



REPUBLIC OF KENYA



Kimweli & another v Sameer Agriculture & Livestock (K) Limited (Cause 1832 of 2015) [2022] KEELRC 1150 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1150 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1832 OF 2015**

L NDOLO, J

MAY 26, 2022

BETWEEN

PIUS MUINDI KIMWELI 1ST CLAIMANT

PATRICK MWANZIA 2ND CLAIMANT

AND

SAMEER AGRICULTURE & LIVESTOCK (K) LIMITED RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Pius Muindi Kimweli and Patrick Mwanzia, against their former employer, Sameer Agriculture & Livestock (K) Limited. The claim is by way of an amended Statement of Claim filed in court on 19th June 2020. The Respondent filed an amended Reply dated 17th January 2022.
2. The matter proceeded to trial with both Claimants testifying and the Respondent calling its Assistant Human Resource Manager & Legal Officer, Paul Maina. The parties also filed written submissions.

The Claimants' Case

3. The 1st Claimant, Pius Muindi Kimweli states that he was employed by the Respondent from November 2012, as a deliveryman/salesman. He was assigned Motor Vehicle Registration Number KAA 776S. On 22nd September 2014, the Claimant was issued with an appointment letter, whose effective date was given as 1st October 2014.
4. The 2nd Claimant, Patrick Mwanzia states that he was employed in a similar position from September 2008. He was assigned Motor Vehicle Registration Number KAG 906N. He was issued with a letter of appointment on 26th March 2015, with an effective date of 1st March 2015.



5. The Claimants claim that on 4th August 2015, the Respondent unlawfully terminated their employment, without justification and in violation of due procedure. They accuse the Respondent of affixing a demeaning notice at the gate, to the effect that the Claimants were ‘not allowed any route.’
6. The Claimants aver that they were thereafter denied entry into the Respondent’s premises. They add that they were not paid their terminal dues.
7. The Claimants’ claims are as follows:
 - 1st Claimant: Pius Muindi Kimweli
 - a) Unpaid salary for July, August & September 2015.....Kshs. 46,200
 - b) Unpaid transport allowance for July, August & September.....19,137
 - c) 1 month’s salary in lieu of notice.....15,400
 - d) Service pay for 4 years.....30,800
 - e) Transport allowance.....76,548
 - f) 12 months’ salary in compensation.....184,800
 - 2nd Claimant: Patrick Mwanzia
 - a) Unpaid salary for July, August & September.....Kshs. 54,000
 - b) Unpaid transport allowance for July, August & September.....19,416
 - c) 1 month’s salary in lieu of notice.....18,000
 - d) Service pay for 8 years.....72,000
 - e) Transport allowance.....77,664
 - f) 12 months’ salary in compensation.....216,000

The Respondent’s Case

8. In its amended Reply dated 17th January 2022, the Respondent admits having employed the Claimants but points out that the 2nd Claimant was a probationary employee.
9. The Respondent denies that the 1st Claimant joined its establishment in November 2012 and gives 1st October 2014 as the effective date of the 1st Claimant’s employment, as cited in the contract of employment.
10. The Respondent states that the 1st Claimant’s employment was terminated on account of absconding duty.
11. The Respondent denies the 2nd Claimant’s plea that he joined the Respondent’s employment in September 2008 and gives the effective date of employment as 1st March 2015, as per the contract of employment.
12. The Respondent states that the 2nd Claimant was on probation when his employment was lawfully terminated on the ground of underperformance.
13. The Respondent maintains that the termination of the Claimants’ employment was lawful in that:



