



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NUMBER 220 OF 2017

JOSEPHAT ASWANI ANGULU.....CLAIMANT

-VERSUS-

CHINA RAILWAY NO. 10 ENGINEERING

GROUP COMPANY LIMITED.....RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

I. INTRODUCTION

1. In a statement of claim dated 17th May, 2017 and filed in court a day later the Claimant prays for the following:-

(a) Three months pay in *lieu* of notice

(538 X 90 days) ----**Kshs.48,420.20**

(b) General damages for unlawful

and wrongful termination

(538 X 30 X 12) - **Kshs.193,680.00**

(c) Certificate of service

(d) Any other relief which this Honourable Court may deem fit to grant.

2. Accompanying the claim is, as expected, a verifying affidavit, list of witnesses, witness statement by the Claimant, Claimant's list of documents, and copies of these documents/exhibits.

3. Summons to enter appearance were issued by the court on 23rd May, 2017 and the court process was served upon the Respondent on 25th May, 2017 as per the copy of summons returned to court together with the filed affidavit of service by SAMUEL G. GEKANANA sworn on 25th May, 2017 and filed in court on 5th March, 2019.

4. The Respondent did not enter appearance and did not file a response to the claim.

5. The matter was ultimately fixed for formal proof on 8th November, 2021 when the Claimant (CW1) testified alone in support of his cause, by adopting his filed witness statement and producing the three documents attached to the statement of claim as exhibits.

II. CLAIMANT'S CASE

6. The Claimant's case as set out in the pleadings, witness statement, and his oral testimony is that he was engaged by the Respondent as a steel fixer on 4th June, 2016 at a daily wage of Kshs.538/=.

7. The Claimant further alleges that his services were unlawfully and without proper reason or justification terminated on 12th November, 2016. The Claimant alleges that he was neither issued with a notice or compensation in lieu thereof, and that he was not accorded a hearing in accordance with the law. He urges that by terminating him in the manner it did the Respondent violated rules of natural justice and various provisions of the Employment Act (the Act).

8. It is on the basis of the foregoing allegations that the Claimant prays as set out at the inception of this judgment. The Claimant's case is further expounded and re-emphasized in the written submissions by his counsel dated and filed in court on 22nd November, 2021.

III. ISSUES FOR DETERMINATION

9. Flowing from the pleadings filed by the Claimant and the evidence adduced, the following issues manifest for determination.

- (i) What were the terms of employment of the Claimant by the Respondent?
- (ii) Was the termination/dismissal of the Claimant by the Respondent lawful?
- (iii) Is the Claimant entitled to the reliefs sought for in the claim?
- (iv) Who meets the costs of this cause?

IV. TERMS OF EMPLOYMENT

10. In paragraph 2 of the statement of claim the Claimant states that he was not issued with a letter of appointment. That means that this court can only rely on the evidence adduced both oral and documentary to infer and decipher the terms and conditions of employment between the Claimant and the Respondent. To a large extent, since the Respondent did not defend this cause, this court has to rely on the evidence by the Claimant subject to the tests of admissibility, veracity, reasonableness, and the applicable laws.

11. The Claimant asserts that he was engaged by the Respondent as a steel-fixer on 4th June, 2016 and that he was terminated on 12th November, 2016. His evidence is that he was on a daily wage of Kshs.538/=. However, there is no evidence adduced on how this daily wage was paid. Was the wage paid daily, weekly, bi-weekly, or monthly?

12. **Section 9 of the Employment Act** (the Act) provides that any employment contract that lasts for a period of three (3) months or more should be reduced into writing. It is the duty of the employer to ensure that this is done. It would appear that the Respondent herein failed to undertake this legal duty and as such this court shall be guided by the evidence adduced by the Claimant subject only to the rules of admissibility of evidence together with other relevant laws.

13. The Claimant testified that he was on a daily wage of Kshs.538/= and that he worked for the period between 4th June and 12th November, 2016. This court has no reason to doubt that proposition as there is no evidence adduced to the contrary. The aggregate monthly pay for the Claimant was therefore Kshs.538 X 30/= Kshs. 16,140/=.

14. The summary dismissal letter dated 12th November, 2016 confirms that indeed the Claimant was an employee of the Respondent. The alleged ground of summary dismissal was gross misconduct that allegedly led to arrest of the Claimant by the police. However, there is no evidence from the Respondent to support, confirm, or affirm that allegation and as such the same remains a mere allegation. It is also clear from the said letter that the Claimant was not accorded a hearing and was not issued with a notice.

