



REPUBLIC OF KENYA



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**Ongati v Rift Valley Products Ltd (Cause 271 of 2018)
[2022] KEELRC 93 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 93 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 271 OF 2018
DN NDERITU, J
JUNE 16, 2022**

BETWEEN

ELISHA ONGATI CLAIMANT

AND

RIFT VALLEY PRODUCTS LTD RESPONDENT

JUDGMENT

I. Introduction

1. In a memorandum of claim dated 30th November, 2018 the Claimant prays for judgment against the Respondent for (in summary):
 - (i) A certificate of service
 - (ii) Cost and interest on all the claims listed
 - (iii) Salary for days worked in June, 2018 at Kshs.4,467.76
 - (iv) Compensation for unfair termination at Kshs.278,301.84
 - (v) Notice pay at Kshs.23,191.82
 - (vi) Underpayment at Kshs.298,721.14
 - (vii) Off days/rest days pay at Kshs.1,225,256.94
 - (viii) Public holidays pay at Kshs.329,563.94
 - (ix) Annual leave pay at Kshs.299,709.67
 - (x) Normal overtime pay at Kshs.1,286,282.42
2. The claim is supported by a verifying affidavit and a bundle of documents.



3. The Respondent filed a response to the claim dated 24th January, 2019 in which it denied each and every allegation in the claim and prayed that the same be dismissed with costs for lack of merits. The Respondent also filed a bundle of documents in support of its position.
4. This cause came up for hearing on 17th January, 2022 when the Claimant (CW1) testified alone and closed his case. On the same day the Respondent called one witness Joseph Kuria Kamau (RW1) and closed its case. It was agreed that Counsel address the court by way of written submissions and Counsel for Claimant filed on 21st February, 2022 and Respondent's on 24th February, 2022.

II.The Claimant's Case

5. From the Memorandum of claim, the written witness statement, oral testimony, documentary evidence and written submissions the Claimant's case is as hereunder.
6. The Claimant avers that he was employed by the Respondent in 2002 as Artisan Grade III on a monthly salary of Kshs.14,850/= and that his services were unfairly and unlawfully terminated on 4th June, 2018.
7. The Claimant testified that his day to day work included repair of heavy machinery and equipment at the Respondent's premises but he occasionally doubled up as a transportation supervisor when his services as a mechanical engineer were not required.
8. The Claimant alleges that he worked from 8 a.m. to 6 p.m, a ten (10) hours shift, daily and that at times he worked until midnight.
9. The Claimant testified that on 4th June, 2018 the Director of the Respondent accused him and a driver of a lorry that the Claimant was supervising of having lost and or stolen 1.4 tonnes of soya during transportation.
10. The Claimant and the driver were arrested and their services were verbally and summarily terminated with a firm warning never to return to the Respondent's premises.
11. The Claimant contends that the dismissal was wrongful, unfair, and unlawful and further prays as per the memorandum of claim as out in Part I of this judgment.

III.Respondent's Case

12. As far as it can be distilled from the response to the claim, oral and documentary evidence, and the written submissions by its Counsel, the Respondent's case is as hereunder.
13. In its response to the claim the Respondent has denied each and every allegation in the memorandum of claim.
14. However, in paragraph 3 of the response to the claim, the Respondent avers that the Claimant was a casual labourer whose services were sought for when a need arose and that he was never engaged on permanent terms. The Respondent further alleges that the Claimant was paid his wages fortnightly.
15. The Respondent avers that it stopped seeking the casual services of the Claimant after he was allegedly involved in theft and or loss of goods belonging to the Respondent.
16. It is the Respondent's case that as at the time the parties parted ways it owed no dues to the Claimant and as such the Respondent prays that the entire claim be dismissed with costs.



IV. Issues For Determination

17. From the foregoing summary of the respective positions taken by the parties, the following issues commend themselves for determination by this court:-
- (i) What was the nature and terms of the employment relationship between the Claimant and the Respondent?
 - (ii) Was the dismissal of the Claimant by the Respondent wrongful, unfair, and unlawful?
 - (iii) Is the Claimant entitled to the reliefs sought?
 - (iv) Costs.

V. Employment

18. The Claimant (CW1) testified that prior to 2002 he knew a manager at the Respondent by the name of Santosh and that he used to repair his car. That sometimes in 2002 Mr. Santosh informed the Claimant that the Respondent had a vacancy for a mechanical engineer to repair and maintain their machines and equipment. The Claimant was interested in the job and was interviewed by the said manager who offered him the job at a monthly salary of Kshs.14,850/= which was paid in cash in two instalments each month.
19. The Claimant testified that his work was to test, maintain, and repair the machines. He produced as exhibit a certificate of proficiency to the effect that he is a qualified motor vehicle mechanic and engineering work Grade III from Central Rift Valley institute of mechanical Engineering.
20. The Claimant also produced a sample payroll for May, 2018 indicating that he was indeed an employee of the Respondent at a monthly salary of Kshs.14,850/=, and a statement of payments to the NSSF made by the Respondent on his behalf.
21. The Claimant stated that there was no written contract between him and the Respondent and he was not certain of the date when his employment commenced except that it was sometimes in 2002.
22. The Claimant clarified that he was never allocated duties as a turn boy but used to supervise transportation when not busy in his mechanical engineering duties.
23. In cross examination the Claimant maintained the above position and insisted that he was a permanent and pensionable employee of the Respondent.
24. The Claimant stated that he was not charged with any offence in respect of the alleged theft and or loss although he recorded a statement with the police (DCI).
25. The Respondent called Joseph Kuria Kamau (RW1) as its only witness. He stated that he is a supervisor at the Respondent. He admitted that the Claimant worked with the Respondent but claimed that the Claimant was a casual employee who performed general duties.
26. RW1 admitted that one Mr. Santosh was a manager at the Respondent at the time the Claimant worked for the Respondent. He alleged that the Claimant left employment of the Respondent without notice and never went back.
27. RW1 alleged that after the Claimant failed to turn up for work the Respondent wrote a letter dated 20th June, 2018 to the County Labour office, Nakuru, informing that the Claimant and another employee had failed to show up at work while under investigation by DCI office, Nakuru, on alleged loss and or theft of cargo that they were transporting. The relevant part of the said letter states that the “matter



was reported to Nakuru CID office and they are investigating the matter but meantime both the above named failed to report back to work and not written letter to the company. Based on the above, we wish to notify that both above are summarily discharged with no claims against the company.”

28. If the Claimant was a casual employee as alleged by RW1 the Respondent had no business writing the above letter “summarily” discharging the Claimant and the other employee. To this court the alleged summary discharge was meant to be and actually amounted to a summary dismissal of the Claimant and the other employee. The said letter was neither addressed nor copied to the Claimant.
29. From the foregoing, it is the view and holding of this court that the Claimant was a month to month employee of the Respondent at an agreed monthly salary of Kshs.14,850/=.
30. The Claimant and RW1 are in agreement in their testimony that the Claimant started working for the Respondent in 2002 but none of them is specific on the date of commencement. The Claimant’s Counsel has urged that in view of lack of concrete evidence on the date of commencement, and in view of lack of written contract of employment or letter of appointment that his court should presume 31st December, 2002 to be the date of commencement. This court is of the considered view that the proposal by the Counsel for Claimant makes logical sense and 31st December, 2002 is hereby presumed to be the date that the Claimant assumed his employment with the Respondent.