- a) The 1st Claimant absconded work without lawful or justifiable reasons, prompting the Respondent to terminate his contract of employment;
 - b) The 2nd Claimant exhibited unsatisfactory and poor performance in his duties, prompting the Respondent to terminate his probationary contract.
14. The Respondent states that the note left at the gate of the Company was not a termination notice. Rather, its purpose was to inform the Claimants that the Respondent was not making deliveries in their designated routes.
15. The Respondent maintains that there was no lawful obligation upon it to subject the 2nd Claimant to the procedures of Section 41 of the Employment Act because the 2nd Claimant was serving probation.
16. The Respondent states that if the Claimants were not paid their terminal dues, this was occasioned by their failure to clear with the Respondent's management.
17. In response to the specific prayers sought by the Claimants, the Respondent states:
- a) The 1st Claimant is not entitled to the unpaid salary for July, August and September 2015, since he absconded duty and forced the Respondent to incur the expense of hiring his replacement;
 - b) The 1st Claimant is not entitled to the unpaid transport allowance for July, August and September, as he was not in employment during this period and he did not incur expenses on behalf of the Respondent;
 - c) The 1st Claimant is not entitled to one month's salary in lieu of notice as he was not terminated but he absconded duty;
 - d) The 1st Claimant is not entitled to service pay as the Respondent made monthly remittance of his benefits to the National Social Security Fund (NSSF) and the Claimant worked for only 10 months from the date of his employment;
 - e) The 1st Claimant is not entitled to compensation as he absconded duty and did not return to work;
 - f) There were no outstanding salary arrears for July, August & September in favour of the 2nd Claimant;
 - g) The 2nd Claimant is not entitled to the unpaid transport allowance for July, August and September, as he was not in employment during this period and he did not incur expenses on behalf of the Respondent;
 - h) The 2nd Claimant is not entitled to one month's salary in lieu of notice as he was only entitled to seven days' notice or seven days' salary in lieu of notice as per Section 42 of the Employment Act;
 - i) The 2nd Claimant is not entitled to service pay as the Respondent made monthly remittance of his benefits to NSSF and the Claimant worked for only 5 months from the date of his employment;
 - j) The 2nd Claimant is not entitled to compensation as his employment was not terminated unfairly.

Findings and Determination

18. There are three (3) issues for determination in this case:



- a) The effective date of the Claimants' employment;
- b) Whether the Claimants have made out a case of unlawful termination of employment;
- c) Whether the Claimants are entitled to the remedies sought.

Effective Date of the Claimants' Employment

19. The effective date of the Claimants' employment is a contested issue. The 1st Claimant, Pius Muindi Kimweli claims that he was employed from November 2012 while the 2nd Claimant, Patrick Mwanzia claims to have been employed from September 2008.
20. However, on the face of the letters of appointment produced in court, the 1st Claimant's appointment took effect on 1st October 2014 and was to run until 31st December 2015, while the 2nd Claimant's employment was effective from 1st March 2015 until 28th February 2017.
21. The question to ask is whether there is evidence of the Claimants having worked for the Respondent before the dates given in the letters of appointment dated 29th September 2014 and 26th March 2015.
22. Although these letters are referenced 'Letter of Appointment' their contents reveal that they were in fact fixed term contracts. Clause 1 thereof states as follows:

“Your date of appointment shall be...to...Upon which you will be required to re-apply to the Human Resources Manager for renewal one month before the end of the contract. This contract is subject renewal by mutual agreement of both parties.”
23. This said contracts make no reference to the Claimants' entry into the Respondent's establishment and it is therefore evident that they were not the initial employment documents. This position is buttressed by the 2nd Claimant's bank statement which indicates that he received a salary from the Respondent as far back as February 2012.
24. The Respondent, as the Claimants' employer was the custodian of their employment records, which it chose to keep away from the Court. In the circumstances, I invoke Section 10(7) of the *Employment Act* and adopt the effective date of employment as pleaded by the Claimants.
25. In its written submissions, the Respondent suggests that there was no continuity of employment from one employment contract to another. In advancing this argument, the Respondent relied on the case of *Fatuma Abdi v Kenya School of Monetary Studies* [2017] eKLR where it was held that:

“...a fixed term contract of employment is a lawful mode of employment with a start and end date.”
26. There is no doubt that a fixed term contract is indeed a lawful mode of employment with defined terms of employment. However, in reckoning the effective date of employment of an employee who has served under successive fixed term contracts, regard must be had to the first date of entry into employment. Years of service cannot be lost simply by issuing a fresh contract of employment.
27. That said, I find and hold that the effective dates of the Claimants' employment are as pleaded in the amended Statement of Claim. This finding debunks the allegation by the Respondent that at the time of leaving employment, the 2nd Claimant was serving probation. I say so because the service period had exceeded the six months' probation period provided in the employment contract.