15. Even if the Claimant had originally been engaged as a casual, Section 37 of the Act provides that where the period of service extends beyond one month, the employee becomes a month to month employee and the wages are calculated as such under Section 35(1) of the Act. Accordingly, this court finds that the Claimant was entitled to one month's notice prior to termination or in case of summary dismissal to one month's payment in lieu thereof.

V. DISMISSAL

16. The Claimant has vehemently denied any misconduct on his part as alleged by the Respondent in the letter of 12th November, 2016. **Section 43 of the Act** provides that an employer is required to prove the reason for termination. **Further Section 47(5)** places a burden upon the employer to justify the grounds for termination or dismissal. Of course no evidence was adduced by the Respondent in this cause and as such it has failed to discharge the obligations under **Sections 43 and 47(5)** of the Act.

17. Even on summary dismissal an employee is still entitled to procedural fairness as spelt out under **Section 47 of the Act**. The Claimant has urged that he was not accorded a hearing by the Respondent leading up to his dismissal. There is no evidence to the contrary and as such that evidence by the Claimant stands unchallenged.

18. In the circumstances, and in view of the foregoing paragraphs, this court takes the view, finds, and holds that the Respondent had no reasonable grounds in terminating the Claimant and the lawful procedure provided for in the law was not followed.

19. The substantive and procedural fairness and the principles applicable have been reaffirmed by this court in many decisions such as **Walter Ogal Anuro VS. Teachers Service Commission** (2013) eKLR; **Loice Otieno VS. Kenya Commercial Bank Limited** (2013) eKLR; and **Mary Chemweno VS. Kenya Pipeline Company Limited** (2014) eKLR.

VI. RELIEFS

20. The remedies sought by the Claimant are set out at the inception of this judgment as extracted from the filed statement of claim. As far as payment in lieu of notice is concerned, and as noted elsewhere in this judgment, the Claimant was entitled to one month's notice under **Section 35 of the Act**, in absence of the contract stipulating otherwise. There is no explanation or evidence in support of the three (3) month's pay sought for in the statement of claim. Under this head of pay in *lieu* of notice the Claimant can only be paid:-

Kshs.538 X 30 days = 16,140/=.

21. The Claimant is also seeking general damages for unlawful and wrongful termination equivalent to 12 months' salary. The damage that an employee suffers for unlawful termination or wrongful dismissal is the salary, wages, and/or allowances that he/she would have earned had it not been for the termination or dismissal. **Section 49(1)(c)** caps such compensation at 12 months gross monthly wage of the employee at the time of dismissal.

22. The Claimant has not expressed or pleaded for reinstatement or re-engagement and hence this court presumes that he no longer wishes to work with the Respondent. Although the Respondent did not defend the cause this court cannot assume that the Respondent would be willing to re-engage or reinstate the Claimant considering the manner in which the Respondent dismissed the Claimant. Further, the Claimant worked for the Respondent for about six (6) months which is not a considerably long time.

23. The Claimant did not testify on whether he was able to get another job after the dismissal or on how easy or hard it is to obtain or secure comparable or suitable employment using the skills that he was applying. There is also no evidence on the level of training or skills held by the Claimant to perform the job. However, this court notes that the Respondent did not offer or pay to the Claimant any compensation as at the time of dismissal.

24. Considering all the factors in the foregoing paragraph based on **Section 49 of the Act** and doing the best that this court can do an award of six (6) months wages would be reasonable compensation in the circumstances. This award, subject to statutory deductions, is as follows:-

Kshs.538 X 30 X 6 = Kshs.96,840/=.

25. The Claimant is entitled to be issued with a certificate of service under section 51 of the Act and the Respondent is ordered to issue and deliver the same to Claimant's counsel within 30 days of this judgment.

26. Costs of litigation follow event as a general rule under **Section 27 of the Civil Procedure Act (Cap 21)**. This court has no reason to depart from that principle in this cause and the Claimant is hence granted costs based on the award made herein.

VII. DISPOSAL

27. In conclusion this court finds in favour of the Claimant and awards as follows:-

(a) Payment in *lieu* of notice (one (1) month's pay) – **Kshs.16,140/=**

(b) Compensation for unlawful and wrongful dismissal six (6) months

wages – **Kshs.96,840/=**

Total – **Kshs.112,980/=**

(c) Respondent to issue and deliver a certificate of service to the Claimant's counsel within 30 days of this judgment.

(d) Costs of the cause to the Claimant based on the award.

DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 7TH DAY OF FEBRUARY, 2022.

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DAVID NDERITU

JUDGE

In the presence of:-

Godia holding brief for Cheloti for Claimant

No appearance for Respondent