VI. Dismissal

31. The Claimant’s evidence is that he was dismissed on 4th June, 2018 after a claim by the Respondent that goods had been lost and or stolen in *transitu* whereby the Claimant was the supervisor during the transportation. The Claimant stated that he was handed over to DCI officers and warned by the Respondent’s Director not to return to the Respondent’s premises.
32. On the other hand the Respondent alleges that the Claimant left his place of work on 4th June, 2018 never to return.
33. The Respondent has not produced evidence to demonstrate that indeed the alleged theft occurred and was reported to the police. No occurrence book (OB) was referenced and no charges were preferred against the Claimant.
34. Although Section 44 of the *Employment Act* (the Act) allows an employer to summarily dismiss an employee, such dismissal shall be founded on authentic gross misconduct as expressed in Section 44(4) of the Act. Under Section 44(3) of the Act, the employee’s conduct must indicate that the employee has fundamentally breached his obligations arising under the contract of service.
35. The Respondent did not call any evidence to establish that indeed the Claimant had participated in the alleged theft and or contributed to the loss of cargo as alleged. Under Section 44(4)(g) the grounds of misconduct must go beyond mere suspicion, it has to be reasonable and sufficient. No evidence was called from the loading point or from the DCI offices to confirm that indeed cargo was lost.
36. The Claimant was not afforded substantive and procedural fairness and as such the summary dismissal was wrongful, unfair, and unlawful and this court holds as such.
37. There is a plethora of authorities on the importance of both substantive and procedural fairness including *Mary Chemweno v Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno v Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro -v Teachers Service Commission* (2012) eKLR.
38. The Respondent in this cause has failed to demonstrate that it acted within provisions of Sections 35, 41, 44, and 45 of the Act in dismissing the Claimant.



VIII. Reliefs

39. Having found that the Claimant was an employee of the Respondent on a month to month contract and that the dismissal was wrongful, unfair, and unlawful this court shall now proceed to consider the remedies sought for in the memorandum of claim.
40. As stated elsewhere in this judgment the Respondent prayed for dismissal of the Claim in its entirety and Counsel thereof has submitted that the Claimant is not entitled to any of the reliefs sought.
41. Prayer (a) is for a declaration that the dismissal was wrongful, unfair, and unlawful. This court has already made a finding on this issue in Part VI of this judgment and without the need of repetition the dismissal is declared wrongful, unfair, and unlawful.
42. Prayer (b) is for salary for days worked in June, 2018. It is agreed by both parties that the Claimant was dismissed on 4th June, 2018 and hence was in employment for four (4) days in that month. It is also agreed that the Claimant was on a mutually agreed monthly salary of Kshs.14,850/=. The salary for the four (4) days is $Kshs.14,850/30 \text{ days} \times 4 = 1,980$. This court rejects the calculation as done in the memorandum of claim for two basic reasons. Firstly, the court has found that the Claimant was on month to month contract and hence the daily pay submitted by the Claimant did not apply to him. Secondly, the legal notice allegedly relied upon was not produced as evidence or availed to court in any other way or form.
43. Prayer (c) is for 12 months gross salary in compensation for wrongful, unfair, and unlawful compensation. This claim is ostensibly based on Section 49(1)(c) of the Act. In assessing the award to be made under this head the court is guided by, the inter alia, the factors listed in Section 49(4) as read with Section 50 of the Act.
44. There is no evidence on record that the Claimant contributed to his dismissal as the alleged theft and or loss of cargo was neither substantiated nor proved by the Respondent during the hearing.
45. The Respondent has not expressed any desire to re-engage the Claimant and the Claimant has not expressed such interest to be re-engaged.
46. The Claimant worked for the Respondent from December, 2002 to June, 2018, a period of over 15 years. That is a considerably lengthy period of time. The Claimant testified that since the dismissal he has not held any other formal employment but he works as a jua kali mechanic
47. The evidence on record is that no terminal dues were paid to the Claimant whatsoever.
48. The conduct of the Respondent before, during, and after the dismissal is unbecoming. The Respondent denied the Claimant both substantive and procedural fairness, disguised the employment relationship as casual, and failed to pay terminal dues, *inter alia*.
49. Considering all the relevant factors and circumstances in this cause this court is of the considered view that this is an appropriate cause for award of the maximum 12 months gross salary as compensation for the wrongful, unfair, and unlawful dismissal. It is calculated as follows in $Kshs.14,850/= \times 12 = Kshs.178,200/=$. This amount is subject to statutory deductions.
50. Prayer (d) is for one(1) month's salary in lieu of notice and this court has no difficulties in awarding the same at Kshs.14,850/=.
51. Prayer (e) is for alleged underpayment allegedly based on Legal Notice No. 64 of 1st May, 2012. Like other legal notices mentioned by the Claimant in his pleadings, the said legal notice was not produced in court and the court has not been called upon to take judicial notice of the same under Section 59