Unlawful Termination?

28. The next issue for determination is whether the Claimants have made out a case of unlawful termination of employment. The Respondent's defence on this limb is that the Claimants themselves absconded duty. On their part, the Claimants state that the Respondent terminated their employment by placing a notice at the gate to the effect that their routes of operation had been suspended.
29. It was common cause that the Claimants worked as salesmen/deliverymen. It follows therefore that suspension of their routes of operation effectively rendered them jobless. The Respondent's witness, Paul Maina testified that the Claimants were to stay at home and wait for re-assignment of routes. There was no evidence that the Claimants were ever re-assigned routes.
30. Regarding the Respondent's allegation that the Claimants deserted duty, there was no evidence of any attempts made to reach out to them to resume work nor were they notified that their employment was on the line on account of desertion of duty. The Respondent itself referred to the decision in *Simon Mbithi Mbane v Inter Security Services Ltd* [2018] eKLR where Abuodha J held that:
- “An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”
31. The Claimant relied on an earlier decision in *Felistas Acheba Ikatwa v Charles Peter Otieno* [2018] eKLR where this Court stated thus:
- “The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”
32. In the present case, there was no invitation to the Claimants to resume duty and no notice was issued to them. The obvious reason for this omission is that there was no work to which the Claimants could be recalled.
33. As regards, the allegation of poor performance made against the 2nd Claimant, the law is also clear. In *Jane Samba Mukala v Ol Tukai Lodge Limited* [2013] eKLR Mbaru J stated the following:
- “Where the termination of an employee is based on the reasons of poor performance, the employer must comply with the provisions of section 41 of the *Employment Act* which require that such an employee should receive an explanation as to such reason in the presence of another employee of their choice... Therefore, it is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further what measures they have taken to address poor performance once the policy or evaluation system has been applied. It will not suffice to just say that one has been terminated for poor performance. Otherwise, it would be an easy option for abuse.”
34. In this case, there were no details given on the allegation of poor performance made against the 2nd Claimant and evidently, he was not given an opportunity to respond to the allegation, which therefore remained unproved and unverified.
35. On the whole, I find and hold that the Claimants have proved a case of unlawful termination of employment against the Respondent.



Remedies

36. Consequently, I award each Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimants' length of service and the Respondent's unlawful conduct in the termination transaction.
37. I further award each Claimant one (1) month's salary in lieu of notice as well as salary for July 2015, being their last month of work.
38. According to the Claimants' payslips, they were contributing members of NSSF. They are therefore not entitled to service pay.
39. Clause 7 of the Claimants' employment contracts provided that transport allowance was payable in the event of official travel. There being no evidence of the Claimants having undertaken any official travel during the period claimed, the claim was not proved and is disallowed.
40. Finally, I enter judgment in favour of the Claimants as follows:
- 1st Claimant: Pius Muindi Kimweli
- a. 6 months' salary in compensation.....Kshs. 92,400
 - b. 1 month's salary in lieu of notice.....15,400
 - c. Salary for July 2015.....15,400
- Total.....123,200
- 2nd Claimant: Patrick Mwanzia
- a. 6 months' salary in compensation.....Kshs. 108,000
 - b. 1 month's salary in lieu of notice.....18,000
 - c. Salary for July 2015.....18,000
- Total.....144,000
41. These amounts will attract interest at court rates from the date of judgment until payment in full.
42. The Claimants will have the costs of the case.
43. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF MAY 2022

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JUDGE

Appearance:

Mr. Isoe for the Claimants

Miss Muliro for the Respondent

