



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

CAUSE NO. 2489 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

CALEB OMEME DUNGANI.....CLAIMANT

VERSUS

SOGEA SATOM KENYA.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Claimant filed a memorandum of claim dated 15th June, 2017. He is praying to be declared that he was unlawfully terminated from his employment.
2. The Respondent's response is also dated 5th February, 2018.

CLAIMANT'S EVIDENCE

3. The Claimant states he was employed by the Respondent for a contract of one year from 27th October, 2016 to 20th October, 2017 with a basic salary of Kshs.28,000/= and was later reviewed to Kshs.30,530/=.
4. He says on 21st December, 2016 he was served with a termination letter. He says he was told the reason for termination was because Freddy had left the country and there were no more service for a driver. He used to drive Fred.
5. He says he was therefore terminated under the circumstances of redundancy but the process was carried out unprocedurally.

He says he brings the claim under Section 33 and Section 44(4) of the Employment Act which connote an employee can dispute facts leading to summary dismissal.

6. The Claimant prays for award amounting to Kshs.463,939/= as particularized on paragraph 14 of the memorandum of claim.
7. He also prays for costs.

RESPONDENT'S FACTS

8. The Respondent denies the Claimant's averments in the memorandum of claim and in fact says that the claimant worked for the Respondent for one month and 25 days.
9. He further says the Claimant's termination is justified under Section 42(1) of the Employment Act.
10. The Respondent states that the Claimant was paid his dues in his bank account and is not entitled to Kshs.463,839/= as prayed in the memorandum of claim.

The Respondent states the Claimant was paid salary upto 22nd December, 2016, accrued leave days and payment in lieu of notice.

Furthermore the Respondent says he explained the reason for terminating the Claimant's employment through his advocates' letter dated 16th January, 2017.

11. The Respondent prays the Claimant's suit be dismissed with costs.

CLAIMANT'S EVIDENCE IN CHIEF

12. The Claimant gave his evidence in court on 9th November, 2021. He basically adopted his witness statement and also produced a list of documents filed in court on 20th December, 2017 as his exhibits.

He says he had a contract of one year but did not serve the contract period as his employment was terminated on 21st December, 2016.

RESPONDENT'S WITNESS EVIDENCE

13. The Respondent witness Miss Agnes Tikolo, Human Resource Manager of the Respondent Company stated the Claimant had been given one year contract.

14. She further says they terminated his employment because the person he was attached as a driver left the country.

She says that they paid him 7 days salary in lieu of notice since he was still under probation.

CLAIMANT'S SUBMISSIONS

15. The Claimant in their summarized version of their submissions aver that the Claimant was employed under a one year contract and was renewable for another one year.

16. He submits that the Claimant during the 3 months he worked for the Respondent no complaints were raised concerning his duties. He says he was with no valid reason rendered redundant.

17. He further says that even if Claimant was to be rendered redundant the proper procedure should have been followed as provided in Section 40 of the Employment Act.

The Claimant depended on the **CASE OF HAPPINESS ABONY MANGO VS SHEREJI CHEMICALS LIMITED (2020) EKLK** where the judge held that Section 42 of Employment Act does not bar a probationary employee from challenging fairness or lawfulness of termination and that such an employee still enjoys protection from unfair termination. The court reiterated that the obligation to justify the reason for terminating a contract under Section 43, 45 and 47(5) of Employment Act applies equally to termination of probationary contract.

18. They also refers to **CASE OF MONICA MUNIRA KIBUCHI AND OTHERS VS MOUNT KENYA UNIVERSITY AND ANOTHER (2021) EKLK** which declared that Section 42 (1) of the Employment Act 2007 is inconsistent with articles 24, 41 and 47 of the Constitution of Kenya 2010 to the extent that it excludes employees on probation from provision of Section 41 of the Act.

19. So the three Judges who presided the above case concluded that the Claimant was unfairly terminated.

RESPONDENT'S SUBMISSIONS

20. The Respondent's in their submissions once again in a summarized form state that the Claimant was on a probationary contract at the time of termination of his contract.

They relied on the **CASE OF MANUEL ANIDOS VS KINANGOP WIND PARK LIMITED (IN RECEIVERSHIP) (2019) EKLK** where court held that it is axiomatic that contracts of service have a mutuality of rights and obligations for both parties because a contract of service is not a yoke of slavery of contract of servitude.

21. The court further proceeded to state that either party is allowed to terminate the contract by giving stipulated notice or reasonable notice if not specifically stipulated in the contract.

22. In other words they emphasized on the doctrine of freedom given by contract between parties in contracts of service.

They aver that parties therefore are bound by terms of the contracts they enter into unless there is evidence that it is vitiated by mistake, fraud coercion, or undue influence.

