



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO.194 OF 2016

BENARD ARASA OYUGI.....CLAIMANT

VERSUS

MENENGAI OIL REFINARIES LIMITED.....RESPONDENT

JUDGMENT

1. Vide an amended Statement of Claim dated 25th March, 2019 and filed on 26th March, 2019, the Claimant sought for the following Reliefs:-

- a) A declaration that the Claimant was unlawfully terminated.**
- b) One month salary in lieu of Notice**
- c) Leave for 12 years and 6 months**
- d) Salary for 25 days worked in August, 2015.**
- e) Compensation under section 49(1)(c) of the Employment Act.**
- f) Certificate of service**
- g) Costs of the claim**

2. The summary of the Claimant's case is that the Claimant was employed by the Respondent in March, 2003 as a general worker in the shortening department at a daily wage of Kshs 450 then in November, 2006 he was deployed to the security department and served as a guard till July, 2011 when he was reverted back to casual worker from July, 2011 till his termination in August, 2015.

3. The Claimant avers that he never took his leave days for the 12 years he worked for the Respondent neither was he compensated for the said leave.

4. The circumstances leading to his termination was that, on 25th August, 2015 the Claimant reported to work as usual only to be verbally terminated from employment without any notice or reason whatsoever.

5. The dispute was reported to the labour office on 1st September, 2015 and the Respondent issue him with a cheque of Kshs 32,733, without any explanation as to what the said money was for.

6. The Respondent entered appearance on 28th October, 2016 and filed an amended response to claim on 15th May, 2019 denying any employer-employee relationship between the Claimant and itself and instead maintains that the Claimant was an independent contractor who was paid for services rendered and his services had come to an end in August, 2015. Therefore that their separation was lawful.

Hearing

7. The Claimant's case proceeded for hearing on the 15th July, 2021, where the Claimant testified as CW-1 and adopted his witness statement which basically reiterated the claim herein.

8. Upon cross examination, CW-1 testified that he was the Respondent's employee however that he was not issued with any documents to show the said employment relationship. He testified further that when he was a general worker he was paid on a daily basis however when he became a guard he was paid on a weekly basis and upon reverting to casual worker he was paid daily and his employment terminated without notice.

9. The Respondent's case on the other hand was heard on the 18th November, 2021, where the Respondent called one witness, Peter Muchibi Kanenje, the Respondent's senior Human Resource officer, as RW-1. According to RW-1 the Claimant was the Respondent's employee who left employment in September, 2015. He then adopted his witness statement filed on 16.11.2021 together with the list of documents filed on 23.9.2021.

10. Upon cross examination, RW-1 testified that the Claimant deserted employment in the beginning of September, 2015 on his own volition therefore that he was not terminated. He further testified that the Respondent did not contact him after deserting employment.

Claimants Submissions.

11. The Claimant submitted from the onset that the documents produced by the Respondent witness during hearing were brought in after close of the pleadings and the Claimant's case without leave of the Court therefore that they are not properly on records and should be expunged from record. In this they relied on the case of **John Ndiritu Nguyo V Kenya Ports Authority and another [2017] eklr** and the case of **Johana Kipkemei Too V Hellen Tum [2014] eklr**.

12. On whether the Claimant was unfairly terminated from employment, it was submitted that, the Claimant was not given notice of termination neither was he subjected to any disciplinary hearing before the termination. It was also argued that no reason was given for the said termination therefore that the termination was unfair in the circumstances. In this the Claimant cited the case of **Walter Ogal Anuro V Teachers Service Commission [2013] eklr** and the case of **William Gituma Gateere V RAA Limited [2020] eklr**.

13. The Claimant then submitted that the Respondent's claim of desertion was not proved. The Claimant then supported its arguments by citing the case of **Ezra Nyamweya Motari V Kanini Haraka Enterprises Ltd [2016] eklr**.

14. It was further submitted that the Claimant ought to have been subjected to disciplinary hearing in accordance with section 41 of the Employment and that failure to subject an employee to disciplinary hearing makes the termination unfair. To buttress their argument the Claimant cited the case of **Mary Chemweno Kiptui V Kenya Pipeline Company Limited [2014] eklr**.

15. The Claimant then submitted that he has proved his case on a balance of probability and urged this Court to allow the claim as prayed.

16. At the time of writing this Judgment there were no submissions on record for the Respondent.

17. I have examined all evidence and submissions on record. The Claimant avers that he was terminated verbally on the 25th August, 2015 when he reported to work. He even reported the dispute to the labour office on 1st September, 2015.

18. The Respondents on their part aver that they never terminated the service of the Claimant. The Respondents further deny ever employing the Claimant and insist that he was an independent contractor.

19. The Respondent also avers that the Claimant deserted duty. The assertion by the Respondent does not explain however why they aver that the Claimant deserted duty when he was never subjected to any disciplinary hearing for desertion.

20. They do not also explain why they send 32,000/= to the labour office when the Claimant had deserted duty.

21. The Claimant was never issued with any notice of termination and neither was he subjected to any disciplinary hearing.

22. It is therefore my finding that the termination of the Claimant was unfair and unjustified. As concerns remedies, I find for the Claimant and award him as follows;

1. 1 months salary in lieu of notice at 11,623.20/=

2. Underpayments of salary for the last 3 years prior to termination as the rest of the claim on this subtitle is time barred

= 2013 to 2016 = 6,014/=

3. Leave pay for 2015 to 2016 = 11,623.20/=

4. Salary for 25 days worked

August 2015 as pleaded 12,107/=

5. Compensation equivalent to 10 months salary for unfair and unjustified termination given the unfairness of being dismissed verbally

= 10 x 11,623 = 116,230/=

6. TOTAL = 157,597/=

Less 32,733/= issued to him by cheque leaving a balance of 124,864/=

Less statutory deductions

7. The Respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 8TH DAY OF MARCH, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Orare for Respondent – present

Magatta for Claimant – present

Court Assistant - Fred