



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 599 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

JULIUS OKANG'A OMULANDO.....CLAIMANT

VERSUS

TRADEWINDS AVIATION SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. By a statement of claim dated 6th April 2016 and filed on 12th April 2016, the Claimant sued the Respondent praying for the following reliefs –

(a). Declaration that the Respondent's action in dismissing the Claimant from employment was unlawful and unfair

(b). Kshs.150,269.70 particularised as below –

i) Salary for May 2013..... Kshs.10,733.55

ii) One month's salary in lieu of notice.....Kshs.10,733.55

iii) 12 months' salary as compensation

for unfair termination.....Kshs.128,802.60

(c)... Costs of this claim.

(d).. Interest on the amount awarded.

Claimant's Case

2. The Claimant avers that he was employed by the Respondent as a Porter/Cleaner on 26th January 2009 at a gross salary of Kshs.13,333.00 inclusive of house allowance and was probation for three months. That his employment was confirmed on 26th January 2009. It is averred that because of his faithfulness he was confirmed on permanent basis. That because of his commitment, the contract of employment was extended from 7th March 2013 to 12th May 2013.

3. The Claimant avers that on or about 9th May 2013 at around 5.00 pm as he was changing clothes at the locker, and filing out some work forms, the Respondent's security officer, Mr Albert Ekayaa came over and asked him what he was carrying and on being searched the security officer found a flash disk. That he was accused of having stolen the flash disk and was detained in a room and later transferred to another where he recorded as statement after being requested to do so. He admitted having had the flash disk but stated that it belonged to him. That the police were subsequently called. He was arrested and placed in a cell and charged on 10th May 2013 with the offence of conveying suspected stolen property in **CMCC No. 2066 of 2013**. He denied the charge and was released on cash bail of Kshs.3,000/-.

4. That when he reported to work on 13th May 2013, he was denied access by the airport security personnel. On further inquiry, the Supervisor, one Mr. Josephat Kilande informed him that he should only report back after he had been cleared of the criminal charges. That Mr. Kilande did not indicate whether the Claimant was on suspension but indicated that he would be paid for the services rendered.

5. It is further averred that on 6th June 2013, one Mr. Godfrey Otieno delivered the Claimant's pay slip which showed that the salary for May

had been paid which was not the case.

6. That attempts to access the Respondent's offices thereafter failed until the criminal case was finalised two years and three months later when he was acquitted on 3rd August 2015.

7. It is averred that on 7th September 2015, the Claimant took copies of the proceedings to the Respondent's office but the Chief Executive Officer (CEO) was not in the office but the Human Resource Manager took copies.

8. That a further visit on 14th September 2015 yielded no results because he was notified that the CEO had not made a decision as was the visitation on 17th September 2015. That on 21st September 2015, he was denied entry. That he called the Human Resource Manager who advised him to leave the airport or risk arrest.

9. The Claimant avers that having been discharging his duties with due dispatch and diligence, his dismissal was actuated by malice, that the accusation of theft was baseless, he was not issued with a warning letter and no disciplinary hearing for which he suffered loss and damage.

Respondent's Case

10. The Respondent case is pleaded as follows. That the Claimant was its employee from 1st February 2009 to 28th May 2013 as a Porter/Cleaner. Under the first contract effective 1st February 2009 to 31st January 2011, the Claimant's consolidated salary was Kshs.8,380/- per month which was reviewed upwards to Kshs.10,000/- on 14th August 2009. That the contract was validated and extended to January 2012 and on 7th February 2012 it was extended for one (1) year. The contract was thereafter extended from 7th March 2013 to 12th May 2013.

11. That the Claimant was summarily dismissed on 28th May 2013 for gross misconduct. That the Claimant sought to take the Respondent's property without its permission and had recorded a witness statement at the Kenya Airways Security Offices in the presence of the Respondent's Security Officer and a Kenya Airports Authority Security Officer. Other averments by the Claimant were denied.

12. The Respondent further avers that it had not paid the Claimant's terminal dues because he had not cleared with it and the same are as tabulated as "*Appendix 7*".

13. It is further averred that the Claimant's employment contract was to lapse on 12th May 2013 and he was involved in a misconduct on 9th May 2013.

