



Erastus v Zhongmei Engineering Group Limited & another; Attorney General (Interested Party) (Cause 2449 of 2017) [2023] KEELRC 2946 (KLR) (17 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2946 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2449 OF 2017
B ONGAYA, J
NOVEMBER 17, 2023**

BETWEEN

MUTWIRI TITUS ERASTUS CLAIMANT

AND

ZHONGMEI ENGINEERING GROUP LIMITED 1ST RESPONDENT

MANGAT I.B PATEL (M.I.B.P. LIMITED 2ND RESPONDENT

AND

ATTORNEY GENERAL INTERESTED PARTY

JUDGMENT

1. The claimant filed the Statement of claim on December 15, 2017 through Memusi Micheni & Associates Advocates. The amended Statement of Claim was filed on January 17, 2018. The claimant prayed for judgment against the respondent for:
 - a. Payment of the claimant's anticipated salary (to be specified later) and house allowance for 18 months Kshs.47,500 x 18 months =Kshs.855,000.00.
 - b. Payment of the claimant's unpaid salary for the entire period of his contract of employment (to be specified later) Kshs.107, 500.00 x 20 months =Kshs.2,150,000.00.
 - c. Leave pay
 - d. General damages for wrongful termination of employment
 - e. An order directing the honourable Attorney General or the Cabinet Secretary in charge of labour relations to enforce.
 - f. Interest on (a),(b),(c) and (d) above at court rates.



- g. Costs of the suit
2. The reply to amended Statement of Claim was filed on February 23, 2018 through Orina & Co Advocates. The respondent prayed that the suit be dismissed with costs.
 3. The claimant's case was that through a letter dated August 30, 2017, the 2nd respondent being a consultant for a project known as the Western Transmission (Kabete-Uthiru-Karen) Pipeline Lot 2, directed the 1st respondent to employ the claimant, in the twin capacity of site surveyor and technician with effect from August 25, 2017 for a period of twenty months, in accordance with a clause 706 of particulars specifications and item no 3.12 of Bill no. 1 (Preliminaries and General).
 4. It is the claimant's case that the 1st respondent disregarded the terms of the subject contract of employment, and put him on half salary until October 31, 2017 when the 2nd respondent's project manager verbally terminated his employment without lawful cause.
 5. On the part of the 1st and 2nd respondent it was pleaded that there was a contract between the parties as the claimant was issued with the letter of appointment. The respondents denied that the monthly salary and allowances was Kshs.155,000 as alleged for the claimant. Further, the appointment letter issued to the claimant captured what was verbally agreed between the parties to the tune of Kshs.40,000/= being monthly gross emoluments which amount was accepted by the claimant because it was based on the nature of work to be assigned to him. Further, the respondents admitted receiving that demand letter but did not act on it because it was without basis. They denied the claims and prayers in the amended statement of claim.
 6. The claimant filed testified to support his case but despite numerous opportunities to call the witness to testify, the respondent failed to do so. The respondent as well failed to file the final submissions. The Court has considered all the material on record and returns as follows.
 7. To answer the 1st issue the Court returns that parties were in a contract of service. The claimant was employed by the letter dated August 30, 2017 to work for the Resident Engineer in the project as pleaded for the claimant. The letter shows he was identified by the second respondent for the 1st respondent to be paid Kshs.40,000.00 gross monthly payment less statutory deduction. The employment had taken effect on August 25, 2017. The Court returns that the 1st and 2nd respondents were the joint claimant's employers.
 8. To answer the 2nd issue and per the claimant's testimony, his employment was terminated at the end of October 2017. Thus, he worked for the respondents for two months. It was a verbal termination.
 9. The 3rd issue is whether the claimant is entitled to the remedies as prayed for. The Court returns as follows:
 - a. The claimant prayed for payment of the claimant's anticipated salary (to be specified later) and house allowance for 18 months $Kshs.47,500 \times 18 \text{ months} = Kshs.855,000.00$. The prayer is found speculative and without contractual basis. Parties appear to have agreed upon a gross or consulted monthly payment of Kshs.40,000.00. The claimant has not shown basis of the 18 months and base of monthly house allowance. The prayer will collapse.
 - b. The claimant prayed for payment of the claimant's unpaid salary for the entire period of his contract of employment (to be specified later) $Kshs.107,500.00 \times 20 \text{ months} = Kshs.2,150,000.00$. At the hearing the claimant testified that he was working for a construction company as an assistant project manager. He did not show how the termination by the respondents or other reason attributable to the respondents had diminished his capacity



to thereafter engage gainfully. His evidence was that he had moved on and he was gainfully employed. He did not explain the basis for the 20 years and the Kshs.107,500.00 per month as was pleaded. The prayer will fail

- c. He prayed for leave pay which was not quantified. The Court finds that he had worked for only 2 months and had not earned leave per section 28 of the *Employment Act* as he had not worked for an aggregate period of 12 months.
- d. The Court has considered the prayer for general damages for wrongful termination of employment. The termination was without notice and it appears no reason was given. It appears that in view of the service of two months and the factors in section 49 of the Act for award of compensation, one-month payment particularly in lieu of termination notice as envisaged in section 35 of the Act will meet the ends of justice making Kshs.40,000.00.
- e. No justification was shown for an order directing the Honourable Attorney General or the Cabinet Secretary in charge of labour relations to enforce. The same will be declined.
- f. The claimant has substantially succeeded and is awarded costs of the suit.

In conclusion judgment is hereby entered for the claimant against the 1st and 2nd respondents jointly and severally for:

- a. Payment of Kshs.40,000.00 less PAYE by December 31, 2023 failing interest be payable thereon from the date of this judgment till full payment.
- b. The payment of costs of the suit.

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

BYRAM ONGAYA

PRINCIPAL JUDGE

