



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

(Before Hon. Lady Justice Maureen Onyango)

CAUSE NO. 1147 OF 2016

FREDRICK NDAITA MOSES **CLAIMANT**

VERSUS

NELSON KURIA **1ST RESPONDENT**

RUTH KURIA **2ND RESPONDENT**

AS CONSOLIDATED WITH CAUSE NO. 1148 OF 2016

PATRICK MUIA KITUNGI **CLAIMANT**

VERSUS

NELSON KURIA **1ST RESPONDENT**

RUTH KURIA **2ND RESPONDENT**

JUDGMENT

Introduction

1. This judgment is in respect of two suits which were heard together. In the first suit, Fredrick Ndaita Moses, the Claimant by his claim dated and filed in Court on 13th June, 2016 is seeking compensation for the alleged wrongful and unlawful termination of his employment by the Respondents and their failure and/or refusal to pay terminal dues and issue a Certificate of Service.

2. In his Claim the Claimant sought the following reliefs:

a) A declaration that the Respondents violated the rights of the Claimant and wrongfully terminated his services

b) Damages for wrongful and unfair termination of services.

c) Terminal dues and benefits of Kshs.1,231,250.00/- comprising of the following:

i. One month salary in lieu of notice Kshs.15,000

ii. Payment for leave days for the period of employment at 21 days per year (8 years, 10 months) Kshs.92,750

iii. Severance Pay at 15 days' pay for

each year of service Kshs.67,500

iv. Public Holidays worked for the period of employment at 9 days for each

year.....Kshs.39,000

v. One rest day per week for the

period of service Kshs.229,500

vi. Overtime at 9 hours a day for three years Kshs.607,500

vii. Damages for wrongful termination of services; 12 months' salary Kshs.180,000

Total Kshs.1,231,250

d) Costs of this suit

3. In the second suit, Patrick Muia Kitungu, seeks the reliefs as set out below:

a) A declaration that the Respondents violated the rights of the Claimant and wrongly terminated his services

b) Damages for wrongful and unfair termination of services.

c) Terminal dues and benefits of Kshs.1,321,610/- comprising of the following:

i. One month salary in lieu of notice Kshs.23,000

ii. Payment for leave days for the period of employment at 21 days per year (11 years, 8 months) Kshs.187,833

iii. Severance pay at 15 days' pay

for each year of service Kshs.134,167

iv. Public holidays worked for the period of employment at 9 days for each year Kshs.80,500

v. One rest day per week for the period of service Kshs.465,110

vi. Damages for wrongful termination of services; 12 months' salary Kshs.276,000

vii. Salary underpayment (23,000 – 18,000) Kshs.5,000 for the period between April 2013 to October 2015
Kshs.155,000

Total Kshs.1,321,610

d) Costs of the suit

The Claimants' Case

4. **Fredrick Ndaita Moses** (the 1st Claimant) avers in his Claim that he was employed by the Respondent in the position of cook at the Respondents' residence effective January 2006. He avers that he performed his duties diligently and to the Respondents satisfaction until October 2015 when the Respondents without just cause unlawfully and unfairly terminated his employment.

5. The Claimant stated that at the time of separation he was earning a monthly salary of Kshs.15,000/-.

6. **Patrick Muia Kitungi** (the 2nd Claimant) avers that he was employed by the Respondent on or about September 2001 in the position of driver at the Respondents' residence.

7. The 2nd Claimant avers that he performed his duties diligently and to the Respondents' satisfaction until October, 2015 when the Respondents without just cause and reason unlawfully un-procedurally and unfairly terminated his employment.

8. The 2nd Claimant further avers that he was earning a monthly salary of Kshs.23,000/- from the time of his engagement until April 2013 when it was unilaterally reduced to Kshs.18,000/- causing him to be underpaid to the date of termination in October 2015.

9. Both Claimants urged this Court to allow their individual claims as prayed.

10. In response the Respondent filed separate responses in which they deny having employed either of the Claimants maintaining that both

were engaged as casual labourers for menial tasks as and when the work was available.

11. The Respondents aver that the Claimants were paid work done as agreed upon completion of each piece of work. They denied terminating the employment of the Claimants employment as alleged holding that the Claimants were never in their employment.

