



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO.455 OF 2016

BENARD MURIUKI GIKANDI.....CLAIMANT

VERSUS

KENYA WILDLIFE SERVICE..... RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 11th November, 2016 on even date through the firm of Munene Chege and Company Advocates, claiming to have been constructively dismissed and to be compensated for the alleged unfair termination. He also sought for payment of leave allowance, overtime pay, off days and public holidays worked.

2. The summary of the claimant's case is that he was employed by the Respondent on 20th June, 2007 as a grade 1 driver to drive the Respondent's motor vehicle in addition to other duties that he would be given from time to time.

3. The Claimant worked for the Respondent diligently till December 2013 when he was allegedly forced to resign due to harsh working conditions. He stated that the Respondent placed him on casual basis from the time of employment for more than 6 years, that he worked in the wild which was dangerous when he had not been trained how to handle risk if it arises. That he worked all days of the week without any rest day and mostly late into the night leaving him fatigued and demotivated and also that the claimant never went for leave and could work on all days including public Holidays without any extra pay or overtime pay.

4. That after resigning the Respondent did not pay him terminal dues forcing him to take up the issue with the county labour officer who wrote several demand letter including the one dated 29th December, 2015 which did not elicit any response.

5. The claimant therefore prays for judgement against the Respondent for the following reliefs;

a) A declaration that the claimant's dismissal was unlawful, unjust and discriminative and the same amounts to constructive dismissal.

b) Off days/ public holidays and overtime arrears.

c) Leave arrears

d) Compensation for unfair termination/constructive dismissal

e) An order compelling the Respondent to settle the outstanding benefits

f) General damages

g) Costs of the suit and interest thereof at Court rates

h) Any other relief that this Court may deem fit to grant.

6. The Respondent entered appearance on the 24th January, 2017 and filed a reply to the clam on 20th February, 2017.

7. The Respondent avers that it indeed employed the claimant sometimes in the year 2007 and deployed him to Nakuru National Park however that the claimant was terminated from service on 16th May, 2008.

8. After two years the claimant approached the Respondent and requested for re-engagement which the Respondent allowed however the terms of engagement changed. The Claimant was employed on a three months renewable contract which he agreed to the terms therein and worked till 16th December, 2013 when the claimant tendered in his letter of resignation claiming personal reasons.

9. The resignation was accepted by the Respondent on the 21st January, 2014 and the Respondent advised the claimant to clear with it and that he would be paid for the 22 days worked in December, 2013.

10. The Respondent avers that the claimant agreed to the terms of engagement and signed the contract voluntarily and has never raised any complaint while at the Respondent employment. It was stated further that the claimant was engaged as a driver and not a ranger therefore the allegation that he was exposed to dangerous animals in the wild is not justifiable.

11. The working hours that the claimant worked were as per the law and never worked for any overtime as alleged.

12. The Respondent avers that it responded to the letter by the labour office on the 29th June, 2016 however that it did not receive any other correspondences from the labour office or the claimant.

13. The Respondent avers that the claimant was paid a consolidated sum therefore the claim of overtime, leave allowance and house allowance cannot stand.

14. The respondent then maintained that the claimant voluntarily resigned from employment and was not unfairly terminated as alleged. Further that his terminal dues being his salary and the certificate of service was to be collected after the claimant cleared with the Respondent which he is yet to clear.

Hearing

15. During hearing the claimant(CW-1) adopted his statement and list of documents filed and in addition testified that he was employed as a driver by the respondent and was at risk for the reason that poaching was on the rise at that time and he was not trained to handle the situation neither was he armed to protect himself. He stated that he was required to guard animals and worked in odd hours without any overtime pay. He stated that when he approached the Respondent he was told if he could not work under the said conditions then he should resign. That he opted to resign as the risk of being attacked by animals and poachers was in the rise and his bid to have him trained and armed fell on deaf ears. He also stated that he was not accommodated by the Respondent and was underpaid.

16. The claimant admitted receiving Kshs.50,000 being his salary arrears and leave arrears pay in the year 2018 after this suit was filed. He therefore now claims for service pay, overtime pay, 7 years leave not taken and for damages for the unfair termination.

17. Upon cross examination CW-1 testified that he was employed on a three months renewable contract. He admitted that he signed the contract without any coercion and the salary was a consolidated figure of Kshs. 10,494. He stated that he never claimed for the overtime while working at the Respondent neither did he complained of the harsh working environment. He also stated that he worked on public holidays and relied on his work ticket showing he worked on 12th and 24th December.

18. Upon further cross examination, he stated that he resigned because his work was no longer good for his health having to work excess hours and in dangerous conditions however that the letter of resignation did not state as much. He admitted that he never made any complaints herein while still an employee of the Respondent. He stated that after expiry of the contrary and before renewal the Respondent gave him 4 to 5 days off however that the said off days were not paid.

19. The Respondent called one witness, Wilson Mulwa, as the RW-1 who testified that he was the Respondent's Human Resource Manager but now retired as from June, 2019.he relied on his witness statement of 12.11.2019 and produced document dated 17.12.2017 and the supplementary list dated 13.11.2019.

20. He testified that the parties herein have consented to resolved prayer (a) and (b) vide the consent dated 17.11.2019. On the unpaid overtime the witness testified that the issue herein was never raised with the Respondent. On the prayer for unpaid off days it was stated that the claimant was paid depending on hours worked. On the alleged public holidays worked the Respondent witness testified that there was no evidence that the claimant worked during public holidays.

21. With regard to the prayer for service pay, it was averred that the claimant worked on a fixed contract depending on availability of work therefore that the employment was not continuous to warrant payment of service pay.

22. On the prayer of underpayment, RW-1 testified that the prayer is time barred it having not been raised while the claimant was working for the Respondent.

23. He also testified that the claimant was not constructively dismissed as alleged rather that he voluntarily resigned from employment which resignation was accepted by the Respondent. Therefore that the prayers sought for compensation for unfair termination is not warranted.

24. Upon cross examination, RW-1 testified that the claimant worked for the Respondent from 2007 to 2013 with breaks in between. He stated that the claimant worked on three months' contracts which was renewable. He admitted that the claimant could have worked at odd hours and over weekends. He further stated that they paid the claimant his terminal dues of Kshs 50,352.50 which covered the 22 days worked in December and accumulated leave days of 78 days.

25. With regard to house allowance, RW-1 testified that the claimant was paid a consolidated salary which factored in the house allowance. He claimed that the claimant took 96 days off however that there are no documents to back up the said claim. Finally that the claimant was not paid service or severance pay.

Submissions.

26. It was submitted for the claimant that the allegation that the claimant was terminated from employment in 2008 and re-engaged in 2010 is untrue for the reason that the Claimant produced contract of employment for 10th March, 2008, 10th July, 2008, 16th October, 2008 and contract for the entire 2009 signed on 23rd January, 30th April and 5th August 2009. It was argued that the claim by the Respondent was contrary to the law under Order 2 Rule 11 of the Civil Procedure Rules as read with section 61 of the Evidence Act.

27. It is the claimants submission that as much as there is a termination letter of 16th May, 2008 the same never materialized as the claimant challenged the dismissal and while still in employment and the Respondent conceded to the Appeal and allowed the claimant to proceed with employment therefore the claimant did not at any point stop working for the Respondent from the time of employment in 2007 till his resignation in 2013.

28. It was submitted that the claimant never resigned willfully as alleged by the Respondent but that he was forced by the circumstances of his employment to resign therefore that the termination was constructively caused by the Respondent. In this they cited the case of **Emmanuel Mutisya Solomon V Agility Logistics Industrial Court cause No. 1448 of 2011** where Court defined constructive dismissal and also the Supreme Court of Canada case of **Potter V New Brunswick Legal Aid Services Commission 2015 SCC 10**.

29. It was also submitted that the Probationary period in which the claimant was retained as a driver was in excess of six years when the law under section 42(2) of the Employment provides for probationary period of 6 months with an extension of another six months only.

30. It was then submitted for the claimant that they have proved their case on a balance of probability and therefore prayed for the claim to be allowed as prayed.

Respondent's Submissions.

31. The Respondent submitted on three issues: whether the claimant was a casual employee and if so whether his employment can be converted to regular employment under section 37 of the Employment Act, whether the claimant was unfairly terminated and whether the claimant is entitled to the reliefs sought.

32. On the first issue it was submitted that the claimant was engaged depending on availability of work and funds as seen in the payment vouchers of May 2009 and June 2009 where the claimant worked for 5 and 7 days respectively. It was argued therefore that the employment of the claimant was never on continuous basis therefore that the contract of employment never converted as envisaged under section 37 of the Employment Act.

33. On the second issue it was submitted that the claimant was engaged on a temporary contract which he agreed to the terms of engagement therein without raising any complaint. Subsequently that the claimant voluntarily on personal reason resigned from employment.

34. It was argued that there was no evidence adduced by the claimant to advance its argument of the prayer of underpayment, overtime work, leave allowance, when the law under section 107 and 108 of the Evidence Act requires that he who alleged must prove. In this they cited the case of **Milton Misanya V Aga Khan Hospital Kisumu[2017] eKLR** where the Court cited the case of **Mari Kagai Ligaga v Coca Cola East and central Africa Limited(Unreported)** and gave the basic ingredients for constructive dismissal which are as follows;

a) The employer must be in breach of the contract of employment

b) The breach must be fundamental as to be considered a repudiatory breach

c) The employee must resign in response to the breach

d) The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.

35. Accordingly, it was submitted that the claimant has not met the ingredients above for the claim of constructive dismissal, as the Claimant resigned 6 years after engagement at the Respondent therefore that the resignation could not have been caused by alleged terms of service.

36. It was further submitted that the claimant was not constructively dismissed rather that he resigned on his own volition therefore he is not entitled to the remedies sought.

37. I have examined the evidence and submissions of the parties herein. The claimant claim that he was treated unfairly and harshly by the respondent forcing him to resign from employment which he view as a constructive dismissal.

38. The respondent on the other hand aver that the claimant was terminated on 16th May 2008. But in 2010, the claimant applied for a re-engagement by the respondent and he was subsequently appointed as a temporary driver a position he had for 3 months until 16th December 2013 when he resigned and the resignation was accepted.

39. From the documents produced by the claimant, he was on temporary appointment from 10th July to 9th October 2008, from 17th October, 2008 to 15th January 2009, from 23rd January 2009 to 22nd April 2009, from 30th April 2009 to 29th July 2010, from 2010 to May 2010, from May 27th 2010 to 26th August 2010 etc.
40. From all these documents, it is apparent that the claimant worked for the respondents from 2008 to 2013 on temporary appointments of 3 months each before the claimant had been exited from service on 16th May, 2008.
41. On 16th December 2013, the claimant tendered his resignation stating that the reason for resignation was personal.
42. The resignation was apparently accepted though the respondents Appendix 2 is not signed.
43. My view is that the claimant indeed resigned from employment and there is no indication that the reason for the resignation was prompted by harsh or unfair termination.
44. This is because in his resignation letter, the claimant indicated that he resigned for personal reasons. The prayer for unlawful and unfair termination cannot therefore stand or be granted.
45. However, the claimant remained on temporary employment all the period he worked for the respondent and was underpaid his wages as submitted.
46. I find for him in terms of the underpayments as submitted and I award him 123,673/= as prayed.
47. I also award him 100,000/= as damages for the unfairness of being kept on temporary continuous employment for 3 years.
48. The rest of the claim is not proved.
49. I find for claimant in total for kshs.223,673/= plus costs and interest.

DATED AND DELIVERED IN OPEN COURT THIS 20TH DAY OF JANUARY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Leon Kalisto holding brief for Lutta for respondent – present

Munene Chege for claimants – absent

Court assistant - Fred