



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1421 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

KENNEDY BOSIRE NYAKUNDI.....CLAIMANT

VERSUS

JAWABU INTERIORS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant instituted this suit by a memorandum of claim filed on 20th July 2016, alleging that the Respondent terminated his employment wrongfully and unfairly and refused and/or failed to pay terminal dues.
2. The Claimant prays for –
 - (a). The sum of Kshs.957,276,923 comprising:
 - i). Salary in leu of notice..... Kshs.42,000
 - ii) Service pay for 7 years..... Kshs.27,705
 - iii) Housel allowance for 18 months..... Kshs.113,400
 - iv) Personal expenditure in company..... Kshs.68,000
 - v) 12 months’ compensation..... Kshs.504,000
 - vi) Salary for September, December and January 2016..... Kshs.126,000
 - vii)..... Eight hours overtime for 70 days..... Kshs.113,076,923
 - viii) Personal expenditure in company..... Kshs.68,000
3. The Claimant alleges that he was engaged by the Respondent on or about 8th August 2014 as a Project Manager at a monthly salary of Kshs.42,000 and the Respondent did not issue a letter of appointment.
4. That he served the Respondent diligently until 2nd February 2016 when the Respondent wrongfully and unlawfully terminated his services and refused to pay terminal dues.
5. The Claimant adopted the written statement dated 6th July 2016 which rehashes the contents of the memorandum of claim but states that he served the Respondent with loyalty and diligence until January 2013.

6. It is the Claimant's testimony that his employment was terminated for no reason and the salary for September, December and January 2016 was not paid. That the Respondent did not provide a termination notice.
7. The Claimant testified that he was a member of the NSSF.
8. It is the Claimant's testimony, that he visited Kituo Cha Sheria Office, who did a demand letter to the Respondent dated 7th April 2016.
9. Although the Respondent was served on 22nd July 2016 it neither entered appearance nor file a response to the claim.
10. The case was heard on 7th February 2022.

Claimant's Submissions

11. Counsel for the Claimant submits that the Claimant has proved his claim on a balance of probabilities as required by law. That the Respondent terminated the Claimant unfairly and unlawfully in violation of the prescribed procedure.
12. It is submitted that the provisions of Section 41 of the Employment Act, 2007 were not complied with. Section 44(3) and (4) of the Act are also relied upon to buttress the submission.
13. It is further submitted that the Respondent failed to honour the invite by the Labour Office. That the testimony tendered by the Claimant is uncontroverted.
14. The Claimant urges that his termination of his employment was unfair and is thus entitled to his dues.
15. The decision in **Benson K Nguti v Kenfreight (EA) Limited [2014] eKLR** is relied upon to urge that the Claimant should be awarded 12 months compensation for unfair termination.

Determination

16. I have considered the memorandum of claim, witness statement and the Claimant's submissions. The only issue for determination is whether the Claimant has established that his employment was unlawfully and unfairly terminated by the Respondent.
17. Under Section 45 of the Employment Act, termination of employment is unfair and unlawful if the employer fails to establish that the reason(s) for the termination was valid and fair and the termination was conducted in accordance with a fair procedure. The employer's burden of proof is further buttressed by Section 43(1) of the Act "**...the employer shall be required to prove the reason or reasons for the termination...**"
18. On the other hand, the burden of proof of the employee is prescribed by Section 47(5) of the Act as follows "**... the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee ...**"
19. Relatedly, the Claimant must prove his/her case on a balance of probabilities.
20. It is trite law that the standard of proof must be satisfied whether the suit is defended or not. There is ample judicial authority for the foregoing proposition.
21. The Court finds the facts in this case intriguing in several respects.
22. First, the Claimant makes no specific allegations of the circumstances in which his employment contract was terminated. The Claimant led no evidence of what the Respondent did or did not do. There is no attribution of wrong doing on the part of the Respondent on 2nd February 2016 or on any other date. The Claimant makes no specific allegations against any officer of the company and none is named or identified.
23. Second, the Claimant led no evidence on any aspect of the employment contract other than the salary but even for the salary, he adduced no evidence of mode of payment or amount. There is no shred of evidence by way of pay slip, bank statement or receipt or anything to associate the Claimant with the salary allegedly received from the Respondent.
24. No shred of evidence was adduced to prove the leave entitlement, supervision, reporting and exit times, place of work or current status of the Respondent or its employees.
25. Third, although Mr. Thomas Wamalwa was listed as a witness, he did not testify and the witness statement on record is neither signed nor dated. The witness would have testified that and the Claimant were colleagues at the work place.
26. Relatedly, in his adopted statement, the Claimant is unambiguous that he served the Respondent diligently until January 2013. Even assuming that this was a typing error in the case of the year 2013, the month too is different from the month indicated on the memorandum of claim. Are these typing errors or uncertainty of events and dates? The Court is not satisfied that these are mere typing errors but fundamental flaws in the evidence to support the claim.

27. Finally, other than the copies of the letter from the ministry of Labour, Social Security and Services dated 22nd February 2016, and the demand letter by Kituo Cha Sheria, Legal Aids Centre, dated 7th April 2016, the Claimant produced not a single document connecting him to the Respondent.

28. The foregoing demonstrates the dearth of evidential proof of the allegations before the Court.

29. In sum, the Court is not persuaded that the Claimant has placed sufficient material to establish that his contract of employment with the Respondent was unfairly terminated.

30. In the circumstances, it is the finding of the Court that the material before the Court is insufficient to establish that the Claimant's employment contract was terminated wrongfully or unfairly as alleged by the Claimant.

31. **In the final analysis the suit is dismissed for want for proof.**

32. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF APRIL 2022

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE