



**Arodi v Modern Western Coach (Cause 24 of 2017)
[2022] KEELRC 12943 (KLR) (26 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12943 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 24 OF 2017
S RADIDO, J
OCTOBER 26, 2022**

BETWEEN

ALBERT ARODI CLAIMANT

AND

MODERN WESTERN COACH RESPONDENT

JUDGMENT

1. The Cause herein was heard by Nduma J on 29 April 2019 and 29 July 2019 when Albert Arodi (the Claimant) testified.
2. When the Cause was called for the Respondent's case on 9 March 2020, it (Modern Western Coach) opted to close its case without leading evidence.
3. The judge directed the parties to file and exchange submissions ahead of mention on 9 June 2020 to fix a judgment date.
4. The Claimant only filed his submissions on 18 June 2020, and the Respondent on 8 July 2020.
5. For reasons which are not clear, the parties only moved the Court on 30 May 2022, seeking directions on the judgment. On 21 June 2022, the parties agreed that I prepare and deliver the judgment as Nduma J had been transferred from the station.
6. The Court has considered the pleadings, evidence, and submissions.

Admission of secondary documents

7. The Respondent objected to the production of the documents filed by the Claimant on the ground that they were secondary documents. The Court allowed the documents and indicated that it would give reasons in the judgment.



8. The record indicates that the Claimant served a Notice to Produce Documents upon the Respondent under the Evidence Act. The Respondent did not react or respond to the Notice.
9. The admission of the documents, therefore, had a legal evidential foundation.

Employment relationship

10. The Respondent denied that the Claimant was its employee. At the most, it contended that the Claimant was a reliever driver engaged and paid whenever needed. It produced copies of Manifest(s).
11. However, in its filed witness statement (not adopted as no witness was called), a director had admitted that the Claimant was employed on permanent terms until June 2016.
12. The Claimant testified that he was employed by the Respondent on 5 January 2016 and that he served until on or around 5 July 2016. The Claimant produced copies of the muster roll from April 2015 to May 2016 and also testified that from April 2015, he was paid a monthly salary of Kshs 15,000/-.
13. The muster rolls indicate that the Claimant was reporting to work regularly.
14. On the basis of the muster roll, manifests, monthly pay records and section 10(3) & (7) of the Employment Act, the Court is satisfied that the Claimant was employed by the Respondent on contract, even though it was not reduced into writing.

Unfair termination of employment

15. On the circumstances leading to separation, the Claimant stated in his witness statement, which was adopted in Court, that on 22 June 2016, an Accountant with the Respondent informed him that due to financial constraints, his services were not required that day and that the Respondent would call him at an opportune time.
16. According to the Claimant, he did not get any call from the Respondent, and when he went to check his status on 5 July 2016, the Accountant told him that the Respondent did not have funds to engage him.
17. The Respondent, on its part, pleaded case was that the Claimant had deserted work. However, it did not lead any evidence to advance the defence.
18. The Court has found that the Claimant was an employee of the Respondent. The Respondent did not issue him with the written notice envisaged by section 35(1)(c) of the Employment Act, 2007.
19. There was no evidence that the hearing contemplated by section 41 of the Act was conducted.
20. The Court finds that the Respondent unfairly terminated the Claimant's employment on 5 July 2016.

Compensation and pay in lieu of notice

21. The Claimant served the Respondent for less than a year.
22. The Court is, therefore, of the view that compensation equivalent to 1 month's salary would be appropriate, together with 1 month's salary in lieu of notice.

Breach of contract

Pro rata leave



23. The Claimant served the Respondent from January to July 2016 and would be entitled to pro rata leave. The Respondent did not lead evidence to controvert the claim for Kshs 10,423/- on account of pro rata leave, and the Court will allow the head of claim.

Unpaid salaries

24. The Claimant prayed for Kshs 113,708/- being unpaid wages for 4 months.

25. Initially, the Claimant was paid a daily rate of Kshs 1,000/-. The Employment Act, 2007 and Labour Institutions Act recognise monthly, daily, and hourly pay rates.

26. The Court, therefore, finds that the Claimant was paid daily for the 4-months before he was put on monthly pay.

Underpayments and overtime

27. The Claimant did not lay a contractual, evidential, or legal foundation to these heads of the claim in that the Court was not informed of the Regulation of Wages Order which prescribed the minimum wages and working hours in the sector the Respondent operated in.

28. Relief is declined.

Conclusion and Orders

29. The Court finds that the Claimant was an employee of the Respondent, and that the Respondent unfairly terminated the contract.

30. The Claimant is awarded:

- i. Compensation Kshs 15,000/-
- ii. Pay in lieu of notice Kshs 15,000/-
- iii. Pro rata leave Kshs 10,423/-

Total Kshs 30,423/-

31. The decretal sum to attract interest from the date of judgment until full payment.

32. The Claimant to have costs.

DELIVERED VIRTUALLY FROM VOI, DATED AND SIGNED ON THIS 26TH DAY OF OCTOBER 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Mwamu & Co. Advocates

For Respondent Ngala Awino & co. advocates

Court assistant Chrispo Aura

