



**Onyango v Modern Coast Builders and Contractors Limited (Cause  
26 of 2018) [2022] KEELRC 13582 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13582 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 26 OF 2018  
B ONGAYA, J  
DECEMBER 20, 2022**

**BETWEEN**

**CHARLES WAMBULILIA ONYANGO ..... CLAIMANT**

**AND**

**MODERN COAST BUILDERS AND CONTRACTORS  
LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the memorandum of claim on January 18, 2018 through Otieno Otwere & Associates Advocate. The claimant pleaded his case as follows. He was employed by the respondent from April 2012 to April 13, 2017 as a paint sprayer at Kshs 24,000.00 per month. He was deployed at Makupa in Mombasa. He repainted the respondent's modern coast buses that needed repair due to road traffic accidents. On April 13, 2014 he requested for permission to attend to the burial of the sister in Busia. He resumed on April 21, 2017 and he was summoned and asked to handover since his employment had been terminated. The claimant's further case is that the termination was unfair for want of due procedure of hearing and notice per the *Employment Act, 2007*. He claims he was not given a certificate of service and no terminal dues were paid. He also claims underpayment. He claimed 5 annual unpaid leaves  $Kshs\ 24,000.00 \times 5 = Kshs\ 120,000.00$ ; 12 months' salaries for unfair termination  $Kshs\ 288,000.00$ ; underpayment  $(Kshs\ 28,428 \times 60) - (Kshs\ 24,400 \times 60) = Kshs\ 265,680.00$ ; and total  $Kshs\ 673,680.00$ . The claimant prayed for judgment against the respondent for:
  - a. Payment of the sum of  $Kshs\ 673,680.00$ .
  - b. A declaration that the claimant was employed on permanent basis.
  - c. An order the respondent to issue the claimant's certificate of service.
  - d. The costs of the suit plus interest on a, b, and c above.



- e. Any other relief as the court may deem just.
2. The respondent filed the memorandum of response on May 29, 2016 through Prof Albert Mumma & Company Advocates. While denying the employment relationship, the claimant pleaded that the termination was not unfair or unlawful because the claimant was terminated in accordance with the provisions of the Employment Act, 2007 with a notification and a hearing at which the claimant defended him-self. The respondent further pleaded as follows. The hearing was on April 13, 2017 about gross misconduct and poor performance and on April 26, 2017 the letter conveying the decision issued. The respondent prayed that the suit be dismissed with costs. The claimant filed on March 21, 2019 the reply to the response essentially repeating the claims and prayers in the memorandum of claim.
  3. The claimant testified to support his case and the respondent's witness (RW) was Emmy Chepkoech Ngetich. Final submissions were filed for the parties. The court has considered all the material on record. The court returns as follows.
  4. The 1<sup>st</sup> issue for determination is whether the parties were in a contract of service. The evidence and submission by the respondent is that the parties entered a contract of service per the letter dated May 27, 2013. The claimant testified that he was employed in April 2012 and denied knowledge of the letter of employment which showed he had been employed on May 27, 2013, the date he signed the letter. On a balance of probability, the court finds that the employment relationship was governed by that letter. His initial basic salary was Kshs 22, 000.00 as stated in the letter. While making that finding, the Court has considered the claimant's testimony that he had not exhibited a payslip for 2012 and he had no document showing he worked for the respondent in 2012. The court further finds that in absence of any other material, the claimant's denial of his signature on the letter of offer as signed on May 27, 2013 is found unbelievable – more so because the claimant had pleaded he had been employed as a bus conductor and in cross-examination denying the pleading, and, stating that he was indeed employed as a paint sprayer. He had also stated he was supervisor and in his testimony changing to state that he was a paint sprayer. The claimant's contradictory accounts cannot be trusted. The respondent's submission that he was employed by the letter of offer he signed on May 27, 2013 is upheld.
  5. The 2<sup>nd</sup> and 3<sup>rd</sup> issues are whether the respondent terminated the employment relationship and whether it was unfair and unlawful termination as alleged for the claimant. The respondent has exhibited the letter of termination of employment dated April 26, 2017. The letter states that a disciplinary hearing was held on April 13, 2017 and thereafter decided that the claimant's conduct was unsatisfactory because he reported at work late with lack of concentration and he was incompetent by not completing painting of the buses. The letter stated that he was being terminated after several warnings in that regard. The claimant testified that he never received the letter to show cause dated March 30, 2017 and that the alleged disciplinary hearing of April 13, 2017 never took place. The issue for determination is whoever is telling the truth between the parties as to the circumstances of the separation. The claimant pleaded that on April 13, 2014 he obtained permission to attend to his sister's burial in Busia and he resumed on April 21, 2017 when he was summoned and informed that his employment had been terminated. In his oral testimony during re-examination he stated in a contradictory and incoherent manner thus, "I see my para 4. There is a time my brother died. It was in April 2017. I was not given leave at all to attend the funeral of my brother..." It is incoherent with respect to who had died – a brother or sister, and, whether permission was granted at all. During re-examination, he had testified thus, "...I never received termination letter. I was terminated on April 13, 2017." Also he had testified thus, "On April 13, 2017 I reported at work. HRM told me to had in overall and that I would receive my final dues at bank. I say HRM used to come to my work station. On April 13, 2017 HRM asked me to hand in overall and to leave job." The Court finds that the claimant again was therefore inconsistent



on the date of termination; whether on April 21, 2017 or April 13, 2017. The submission made for the claimant is found inconsistent with the actual claimant's testimony on record and the submission being, "According to the claimant evidence he testified that he was on duty on April 11, 2017, April 12, 2017 and on April 13, 2017 when he received sad news and was permitted to attend his sister's burial. The claimant testified that he came back on April 21, 2017 when he was called and asked to remove his overall and leave. He categorically stated that he was not subjected to any disciplinary process." In the circumstances, the court finds that the claimant's inconsistent and incoherent account cannot be trusted. The respondent's coherent account is therefore upheld. The balance of probability is that the claimant received the letter to show cause dated March 30, 2017 inviting him to a disciplinary hearing on April 13, 2017 and to attend with a fellow employee. He attended and thereafter the termination letter dated April 26, 2017 issued. The claimant appears to have received that letter by signing on it. There is no reason to doubt the employer's account. The court finds that the claimant was accorded due process of a notice and a hearing per section 41 of the Act and as at termination the reasons existed and related to the claimant's capacity, compatibility and the respondent's operational requirements per sections 43 and 45 of the Act respectively. The termination was not unfair in procedure and in substance.

6. To answer the 4<sup>th</sup> issue, the court returns that the claimant's claims and prayers must collapse. The court has found that the termination was not unfair or unlawful. The claimant has claimed underpayment but the basis for the claim is not stated at all. The claimant in his own case alleges that he took some leave days to attend to a funeral. The respondent has exhibited some documents showing the claimant signed for leave days. The claim for leave days due and not taken is a special pecuniary claim requiring particularised pleading and strict proof. That was not done and the claim on leave days will collapse. The claimant claimed underpayment which in submissions is changed to unpaid house allowance. The basis for the house allowance as submitted is not pleaded at all and the underpayment is not established at all. As submitted for the respondent, it is not shown that the claimant was paid below the prescribed minimum statutory pay per relevant wage orders. The prayer for underpayment will fail as unjustified. The respondent has succeeded and the claimant will pay the costs.
7. In conclusion the claimant's memorandum of claim is hereby dismissed with costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS TUESDAY 20<sup>TH</sup> DECEMBER, 2022**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