and 60 of the Evidence Act (Cap 80). For this reason the court is unable to award the claimed sum of Kshs.298,712.14.

53. Prayer (f) is for overtime pay amounting to Kshs.1,268,282.42. The Claimant alleges that for all the days, months, and years that he worked for the Respondent he reported to worked at 8a.m. and left at 6 p.m.
54. Under Section 10 and 74 of the Act the employer is presumed to be in custody of the employment records. However, the cardinal rule in evidence is that he who alleges must prove. The burden of proof rests with the party that alleges any fact or set of facts. That is the essence and import of Section 107 of the Evidence Act.
55. Where a party intends to rely on document(s) or evidence that is in custody of the adverse party the law provides for the manner of prompting and even forcing the party in such custody or possession to produce the said evidence or document(s). The applying party may apply for issuance of notice to produce and or summon for witness(es) to produce and or avail the requested document(s) or evidence (see Sections 67, 68 and 69 of the Evidence Act).
56. If the party in possession of such document(s) or evidence fails or refuses to produce the same, the court shall take appropriate steps including taking the presumption that such a party has failed or refused to produce such evidence or documents(s) because if availed the same would be against it (See Sections 171, 172, and 173 of the Evidence Act).
57. The fact that employment records are ordinarily presumed to be in custody of the employer does not imply that such employer is duty bound to produce such documents if it does not wish to rely on the same in evidence. If an employee wishes to rely on such records or any other evidence in custody of the employer, such an employee is under obligation to apply all avenues provided for in law to ensure that such documents are availed and or produced in court. In other words, the legal obligation for a party to prove its case does not shift to the other party just because such other party is in custody of the documents or evidence that the party bearing the burden of proof wishes to rely on.
58. Applying the above principles and law to this cause the Claimant did not produce any records to prove that he worked overtime as alleged or that he worked on leave days or public holidays. The Claimant did not apply to court to have the Respondent ordered to produce the alleged records or evidence.
59. It is the view and holding of this court that for the above reasons the claimant failed to prove that he is entitled to prayers (f), (g), (h) and (i) as prayed in the statement of claim and the said prayers are hereby dismissed. The legal notices mentioned in those prayers were not produced as exhibits or in any other form or manner availed to court.
60. Prayer (j) is for certificate of service and the Respondent is ordered to issue and deliver the same within 30 days of this judgment in accordance with Section 51 of the Act.

VIII. Costs

61. The Claimant is awarded costs of this cause based on the award made.

IX. Disposal

62. In final disposal the Claimant is awarded/provided the following:-
 - (a) A declaration be and is hereby issued that the dismissal of the Claimant by the Respondent was wrongful, unfair, and unlawful.



- (b) Salary for four(4)days worked in June, 2018- Kshs. 1,980.00
- (c) Compensation for wrongful,unfair, and unlawful dismissal- Kshs.178,200.00
- (d) One(1) month's salary in lieu of notice Kshs. 14,850.00

Total . Kshs.195,030.00

This amount shall earn interest at court rates from the date of this judgment till payment in full.

- (e) Costs to the Claimant.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 16TH DAY OF JUNE, 2022.

DAVID NDERITU

JUDGE

