a contract, until two weeks later when a three months contract was sent to him on e-mail. The claimant stated that he did not immediately sign the three months contract, as he sought audience with the respondent, to query why he was being issued with a three months contract instead of a year's contract.
10. On 08.07.2019 the claimant states that he reported to work, when he was informed that his supervisor Mr. Vadgama wanted to see him, and that said Mr. Vadgama orally terminated him from employment, stating:

“ we gave you a contract which you've not signed and to that effect, the company has decided that they are no longer need your services. We found a suitable replacement for you. Kindly make your way to the HR office so that you can start the clearing process.”
11. The claimant states that he went to the Human Resource Office as directed, but the human resource officer declined to clear him stating that she needed written instructions from Mr. Vadgama. The claimant informed Mr. Vadgama of the human resource officer's response. In turn, Mr. Vadgama wrote to the human resource officer instructions on email. When the claimant returned to the human resource officer for clearance, the human resource officer declined to issue the claimant with clearance stating that she needed to discuss with the CEO, at which point the claimant left the premises without clearance.



12. That on 17.07.2019 the claimant received a call from James Wamunga who introduced himself as the new human resource officer for the respondent, who then accused the claimant of absconding from duty from 09.07.2019.
13. The claimant states that he asked the said Mr. Wamunga to confirm the true position with Mr. Vadgama and Miss Tracy since according to the claimant, he had been terminated by the respondent as communicated by Mr. Vadgama.
14. The claimant requested for a meeting with Wamunga. The claimant states that at the meeting Wamunga focused on ensuring that the claimant signed the contract. The claimant declined to sign, for reasons that signing would add no value, since from his understanding he had been terminated from employment already.
15. On 07.08.2019 the claimant received a call from Druscillah, the finance and payroll assistant, who informed him that she had his July, 2019 salary ready, in form of cheque, and that he needed to contact the HR office. The claimant called Wamunga who confirmed that he could go and collect the cheque, however, on reaching the office he told him that he could only be paid if he signed the impugned contract.
16. It is the claimant's case that the respondent terminated his employment because of his refusal to offer bribes to Nyayo house personnel for the renewal of his passport, and that the respondent unlawfully withheld his salary for days worked in the month of July.
17. On the part of the respondents it is stated that there was a contractual relationship between the parties and that there was a contract of employment in existence at all material times, which contract the claimant signed on 29.05.2019. That the claimant without any justifiable reason or official approval from the respondent, failed to report to work from 09.07.2019 despite numerous appeals from the respondent's human resource manager to officially seek for permission to be away from duty.
18. That the claimant being aware that his duties entailed travelling out of the country from time to time, continued to hold an expired passport even after he had been advised to obtain a new passport by his supervisor. That he also refused to acknowledge his contract extension letter which had been sent to him on email.
19. That a meeting was held on 25.07.2019 between the claimant, Hetal Vadgama and James Wamunga wherein the claimant stated:
 - a. He needed time to be away with his family on getting his passport.
 - b. He wished to be away and come back when ready to check on the job availability.
 - c. He was aware of the company's grievance policy.
 - d. He would give feedback to the company with respect to the contract issued and that he had no issue with the short-term contract. He further indicated that he would prefer to have the contract after mid-September 2019.
 - e. He had worked in the same fleet for nine (9) years without any upgrades and that he needed to grow.
 - f. The company had the liberty to decide on how to deal with the days he had been absent from work.



20. It was the respondent's case that the claimant had not been terminated since he had not received any formal communication in accordance with the company's policy on termination and that he had not met the criteria for promotion.
21. On 29.07.2019 the human resource manager wrote to the claimant and informed him that he had no leave balance and that his request to be on vacation until mid-September 2019 was only possible if he made a request in writing for leave (without pay). The respondent states that as at the time of making his statement, the claimant's supervisor had not received any such request.
22. On 05.08.2019 the respondent wrote to the claimant indicating that the company had not received an official leave (unpaid) request and an acknowledgement of the contract extension letter and also sought to know whether he had obtained a new passport.
23. It is the respondent's case that the claimant wilfully absconded and continued to abscond duty even after the meeting held on 25.07.2019. and that the respondent took all reasonable steps not to sever the employment relationship between them.
24. The parties filed their respective submissions. The Court has considered the parties' respective cases and makes finding as follows.
25. The 1st issue for determination is whether the separation amounted to unfair termination of the contract of service. By his own case, the claimant's last term contract was signed on 29.05.2019. It was backdated to 15.06.2018 and expiring on 14.06.2019 being two weeks after issuance. On 08.07.2019 the claimant met Mr. Vadgama. The claimant's own account was that at the meeting he was told he was being terminated because he had failed to sign the next term contract. The claimant testified that on that date he told the Human Resource Manager thus, "I told the HRM that I would not go back if my supervisor did not want me present. Later evening, I called. HR said, no response" The claimant's further testimony was that after two weeks he received a telephone call from a new Human Resource Officer upon allegations of absconding duty but he replied that he was waiting for a termination letter. The claimant further testified that he later attended a meeting where he was asked to sign a three months' term contract and which had been issued 2 weeks earlier but he declined to sign. The Court has considered the claimant's own account and returns as follows:
 - a. By July 2019 the claimant's last term contract had lapsed. As at the meeting of 08.07.2019 there was no subsisting contract between the parties that would be subject of termination as urged by the claimant.
 - b. Thereafter parties engaged in negotiations to sign the next three months term contract but the claimant declined to sign for no established reasons or for the misconceived reason that he had been terminated on 08.07.2019 but which the Court has found not to have been the correct position.
 - c. The Court returns that the last term contract having lapsed by effluxion of time, no other contract was concluded between parties and there was no contract of service terminable on 08.07.2019 as urged for the claimant.
 - d. Thus, the Court considers that the separation followed the lapsing of the last term contract and the failure by the claimant to sign the next three months term contract. The alleged unfair termination is found unjustified. The evidence was that the parties engaged to negotiate the next three years term contract but they appear to have failed to reach a positive outcome and they separated. The claims and prayers in that regard will collapse.
26. To answer the 2nd issue, the Court returns as follows:



- a. The claimant testified he did not know if at all he was paid 8 days' worked in July 2019. The respondent's witness testified that the claimant was paid the 8 days as collected on 23.10.2019 together with the pay for 31 leave days but there was no evidence of the payment. On a balance of probability there is no reason to doubt the respondent's account which included that there was no evidence of the payment. Per the respondent's submissions the claimant is awarded Kshs.100,000.00 for days worked in 2019 and not paid plus Kshs. 300,000.00 for 31 leave days making Kshs.400,000.00 payable less due PAYE. The claimant is also entitled to a certificate of service.
 - b. The respondent by letter dated 02.09.2019 informed the claimant that his contract of service would end by that notice and he would be paid monthly gross salary up to 30.09.2019, 31 leave days and pensions benefits. It would appear that the letter was misconceived because as at the time of issue, parties were not in any contract of service. However, the respondent has urged that the same was the agreement the parties arrived at the meeting of 25.07.2019 amounting to extension of contract by conduct. The Court however returns that the letter was misconceived as of no consequence because the claimant has not been shown to have agreed to that position and there are no details on such conduct that would constitute such extension or renewal of the contract. At best, the letter amounted to the respondent's design of the terms of separation after the last fixed term contract lapsed and the claimant declined to sign the next fixed term contract.
 - c. The Court has considered all circumstances of the case including the claimant's unexplained reluctance to sign the next term contract and the respondent to pay only 50% of the costs of the suit.
27. In conclusion judgment is hereby entered for the claimant against the respondent for:
- a. Payment of Kshs. 400,000.00 (less PAYE) by 01.12.2023 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.
 - b. The respondent to deliver the certificate of service by 01.11.2023.
 - c. The respondent to pay only 50% costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS TUESDAY 17TH OCTOBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