23. The Respondent's also relied on **CASE OF CHARLES OKOTH VS ABDUL RAHMAN HAMUMY (2018) EKLK** where the court held that courts have a duty to enforce contracts and not to rewrite them.

They therefore claim the Claimant was on probation and it was proper to terminate his contract by giving 7 days payment in lieu of notice and there is no requirement to give notice as termination in cases of probation are regulated by the contracts.

24. It is the Respondent's submissions that the Claimant is not entitled to 12 months' salary as his termination was during probation and that he was paid his money in lieu of notice.

They say the annual leave was also paid to him for the days worked.

25. THE ISSUES FOR DETERMINATION ARE AS FOLLOWS:-

- i. Was the Claimant on probation at the time of termination and does article 41 of the Kenya constitution apply to employees during the probation
- ii. Was the Claimant unfairly terminated.
- iii. Is he entitled to the prayer sought.

DECISION

26. The Claimant according to the evidence adduced by the respective parties as well as the submissions and pleadings was employed by the Respondent by his employment letter dated 4th November, 2016.

27. The contract was to commence 27th October, 2016 to 26th October, 2017.

28. The contract had a provision that the first three months the employee was to be on probation and either of the parties could terminate the contract by giving 7 days' notice or 7 days pay in lieu of notice.

29. On 21st December, 2016 the contract was terminated and the reason given was that the employee he was assigned to be driving a Mr. Freddy had left the country and so the Claimant's position was declared redundant. The respondent stated he acted in accordance to the contract and gave claimant 7 days' notice as he was still on probation.

30. The court will be supported by the case of **HAPPINESS NYABONYI VS SHREEJI CHEMICALS (SUPRA)** where the court held that Section 42 of the Act does not bar an employee from challenging the fairness or lawfulness of termination and that such an employee still enjoys protection from unfair termination.

31. The recently decided case of **MONICA MUNIRA KIBUCHI AND OTHERS VS MOUNT KENYA UNIVERSITY (SUPRA)** the three man bench declared Section 42 (1) of the employment Act is inconsistent with articles 24 and 41 and 47 of the Kenya Constitution 2010 to the extent that it excludes employees on probation from the provisions of sections 41 of the act. I am supported by those authorities to uphold that the employees who are on probation are equally protected from unfair Labour practices and to hold otherwise is to go against the constitution and already decided authorities.

32. The upshot of the above averments is that the respondent was still under a duty to follow the mandatory provisions of declaring an employee redundant as provided in section 40 of the employment act even though he was on probation. The fact remains an employee is still protected even if he is an apprentice or an indentured learner and even more so a fully qualified employee who is on probation.

33. Section 40 of the employment Act provide the conditions precedent before one is declared redundant as provided in the case of **JANE I. KHALECHI VS OXFORD UNIVERSITY PRESS E.A LTD (2013) eKLR**. The court held that these conditions are mandatory and are not left to the choice of the employer.

34. For one the employer must inform the employee or his union if he belongs to one in writing and one month in advance that he intends to declare him redundant. In other words an employer cannot just wake up one morning and serve the employee with a termination letter on the basis of redundancy as it happened in this case. That was substantially unfair and unreasonable.

35. The Claimant says he was terminated unlawfully contrary to Section 33 of the Employment Act and Section 44 (4) of the said Act.

Section 33 refers to food and 44(4) is about gross misconduct.

The two are not relevant hereto and so the court will not reference them. Of course the applicable law is section 40 and 43 of employment act.

36. In conclusion, the court finds the Respondent failed to apply fair labour practice in terminating the claimant without giving him the requisite notice and indeed failing to comply with section 40 of the employment act.

The court finds the Claimant has indeed proved a case for unfair and unlawful termination and enters judgement in his favour.

37. I will want to interrogate whether the Claimant was nevertheless paid his dues.

- i. He deserved 7 days' pay in lieu of notice Kshs.6,538/=

ii. Annual leave daysKshs.3801/=

iii. Day's unpaid (if any)Kshs.28,000/=

iv. House allowance for 2 months as 10 months is not provedKshs.11,200/=

v. Damages for unfair termination. I will award 2 months considering the short period he served the Respondent....Kshs 61,060/=.

TOTAL award..... Kshs 110,599/=.

If any of the above are already paid to the claimant the same to be deducted and any balance be paid to the Claimant.

38. The Claimant is awarded costs.

Orders accordingly.

ORDER

Case to be mentioned on 21st April, 2022 to confirm if the above has been mutually settled and mark the matter as closed.

ANNA NGIBUINI MWAURE

JUDGE

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 8TH 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 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