14. That the Claimant had not shown that he was unfairly terminated.

Evidence

15. The Claimant adopted the written statement as evidence in chief and confirmed on cross examination that his last contract was to expire on 12th May 2013. He admitted having been found with a flash disk on 9th May 2013 and did not clear with the Respondent.

16. RW1 adopted the witness statement as evidence in chief and testified that on 9th May 2013, he was summoned to the Kenya Airways Security Office to attend to a matter affecting the Claimant. That the Claimant alleged that the flash disk belonged to him but was unaware of the contents since they were in a foreign language and none of the security officers present could understand it. That the Claimant was supposed to declare the item for recording in the record book and there was no record that he had done so. That in such circumstances, such items are suspected to have been stolen from passengers' luggage and the Kenya Airports Authority and the Kenya Police are involved. That the Kenya Airports Authority Security Officer invited the police for further investigation.

17. On cross examination, the witness confirmed that he was unaware whether a complaint had been made by a passenger. He also stated that he had been listed as a witness in the case against the Claimant but did not testify. That the Claimant's security pass was withdrawn by the Kenya Airports Authority.

18. On re-examination, RW1 confirmed that the Claimant's security pass was issued and withdrawn by the Kenya Airports Authority.

19. RW2 testified that the Claimant was an employee of the Respondent from 2009 to May 2013 on renewable fixed term contracts up to 12th May 2013. That the Respondent made no allegations against the Claimant since the flash disk was discovered by the Kenya Airways Security. That the Claimant could not access the airport without a pass issued by the Kenya Airports Authority since the same had been backlisted. That the Claimant was not paid because he had not cleared with the Respondent since he had not returned the uniform badges and protective equipment.

20. He testified that the Claimant could not access airports in Kenya as a worker since his pass was backlisted.

21. On cross examination, the Witness confirmed that the Claimant had no disciplinary issues and the Respondent would have renewed the contract on expiry on 12th May 2013. That he was unaware of any report of a lost flash disk. That he had no evidence that the Claimant's pass had been withdrawn. That the Claimant violated Airport Regulations and no notice to show cause was issued or disciplinary hearing. That the termination letter was not served upon the Claimant.

22. The witness testified that the Claimant's reported on 13th May 2013 but could not access the Airport.

Claimant's Submissions

23. The Claimant identifies two substantive issues for determination, whether the Claimant's termination was lawful and fair and whether the Claimant is entitled to the remedies sought.

24. As regards substantive fairness, the Claimant relies on the decision in **David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR** as well as Section 43 of the Employment Act. It is submitted that the Claimant testified that he was not given any proper explanation as to the reason(s) for termination.

25. That the Respondent had no valid reason for terminating the Claimant because there had been no complaint about a lost flash disk and the Respondent had been renewing the Claimant's contract since 2009 and was vindicated by the Court by the acquittal. In addition, the Respondent adduced no evidence that the Claimant's Airport pass had been backlisted.

26. It is submitted that the termination was substantively unfair.

27. On procedure, the Claimant relies on Section 41 of the Employment Act 2007 as well as the decision in **David Gichana Omuya v Mombasa Maize Millers Limited (supra)** to urge that despite attempts to be informed of his status in September 2015, no information was provided by the Respondent's Human Resource Manager.

28. It is argued that the termination on 28th May 2013 was never served upon the Claimant though the Claimant had an email address. That the letter was an afterthought.

29. It is submitted that the termination was procedurally unfair for want of compliance with Section 41 of the Employment. The decisions in **Shankar Saklani v DHL Global Forwarding (K) Ltd [2013] eKLR, Linus Barasa Odhiambo v Wells Fargo Limited** and **KUDHEIHA Workers Union v Board of Governors, Kerugoya Boys Secondary** were relied upon on the right to be heard.

30. As regard remedies, it is submitted that the Claimant is entitled to salary for May 2013, one month's salary in lieu of notice and 12 months' salary compensation and costs of this suit.

Respondent's Submissions

31. The Respondent identified similar issues for determination.

32. On termination, it is submitted that it was conducted lawfully. That the Claimant had served the Respondent since 2009 under fixed term contracts and the last on record was valid until 12th May 2013 and had no renewal clause and the Respondent had no obligation to renew it. It is submitted that the Claimant's contract lapsed on 12th May 2013 and the Respondent issued a formal notice of termination on 28th May 2013.

