



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 485 OF 2017**

**ENOS IRERI.....CLAIMANT**

**VERSUS**

**DAVID TOURS & CAR HIRE LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> April, 2021)

**JUDGMENT**

The claimant filed the memorandum of claim on 20.06.2017 through Isaac Onyango & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination of the services of the claimant by the respondent was irregular, unlawful, unfair and wrongful.
- b) Payment of Kshs. 933, 945.00 being:
  - i. Three (3) months' salary in lieu of notice Kshs. 96, 615.00.
  - ii. Unpaid leave days (60) days Kshs. 64, 410.00.
  - iii. Severance pay at one-month salary for each of 14 years served Kshs. 386, 460.00.
  - iv. Damages for unfair or wrongful termination or dismissal from employment under section 49(1) of the Employment Act (Kshs.15, 065 x 12 months) Kshs. 386, 460.00.
- c) Certificate of service.
- d) Costs and interests of the claim.

The claimant's case is that he was employed by the respondent from January 2003 until 04.01.2017, a service of 14 years. Further, it is alleged by the claimant that on 03.01.2017 while on duty, he was summoned by the respondent's director who verbally informed the claimant that his services had been terminated and directed the claimant to go back home and wait to be invited to collect the settlement of his terminal dues. Further, reasons for termination or chance for the claimant to explain were not given at all – and thereafter the claimant visited the respondent on numerous occasions but the respondent failed, declined, refused and neglected to settle the claimant's terminal dues. Further the claimant had a clean record of service for the 14 years and the claimant having attained 55 years of age looked forward to retire peacefully and satisfactorily while working for the respondent.

The respondent filed on 06.02.2018 the statement of response through KMK Law LLP Advocates. The respondent admitted that it employed the claimant as pleaded for the claimant and the claimant was taken in as a friend. Further the claimant was largely left on his own to undertake his duties due to the seasonal nature of the respondent's business. In that regard the respondent allocated the claimant an office where he could hang around (to do his own work) as he awaited clerical and other tasks on need basis from the respondent. Further, on 04.01.2016 the claimant verbally requested to go on leave to attend to his family matters and to utilise his outstanding leave days for the years June 2015 to June 2016 being 30 days. The respondent never terminated the claimant's employment but instead the respondent received a letter by the respondent's advocates alleging unfair termination. The respondent's case is that the claimant was allowed to take the 30 days' leave as was requested and was expected to return on duty upon end of leave but he failed to return. Further, throughout service the respondent paid the claimant a stipend of Kshs. 26, 578.00 to supplement what he made from his own work. Further, the respondent gratuitously subscribed the claimant to NSSF social security plan and the NHIF scheme. The respondent admitted that the claimant is entitled

to the certificate of service and not any of the other remedies as prayed for.

The claimant testified to support his case and the respondent's witness (RW) was its Director one David Ngunjiri Wanjuki. Final submissions were filed for the parties. The Court has considered the material on record and makes findings as follows:

1) The Court finds that by their pleadings parties are in agreement that they were in employment relationship as pleaded for the claimant and the respondent admits that it remitted the relevant NSSF and NHIF dues. The respondent has admitted that it is willing to issue the relevant certificate of service for the claimant's 14 years of service which further confirms the contract of service between the parties. The claimant pleaded and testified that he earned Kshs, 32, 205.00. RW testified that in June 2016 the claimant earned Kshs. 32, 205.00 per respondent's documents. The Court therefore returns that the last claimant's monthly pay was Kshs. 32, 205.00. The claimant worked in the respondent's tour operator business as a clerk.

2) The 2<sup>nd</sup> issue for determination is whether the respondent terminated the claimant's contract of service as alleged for the claimant or the claimant took 30 days' leave and failed to return on duty thereafter and instead issued a demand through his advocates. The claimant testified that on 04.01.2017 the Director David Wanjuki Ngunjiri told him that his services were no longer needed. He denied that he had applied for leave in January 2017. He further testified that he asked to be told when he would resume duty but he was not advised at all. The claimant testified that he was not paid any money or Kshs. 50,000.00 when he left on 04.01.2017. RW testified that on 04.01.2017 the claimant wanted to be paid in lieu of leave days. RW testified that he authorised the claimant to take his leave and RW gave him Kshs. 50,000.00 to deal with his personal issues in rural areas. RW further testified that the Kshs. 50, 000.00 he said he gave to the claimant on 04.01.2017 covered the salary for January 2017. RW's further evidence was that thereafter, he received the demand letter from the claimant's advocates demanding Kshs. 900, 000.00. RW testified that prior to the demand letter the claimant had not asked for terminal dues from RW. The Court has considered the evidence. The Court finds that the evidence by RW is not coherent and cannot be trusted. First, RW testified he gave the claimant Kshs. 50, 000.00 to use in the village then changed his position when he stated that the Kshs. 50, 000.00 covered January 2017 salary. It should be obvious that Kshs. 50, 000.00 was beyond the claimant's monthly pay and there was no documentary evidence to prove the payment in circumstances whereby payments to the claimant by the respondent were documented. The Court finds that the respondent had not given the claimant the Kshs. 50,000.00 and further finds that the claimant had not asked to proceed on leave. In any event RW confirmed that the claimant did not work in January 2017 and if Kshs. 50, 000.00 was to cover for January 2017 salary, the same was not counter-claimed as refundable – which shows that in fact it was not given as alleged and as testified for the respondent. Second, RW particularly testified that the claimant had asked to encash the leave days in lieu of proceeding on leave and the Court finds that the evidence contradicts the respondent's pleaded case that the claimant requested to proceed on leave to attend to private matters. Third, accordingly, the Court returns that there is no reason to doubt the claimant's account that on 04.01.2017 RW told the claimant that his services were no longer needed.

3) The Court finds that the claimant's termination on account that his services were no longer needed amounted to termination on account of redundancy but in contravention of the procedure in section 40 of the Employment Act, 2007. Further, the claimant has established that by that termination there was no valid reason for termination as envisaged in section 43 of the Act. RW denied the fact of terminating the claimant at all but the Court has found otherwise. The Court returns that the termination was unfair both in procedure and substance. As submitted for the claimant the procedure was unfair contrary to section 45(2) (c) of the Employment Act, 2007.

4) The Court has considered the prayers made. The claimant has prayed for 3 months' salary in lieu of notice. The claimant has made no justification for that prayer. The Court has considered that under section 40 of the Act the claimant would be entitled to a month's pay in lieu of termination notice. Further, as submitted for the respondent, in **Brookhouse Schools Limited –Versus- Dorcas Njeri Gichuhi [2016] eKLR**, it was held by Ndolo J that section 35 of the Act is clear that the statutory termination notice period for an employment contract in which an employee is paid on a monthly basis is one month and, in the present case, there being no otherwise contractual notice period, the Court finds that only one-month notice was due. He is awarded **Kshs. 32, 205.00** in lieu of a month's notice. RW admitted that the claimant had pending leave days which he wanted payment in lieu of taking the leave. The claimant has claimed pay for 60 days of leave for the last two years served. The Court finds that on a balance of probability the claimant did not take the leave or pay in lieu of annual leave for the two years as claimed. He was awarded **Kshs.64, 410.00** as prayed for. The claimant has prayed for service pay at one month for each year served. The claimant has not offered any contractual or statutory basis for the claim and prayer as made. The submissions filed for the claimant make no justification for the claim as though the claimant abandoned the prayer. The respondent remitted NSSF for the claimant's service. The Court returns that per section 35(6) of the Act, the claimant was not entitled to service pay as claimed because NSSF had been remitted.

5) The claimant prays for compensation for unfair termination. The Court has found the termination was unfair. However, whereas the claimant was informed that his services were not required and therefore amounting to redundancy per section 40 of the Act, the claimant did not anchor his case upon that provision. The Court has found the reason to have been not genuine because RW denied the fact of termination and upon that reason, but, the Court has found the termination took place and upon that reason. In urging for 12 months' compensation under section 49 of the Act, it was submitted for the claimant that he had spent the better part of his youthful service with the respondent and he had been unable to secure alternative employment; he had served for a long period of time; and the termination was sudden. For the respondent it was submitted that the respondent's enterprise was seasonal and the respondent had allowed the claimant to use the allocated office to do his own work during low seasons of the respondent's business; the claimant performed his own work alongside the work assigned by the claimant; and the respondent owed the claimant no lifelong employment. It was submitted that the Court should consider that the claimant had been paid Kshs.50, 000.00 but the Court has already found that such payment was not made at all. The Court has considered the parties' respective submissions against the factors in section 49 of the Act in the circumstances of the present case and to balance justice for parties the claimant is awarded 6 months' salaries for the unfair and sudden termination of his employment, making **Kshs.193, 230.00**.

6) The claimant has substantially succeeded in the claim and is awarded costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The respondent to pay the claimant a sum of **Kshs. 289, 845.00** (less due PAYE) by 01.07.2021 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 2) The respondent to deliver the certificate of service in 30 days from the date of this judgment.
- 3) The respondent to pay costs of the suit.

**Signed, dated and delivered by video-link** and in court at **Mombasa** this **Friday 16<sup>th</sup> April, 2021**.

**BYRAM ONGAYA**

**JUDGE**