12. It is on this basis that the Respondents state that the Claims as filed herein are baseless and that the Claimants are not entitled to the reliefs sought. The Respondents urged this Court to find in their favour and dismiss the Claims in their entirety with costs to the Respondents.

Evidence

13. At the hearing on 28th September 2021 with both Claimants testified. The Respondents closed their case without calling any witness. Parties thereafter filed and exchanged written submission.

14. In their evidence both Claimants reiterated the averments made in their claims.

15. The Claimants testified that they were never issued with either letters of appointment or payslips by the Respondents and that their salaries were paid in cash or through Mpesa money transfer. The Claimants attached Mpesa statements as proof of payment of their salaries by the Respondents.

16. They maintained that their claims against the Respondents are valid and urged this Court to allow the same as prayed.

Claimants' Submissions

17. The Claimants submitted that the Respondents breached the provisions of Section 9 of the Employment Act, 2007 by failing to provide the Claimants with written contracts upon their employments.

18. The Claimants further submitted that their terminations was un-procedural as the Respondent failed to comply with the mandatory provisions of Section 45 of the Employment Act, 2007.

19. They further submitted that they are entitled to the reliefs sought in their respective claims as the Respondents failed to avail evidence to disapprove their employment status.

20. They relied on Sections 10(5), 49 and 51 of the Employment Act, 2007. They also relied on the case of **Hildah Mwangale v Fiyabi Fisi** [2017] eKLR

Respondents Submissions

21. The Respondents on the other hand submitted that the Claimants have failed to discharge their burden to show that their termination was indeed unlawful as required under the provisions of Section 47(5) of the Employment Act, 2007 and Sections 107, 108 and 109 of the Evidence Act.

22. The Respondents further submitted that the Claimants are not entitled to the reliefs sought in their respective Claims and urged the Court to dismiss the claims as prayed.

23. On specific heads of claim the Respondents submitted that the Claimants have not proved that they are entitled to overtime payments. To buttress this argument the Respondents relied on the case of **Rogoli Ole Manadiegi v General Cargo Services Limited (2016) eKLR** where the Court held that the burden of proving extra hours or days worked rests with the employee.

24. The Respondents further submitted that the Claimants are not entitled to severance pay as they were not declared redundant. For emphasis the Respondents relied on the cases of **Julius Arisi & 90 Others v Research International East Africa Limited (2019) eKLR** and **Hassanath Wanjiku v Vanela House of Coffees (2018) eKLR**.

25. On the Claim for underpayment sought by Patrick Muia Kitungi, the 2nd Claimant, the Respondents submit it is not founded law as the Claimant has not availed any evidence to support this assertion. They submit that the 2nd Claimant ought to rely on the basic minimum wage as provided under the *Regulations of Wages (General) (Amendment) Order, 2015*. To fortify this argument the Respondents relied on the case of **Martin Ileri Ndwiwa v Olerai Management Company (2017) eKLR**.

26. The Respondents further submitted that the Claimants are not entitled to compensation for wrongful termination as pleaded. For emphasis the Respondents relied on the Court of Appeal decision in the case of **Kenya Broadcasting Corporation v Geoffrey Wakio (2019) eKLR**.

27. The Respondents submitted that the Claimants are not entitled to costs having failed to serve the Respondents with a demand letter prior to filing their Claims now before this Court for determination.

28. In conclusion the Respondents urged this Court to find the Claims devoid of merit and to dismiss them with costs to the Respondents.

Analysis and Determination

29. I have carefully considered the pleadings, evidence, the written submissions and authorities cited by the parties. The following issues arise for determination:

- i. Whether the Claimants were casual employees or not;
- ii. Whether the termination of the Claimants' employment was valid both procedurally and substantively;
- iii. Whether the Claimants are entitled to the reliefs sought.

Whether the Claimants were casual employees or not

30. The Employment Act defines a casual employee as –

A person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.

31. The Respondents admitted that they engaged the Claimants but maintained that they were never under their employment and that their engagement was on casual and on a needs basis. The Respondents however did not dispute the duration under which the Claimants worked for them.

32. The Claimants on the other hand maintained that they were in fact employed by the Respondents who neither issued them with employment contracts or payslips as proof of their terms of engagement.

33. The Claimants further stated that they were paid salaries on a monthly basis in cash or deposits in their Mpesa wallets.

34. The Claimants maintained that they worked continuously from September 2001 and January 2006 respectively until October, 2015 when their employment was terminated. From the foregoing the Claimants were engaged by the Respondents for a period of 14 years and 9 years respectively.

35. From the definition of casual employee, the Claimants were not on casual employment at the time of the termination of their employment. Section 37 of the Act provides for conversion of casual employment to term contracts as follows:

37. Conversion of causal employment to term contract

(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

(5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.

36. The terms of engagement of the Claimants automatically converted to monthly term contracts upon completion of one month's continuous service by operation of the law. I therefore find and hold that the Claimants were not casual employees.

Whether the termination of the Claimants' employment was valid both procedurally and substantively

37. The procedure for fair or lawful termination is provided for in Section 41 and 43 of the Employment Act as follows:

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

38. Section 45 of the Employment Act, 2007 prohibits the unfair termination of employment by employers and provides that for termination to be lawful the employer must comply with both fair procedure and have valid reason for the termination.

39. Section 45 provides as follows:

45. Unfair termination

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

40. In this case the Claimants testified that their termination was unlawful, wrongful and unfair contrary to the express provisions of the Employment Act.

41. They testified that there was no notice to show cause issued to them inviting them for a disciplinary hearing and/or minutes of any disciplinary hearing attached to confirm that the Claimants were accorded a fair trial prior to their termination in accordance with the mandatory provisions of Section 41 of the Employment Act, 2007.

42. The above evidence was not rebutted by the Respondents. I therefore find and hold that the Claimants have discharged the burden of proving unfair termination of their employment by the Respondents as required under the provisions of Section 47(5) of the Employment Act, 2007. On the other hand, I find that the Respondents failed to discharge the burden of proving a valid and fair reason for dismissing the Claimants. They also failed to prove that a fair procedure was followed.

43. In the Court of Appeal decision in the case of **Kenfreight (EA) Limited v Benson K. Nguti (2016) eKLR**, the Court held that: -

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee's conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure ...”

44. Having found that the termination of their employment was unfair, the Claimants are entitled to salary in lieu of notice plus compensation for unfair termination under Section 49 of the Employment Act, 2007.

45. The Claimants are further entitled one month's notice or pay in lieu. They are therefore awarded one month's salary in lieu of such notice.

46. I do not find sufficient proof of work performed on public holidays and rest days and dismiss the claims. I further find that the Claimants did not prove their prayers for overtime.

47. On the prayer for underpayment by Patrick Muia Kitungi (the 2nd Claimant) who maintains that the Respondents without lawful and just cause reduced his salary from Kshs.23,000/- to Kshs.18,000/- during the period between April, 2013 to his termination in October, 2015, the Regulations of Wages (General) (Amendment) Order for the relevant period provide that a driver's monthly salary was Kshs.14,785.70/-. I therefore find no basis for the prayer for underpayment as sought by the 2nd Claimant as his pay was above the minimum rate. The claim is therefore dismissed.

48. Similarly, the claim for severance pay is dismissed as this is not a case of redundancy.

49. On damages for unfair termination the Claimants prayed for the maximum 12 months' salary as compensation. Taking into account all relevant factors as provided in Section 49(4) of the Act, compensation equivalent to five (5) months' salary is reasonable in the circumstances of the two suits and I award them the same.

50. The Claimants are further awarded payments for leave days, the Respondents having failed to avail proof and/or records to confirm that the Claimants had in fact utilized the said leave days. I award each of them leave for three years.

51. In conclusion judgment is entered in favour of the Claimants against the Respondent as follows:-

a) FREDRICK NDAITA MOSES

- i. One month salary in lieu of notice Kshs.15,000.00
- ii. Payment of Leave days Kshs.36,346.15
- iii. Damages for wrongful termination Kshs.75,000.00

TOTAL Kshs.126,346.15

b) PATRICK MUIA KITUNGI

- i. One month salary in lieu of notice Kshs.18,000.00
- ii. Payment of Leave days Kshs.43,615.40
- iii. Damages for wrongful termination Kshs.90,000.00

TOTAL Kshs.151,615.40

52. The amounts shall be subject to statutory deductions.

53. The Claimants are awarded costs of the suit and interest from

the date of this judgment until settlement in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF FEBRUARY 2022

MAUREEN ONYANGO

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 had 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.

MAUREEN ONYANGO

JUDGE