33. Reliance is made on Section 43 of the Employment Act. It is further submitted that the Claimant's contract of service terminated by operation of law. The Canadian Supreme Court decision in **Wells v Newfoundland** is relied upon to demonstrate the terms of a contract.

34. It is submitted that by reason of backlisting of the Claimant's Airport access pass, the Claimant could not access the workplace after 9th May 2013 and the contract lapsed on 12th May 2013 obviating the need for notice to show cause or disciplinary hearing.

35. Finally, that the Respondent could not have waited until 2015 when the Claimant was acquitted since there was no employer-employee relationship between the parties.

36. On reliefs, it is submitted that the Claimant is not entitled to the reliefs sought since the contract of employment with the Respondent came to an end by effluxion of time. That the Claimant has failed to prove that he was unfairly terminated. That if the Claimant's case is found sustainable, compensation be limited to one month's salary.

Determination

37. From the pleadings, documents on record, oral evidence and submissions by the Counsel, the issues for determination are: -

a) Whether the Claimant's contract of employment was unfairly terminated by the Respondent or ended by reason of effluxion of time.

b) Whether the Claimant is entitled to the reliefs sought.

38. As to whether the Claimant was unfairly terminated or the contract of employment ended by operation of law, it is not in dispute that the Claimant was an employee of the Respondent from 1st February 2009 under fixed term contracts. The first contract commenced on 1st February 2009 and ended on 31st January 2011. The second commenced on 1st February 2011 and ended on 31st January 2012 and was extended from 7th March 2012 to 7th March 2013. The last validation and extension of contract was from 7th March 2013 to 12th May 2013

and was signed by the Claimant on 15th March 2013.

39. The Claimant's averment that the contract was permanent was not supported by any evidence.

40. According to paragraph 8 of the statement of claim, the Claimant is explicit that "*the last contract was extended from 7th March 2013 to 12th May 2013*".

41. The last validation and extension of the contract of employment which the Respondent signed stated as follows "*Duration of contract: 7th March 2013 to 12th May 2013*".

42. It is not in dispute that on 9th May 2015, the Claimant admitted having been found with a flash disk within the air site that had neither been declared nor recorded in the record book as required and was arrested and arraigned with the offence of conveying suspect stolen property and was acquitted on 3rd August 2015.

43. The question of termination of fixed term contracts has been addressed by this Court and the Court of Appeal authoritatively. In **Savings and Loan Kenya Limited v Mayfair Holdings Limited [2012] eKLR**, the Court of Appeal expressed itself as follows –

"... the object of construction of terms of a written agreement is to establish therefrom the intention of the parties to the Agreement which must be approached objectively. The question in this appeal is not what the appellant or the respondent meant or understood by the words used but the meaning which the particular clause would convey to a reasonable person having all the background information that was available to the parties at the time of the contract."

44. The Court is in agreement with these sentiments.

45. In the words of Rika J. in **Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited & Another [2012] eKLR** cited with approval by the Court of Appeal in **The Registered Trustees De La Salle Christian Brothers T/A St. Mary's Boys' Secondary School v Julius D. M. Baini [2017] eKLR**

"In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. ... Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination."

46. The foregoing position was restated in **Francis Chire Chachi v Amatsi Water Services Company Limited, [2012] eKLR**.

47. In **Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho-Kariuki [2017] eKLR** the Court of Appeal stated that –

"Bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry..."

48. Finally, the issue of termination of fixed term contracts was also alluded to in **Emmanuel Musembi Nthambi v Tarmal Wire Products Ltd [2019] eKLR** where the Court of Appeal stated that –

"The contract was for a fixed term and upon expiry, the respondent exercised its discretion not to renew ... The appellant worked on contract for the time stipulated therein; the contracts lapsed by effluxion of time and the respondent exercised its rights under the contract not to renew ..."

49. Applying the foregoing principles to the instant case, the inescapable conclusion, in the view of the Court is that the Claimant's contract of employment ended on expiry of its duration on 12th May 2013 as submitted by the Respondent and repeatedly confirmed by the Claimant on cross examination, and the Respondent was under no obligation to renew the contract or notify the Claimant that the contract had indeed lapsed.

50. From the wording of the contract dated 26th January 2009 and subsequent validation and extensions, it is evident that the parties intended the contract to end at a particular time and had no provision for renewal or notice that the contractual duration had lapsed.

51. In the Court's view, the letter of termination dated 28th May 2013 which was never communicated to the Claimant had no effect since it purported to terminate a non-existent contract of employment.

52. It is common ground that the Claimant was not on duty on 10th, 11th and 12th May 2013 and could not access the workplace on 13th May 2013 when he reported and thereafter. Regrettably, he did not explain why he did could not do so.

53. Similarly, it is not in dispute that the Claimant was not at the workplace from 9th May 2013 to the 28th May 2013. Intriguingly, the Respondent admitted in its memorandum of response that the Claimant was its employee from 1st February 2009 to 28th May 2013.

54. Whereas the Claimant submits that his dismissal on 28th May 2013 was unfair for want of compliance with Sections 41, 43 and 45 of the Employment Act, specifically on reason(s) for termination, burden of proof and the procedure, employed, the Respondent submits that the Claimant's employment contract terminated by operation of law since it lapsed on 12th May 2013 and had no extension clause. In addition, the Respondent was not bound to extend it.

55. The Court disagrees with the Claimant's submission that he was unfairly terminated for various reasons.

56. First, it is common ground that the Claimant admitted to have been found with a flash disk in suspicious circumstances. The explanation that it was his does not appear to have satisfied the police who decided to charge him in Court, the fact that he was later acquitted notwithstanding. It is unclear why he had not declared it to obviate the suspicion the security officials had. By being in possession of the gadget, the Claimant set in motion a concatenation of events whose destiny he had no control over and had to face the consequences.

57. Second, the fact that the Respondent had renewed the contract previously on two occasions does not of itself constitute a renewal of the contract. Even if the Respondent intended to renew the contract, it had not manifested its intention to do so by 9th May 2013 when the Claimant was arrested. There is no reliable evidence on record to show that the contract was in fact renewed or the parties entered into a new contract.

58. Third, although the Claimant submits that the termination was unfair, no evidence was led from which the Court could infer unfairness from the particular circumstances. For instance, the statement of claim makes no specific allegation on the part of the Respondent. There are no accusations by the Claimant for the Court to infer unfairness. The statement of claim makes no reference to the date of termination or the manner in which it took place or was conducted by the Respondent. The submission that the termination was substantively and procedurally unfair appear incongruous to the averments and evidence on record. Finally, reliance on the circumstances after the Claimant's acquittal on 3rd August 2015, two years and three months later overstretches imagination.

59. For the above reason, it is the finding of the Court that the Claimant has not on a balance of probabilities established that he was unfairly terminated by the Respondent.

60. Similarly, it is the finding of the Court that the Claimant's contract of service with the Respondent terminated by operation of law on 12th May 2013 thereby discharging the parties thereto. In other words, the contract was not terminated at the instance of the Respondent on 28th May 2013.

Reliefs

(a) Unpaid salary for 3 months Declaration that the Respondent's action in dismissing the Claimant from employment was unlawful and unfair

61. Having found that the Claimant's employment contract did not terminate at the instigation of either of the parties but by operation of law, the Claimant is not entitled to a declaration that the termination was unlawful and unfair.

(b) Sum of Kshs.150,269.70 comprising salary for May, one month' salary in lieu of notice and 12 months' salary compensation for unfair termination

62. Having found that the Claimant's contract of service terminated by reason of effluxion of time on 12th May 2013, the claim for payment in lieu of notice and compensation for unfair termination fails. However, the Respondent admitted that the Claimant was its employee from 1st February 2009 to 28th May 2013. The Court awards the salary for May 2013 in the sum of **Kshs.13,333.55**.

(c) Certificate of service

63. The Respondent to issue the Claimant with a certificate of service forthwith.

64. **In conclusion, judgment is entered for the Claimant for the sum of Kshs.13,333.55.**

65. Interest at Court rates from the date of judgment till payment in full.

66. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF JANUARY 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered

through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGEv