



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 985 OF 2017

AMOS KIMANI GAKII.....CLAIMANT

VERSUS

AMBOSELI COURT LTD.....RESPONDENT

JUDGEMENT

1. The Claimant by the statement of claim dated the 25th of May 2017 and filed on the 29th May 2017 sought the following remedies from the Respondent;
 - (a) A declaration that the said termination was unfair
 - (b) An Order directing the Respondent to pay the sum of Kshs.303,803/= as particularized in paragraph 17 of the claim to the Claimant.
 - (c) An order for the payment of Kshs.230,400/= to the Claimant being compensation for unfair termination of the employment.
 - (d) An order directing the Respondent to issue a certificate of service to the Claimant.
 - (e) The costs of the suit with interests thereon at the court rates.
 - (f) Any other relief the court would deem just and appropriate to grant.
2. The Claimant avers that he was employed by the Respondent initially as a constructor where he was being paid Kshs.400/= per day. The Claimant avers that he was employed by the site manager one Reuben Kihaka Kamau.
3. There was no contract of employment but he was requested to submit his National Identity Card where his details were recorded and a copy of his details were recorded and copy of the National Identity Card retained. There was also a form he was required to fill and submit.
4. The working hours were from Monday to Saturday 8.00 am- 5pm. The salary was later increased to Kshs.500/= per day and thereafter to Kshs.600/= per day. The Claimant says that due to his hard work and exemplary service his salary in 2013 was increased to Kshs.800/= per day amounting to Kshs.19,200/= per month.
5. The salary was paid on weekly basis and the Claimant was required to sign against his name after receiving the salary. The employment was terminated on the 9/1/2016 when he together with other employees were orally informed by the Manager one Pius Muthomi that work had reduced and they should not report to work the following day. Other employees were, however employed by the Respondent and they continued working at Sosian Estate constructed by the Respondent.
6. The claimant says that at all times he was a diligent employee, was not given any leave during the 7 years 4 months he worked and that the summary dismissal was unlawful and unconstitutional

THE DEFENCE

7. The Respondent filed a memorandum of appearance dated 6th June 2017 through the firm of Njeru Nyaga and Co Advocates. The Response was filed on the 20th of June 2017. The Respondent says that the Claimant was among many others who would frequently visit the Respondent premises in search of casual jobs. The Respondent says it hired on the availability of work which it still continues to do. The Respondent says that at no given time did the claimant work continuously for more than 5 days a week. The Claimant was not entitled to leave since he was a casual.

CLAIMANT'S CASE

8. CW1 Amos Kimani Gakii adopted the witness statement dated 25/05/2017 and filed on the 29/5/2017 as his evidence in chief and a list of documents dated 25th May 2017 as exhibits 1-4. He testified that he was working at Amboseli from 1/08/2008 as a constructor. He was not given a contract but was asked for his Identity Card and the name put in the book.

The Claimant says he was assigned duties at Soslam estate owned by the Amboseli Court where by the year 2013 he was earning Kshs.800 per day that translated to Kshs.19200 per month. He used to be paid Kshs.4,800/= on the Saturdays. On 9/1/2016 he reported to work but was told that his job was terminated. He was told by the site Manager that work had reduced.

9. On the 10/1/2016 other people were employed. He was not given notice and did not go on leave and was not given house allowance. He says he was unlawfully terminated and prays to court to declare he was unfairly terminated. Upon cross-examination, he said that he did not have employment letter but had payslips where he used to sign on receipt of money. The Company had the book that he used to sign. The Amboseli court was in Kayole in Nairobi. He used to be paid weekly and that he got a recommendation letter from the Respondent.

10. On re-examination, he said that he was employed by Amboseli as he had the recommendation letter and NHIF forms. They used to sign for salary but there were no slips. He was not paid daily but would be paid weekly. He worked for Amboseli for eight years

11. The Respondent did not call any witness. The Claimant in the submissions contends that the Respondent did not comply with the requirements of section 45(2) of the Employment Act 2007 and section 41 (2) of the Employment Act 2007. The Claimant argued that the Respondent did not avail any evidence to show why the Claimant was terminated. The Claimant submitted that if at all the work had reduced then the Claimant would have been declared redundant.

12. The Claimant relied on the case of **Daniel Kiplagat Kipkeibut versus Smep Deposit Taking Microfinance 2016 eKLR** for the proposition that *for termination of employment to pass the test of fairness, there must be both substantive and procedural fairness. Substantive justification has to do with the establishment of a valid reason.* On the remedies, the Claimant has made submissions on the one-month salary in lieu of notice, houses allowance, service pay, pending and untaken leave, and damages for unlawful termination which I have heard the opportunity of going through.

ISSUES FOR DETERMINATION

- (i) Whether the Claimant's casual employment converted to a contract of service for payment of monthly salary.
- (ii) Whether the termination of the Claimant's employment was wrongful and unlawful.
- (iii) Whether the Claimant is entitled to the reliefs sought.

13. Section 37 (1) of the Employment Act 2007 provides that: "... where a casual employee-

(i) 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

(ii) Performs work which cannot reasonably be expected to be completed within a period, or

(iii) 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."

14. Section 35(1) (c) of the Act provides that where contract to pay wages or salary periodically in intervals of or exceeding one month, the contract shall be terminable by either party at the end of the period of 28 days next following the giving of notice in writing.

15. The Claimant contends that he worked for the Respondent from 1/08/2008 to 9/01/2016 and as such his casual employment converted to contract of service in which wages are paid monthly. The Respondent contended but did not give evidence that the claimant did not work continuously for the said period but would be called as and when work became available. Mr. Pius Muthomi in his recommendation letter of 4th February, 2016 concerning the Claimant confirmed Claimant worked for the Respondent for 8 years.

16. The only employment records are those provided by the claimant. The signed employment sheet shows that the claimant was paid a salary of Kshs.4,200/= per week as of the year 2015 which in a month would amount to an aggregate of Kshs.8,800/= per month. The amount of Kshs.4,200/= was spread through the week. The employment records are normally in the custody of the Respondent who in this case chose not to tender any evidence. The only inference which can be drawn from this is that the Respondent failed to produce the records of employment for reasons best known to them. Probably it would have been adverse to their case,

17. Under section 45 of the Act, termination of employment of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. In this case the Claimant contended that he was dismissed without any just cause and without being accorded a chance to defend himself. He further contended that the dismissal was done without prior notice. This was in contravention of Section 41 of the employment Act.

18. The Respondent did not cite any reason for the dismissal or adduce any evidence to demonstrate that the process was fair. The Claimant's employment having been converted to contract of service was only terminable with 28 days' notice as contemplated by section 35 (1) of the Employment Act 2007. In the instant case, there was no evidence adduced to show that there was any notice given. The dismissal was therefore unfair, wrongful and unlawful within the meaning of section 36 and 45 of the Employment Act 2007.

19. In view of the foregoing, I declare the dismissal of the Claimant by the Respondent to be unfair, wrongful and unlawful as prayed.

20. REMEDIES

- (a) The Claimant is awarded one month salary in lieu of notice in accordance to Section 36 of the Employment Act. Kshs.19,200/=.
- (b) Housing allowance is accorded as Respondent did not produce records to confirm the same was consolidated in the salary but as is not clear how long he worked for the Claimant, I will go by 7 years as per the documents in court Kshs.103,680/=.
- (c) Unpaid leave is declined as there are no particulars but service pay is also awarded as the Respondent did not prove that he used to remit pension dues to NSSF Kshs.67,200/=.
- (d) The court will award 3 months equivalent for unlawful termination Kshs.57,600/=.
- (e) Costs follow the event and Claimant is awarded costs.
- (f) Interest is provided at court rates from the date of judgment till full payment.
- (g) Claimant to be issued certificate of service within 30 days.
- (h) The total effect of my award is Kshs.247,680/=.
- (i) Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 24TH DAY OF MARCH, 2022.

ANNA NGIBUINI MWAURE

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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE