



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 65 OF 2015

TOM OTIENO MIDIANGA.....CLAIMANT

VERSUS

WILHAM KENYA.....RESPONDENT

JUDGMENT

1. The Claimant instituted this suit vide a Memorandum of Claim which he filed on 22nd January 2015 against the Respondent wherein he averred that he was employed on 20th March 1990 as its Airport Supervisor and later changed his job description to that of Export Supervisor through a letter dated 26th August 2004. He averred that he was subsequently issued with a new appointment letter which he was advised superseded the original appointment and that as at 24th June 2013, his monthly gross salary was Kshs. 47,969/-. The Claimant averred that he was however never paid for the work he did for the Respondent every Sunday which is supposed to be a rest day and that he worked on all Sundays without pay, from the time he was employed until the time he was unfairly terminated. The Claimant averred that by a letter dated 29th May 2013, the Respondent suspended him from duty for 2 weeks for allegedly failing to provide finished products on time causing off load of the products. He averred that he was not given any or any reasonable opportunity to respond to the allegations of negligence and was advised to keep off the Respondent's premises for the period of the suspension and that by another letter dated 24th June 2013 he was notified by the Respondent that his employment had been terminated with effect from the date of the letter, purportedly in accordance with a term of his contract. The Claimant averred that the termination letter did not make any reference to his earlier suspension and that it was issued before he was first given an opportunity to defend himself against the allegations. He averred that in the circumstances, the termination of his employment was unfair, unconstitutional, and unlawful and also contravened the rules of natural justice. He therefore claimed from the Respondent a total sum of Kshs. 2,047,574/- being the unpaid wages for Sundays worked between March 1990 to May 2013. He admitted that after the termination of his employment the Respondent only paid him salary for the days worked in June, 2013 but averred that the Respondent forced him to sign a discharge voucher after threatening to withhold the June 2013 salary which he badly needed. The Claimant pray for judgment against the Respondent for: a declaration that the termination of his services was unfair and wrongful; damages equivalent to 12 months' salary as compensation for unfair termination and for the unpaid wages for Sundays worked as averred herein above.

2. The Claimant filed two Witness Statements one from him and another from Mr. Daniel Nyasiru Atsulu. Mr. Atsulu stated that he was formerly employed by the Respondent as a Driver between January 2013 and July 2013 assigned the duties of transporting fresh produce from the Respondent's Go-down within the Airport to the Cargo Centre. He stated that on Sunday 19th May 2013, he was on duty and the Claimant was the Supervisor on duty and he was to ferry fresh produce to the Cargo Centre for export from about 7.00pm in the evening, through a Canter Vehicle and that he was to make the delivery in 2 trips. That the Claimant supervised the handing over of the produce to Maya Freighters' Supervisor, one Mark Wangusi, who then supervised the loading of the product before he drove off to the Cargo Centre. He further states that while at the queue at the Cargo Centre, he switched off the vehicle engine as was the requirement but that when his turn to move into the offloading area came the vehicle engine could not start due to a faulty starter. That there were no people around to push the vehicle so as to jump start the same and therefore experienced delay for more than one hour and he could not offload the produce. That by the time the vehicle was pushed to jump start, the time for offloading had ended and he was forced to go back to the Respondent's Go-down with the products. That he is aware the Claimant herein was suspended and eventually dismissed from employment because of what happened on the night of 19th May 2013 and states that the Claimant was not to blame for the failed delivery of products for export on that day/night. He stated that the Respondent's vehicles were always in bad state, were never properly serviced and would stall all the time and that his plea to the Transport Manager to ensure the vehicles were in good condition were never addressed. That the same is the reason why he decided to resign from his position as a Driver of the Respondent Company

3. The Claimant states that as at June 2013, he was earning a salary of Kshs. 39,060/- and house allowance of Kshs. 5,859/- making his total earnings to be Kshs. 44,919/- excluding overtime. He reiterated the statement by Mr. Atsulu that the allegations made against him were caused by the Respondent's own failure to provide reliable transport and he was not to blame in any way. He stated that the Respondent terminated his services without giving him any hearing and that he had served the Respondent from the age of 24 to the age of 48 and cannot therefore get any job.

4. The Respondent filed its Memorandum in Reply dated 9th June 2015 admitting that the Claimant was its employee for the stated duration and averred that he was entitled to one rest day per week which was not necessarily on Sundays. It produced copies of the muster roll for the period between 2009 and 2012 showing the dates which the Claimant was off duty. It further averred that the Claimant's duties included being responsible for all packed produce in the export department and providing proper stock movements to his supervisor. The Respondent averred that the Claimant was given reasonable time to respond to the allegations made against him and that he was later suspended to pave way for investigations into the matter. The Respondent averred that it terminated the service of the Claimant in a fair and procedural manner because his negligence on the delivery of packaged goods to the freight company delayed the shipment of goods without any reasonable explanation and occasioned financial loss to the company. Further, that the Claimant had become negligent over a period of time, in the performance of his duties and that various warning letters had been issued to him prior to his suspension and eventual dismissal. It further averred that the Claimant was paid all his dues of Kshs. 59,068/- as per the discharge voucher dated 7th August 2013 and the letter dated 24th June 2013 and that a certificate of service was also issued to him. The Respondent prays that the claim against it be dismissed with costs as the Claimant's claim is an afterthought and brought to the Court in bad faith.

5. The matter was disposed of in terms of Rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016. The Claimant submitted that he has proved his claim to the required standard through the documentary evidence and witness statements filed herein. He submitted that it is not disputed that he worked for the Respondent for over 23 years, being the period between 20th March 1990 and 24th June 2013 and that the circumstances leading to termination of his employment are also not in dispute. The Claimant submitted that the Respondent's actions were in violation of Section 41 of the Employment Act 2007, Articles 41 and 47 of the Constitution of Kenya 2010 and the rules of natural justice. Further, that the reason for terminating his contract of employment failed to meet the threshold for substantive fairness as the allegation made against him was false and the Respondent has not controverted his explanation on the same. The Claimant submitted that the Respondent did not also file any witness statement to contradict the Claimant's statement and that the defence witness confirmed that no hearing took place before the termination of the Claimant's employment. He relied on the case of **Peter Kamau Mwaura & Another v National Bank of Kenya [2020] eKLR** where the Court cited the case of **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR**, where the Court of Appeal held that the employer must prove the reasons for termination/dismissal per Section 43; prove the reasons are valid and fair per Section 45; prove that the grounds are justified per Section 47(5), amongst other provisions and that a mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination. The Claimant submitted that the Respondent in the instant case has failed to prove as required of it under Sections 43 and 45 of the Act, that the reason or reasons for termination/dismissal was valid and/or fair. He urged this Honourable Court to find and hold that his contract of employment was unfairly and wrongfully terminated by the Respondent and the Respondent is liable to pay damages and other terminal benefits to the Claimant. The Claimant submitted that the Respondent's preliminary objection dated 13th December 2019 is both incompetent and lacking in merit as it raises an issue of limitation which was never pleaded in the Respondent's Reply and which defence/reply was never amended. He relied on the cases of **Kiungani Farmers Co. Ltd v Mbugua [1984] KLR 476** and **Town Council of Awendo v Nelson Oduor Onyango & 13 Others [2013] eKLR** where the Court of Appeal held that failure to plead limitation as a defence denies the party raising it the right to rely on such a point of law as a defence. He further submitted that Section 90 of the Employment Act, 2007 gives a limitation period of three (3) years within which to file a claim in respect of employment and/or labour matters and that considering he filed the claim about 2 years after the wrongful termination, the contention by the Respondent does not hold water. He submitted that even if the claim for unpaid wages for Sundays worked was to be considered to be outside limitation period, which is denied, the claim was revived when the Respondent made a written undertaking to pay the Claimant for "Days Worked" in the termination letter dated 24th June 2013. The Claimant submitted that Section 23(3) of the Limitation of Actions Act, Cap. 22 provides as follows:-

(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:

Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt. (emphasis theirs)

6. The Claimant submitted that in view of the above and the peculiar circumstances of the case, the Respondent was aware the defence of limitation is not available to it and hence its failure to plead limitation as a defence. He urged the Court to overrule/dismiss the preliminary objection with costs to the Claimant. The Claimant submitted that considering he had worked for the Respondent for more than 23 years, this Court should be persuaded to award him 12 months gross salary as compensation for the unconstitutional and unfair termination, as under Section 49(c) of the Employment Act. In support of this submission for an award of maximum compensation, he relied on the decisions of this Honourable Court in the cases of **Peter Kamau Mwaura & Another v National Bank of Kenya [2020] eKLR**; **Gladys Wambui Mwai v Highland Plants Limited [2019] eKLR**; and **John Mutia Maluki v Schenker Limited [2018] eKLR**. He further submitted that since the Respondent did not prove the alleged off days and further produced a Muster Roll for only 19 months, the same does not deny his averment that he worked on all Sundays from the date he was employed but was not remunerated for working on those rest days. The Claimant submitted that even if the Court is to consider the off days for the months appearing in the said Muster Roll and it is taken that he is not entitled to claim anything for the Sundays in those months, then he would be entitled to 76 days only to reflect an amount of Kshs. 491,368/-. The Claimant however urged this Court to reject the evidence contained in the Muster Roll because the same has been presented selectively and that neither the Claimant nor any other employee of the Respondent signed the Muster Roll to authenticate the information contained therein. He further urged the Court to find and hold that the Claimant has proved his claim for special damages of Kshs. 2,047,574/-, or at the very least, Kshs. 1,556,206/-.

7. The Respondent submitted that it raised a preliminary objection to wit; the Claimant's cause of action is time barred for the claim for unpaid wages for Sundays worked between March 1990 to May 2013 being a continuous injury. The Respondent submitted that as under Section 90 of the Employment Act, the time limitation in the case of a continuing injury is capped at 12 months after stoppage of the injury complained of and that its objection therefore falls within the ambit of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** for being in contravention of mandatory provisions of section 90 of the Act. The Respondent submitted that this Honourable Court expounded on the issue of continuing injury in **Ephraim Gachigwa Mwangi v Teachers Service Commission & Board of Management Thogoto Teachers College [2018] eKLR**. It submitted that the injuries complained of by the Claimant were continuing in nature and the same ceased at the time of termination on 24th June 2013 and that the Claimant ought to have therefore filed claim in respect of the above mentioned prayers within 1 year from the date of termination and such, not later than 23rd June 2014. The Respondent further

submitted that the Claimant did not challenge the Discharge Voucher signed with respect to the termination. The Respondent submitted that the Court of Appeal in **Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR** while addressing a settlement agreement that had been signed by the Respondent, observed that:

“21. In our minds, it is dear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same, it did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties, in **Trinity Prime Investment Limited vs. Lion of Kenya insurance Company Limited [2015] eKLR** this Court, while discussing the import of a discharge voucher which is more or less similar as the agreement in question observed:

"The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged." (emphasis theirs)

8. The Respondent submitted that the Claimant's suspension precluded the subsequent termination of his services and that as per his job description he was tasked with the responsibility of all packed produce in the export department and which duties he admits to. The Respondent submitted that the Claimant's services were thus terminated in accordance with Section 43 and 45 of the Employment Act and that justified valid reasons were given to him. It urged the Court to consider the previous conduct of the Claimant with regard to performance of his duties; specifically the notices to show cause dated 18th April 2011, 31st January 2012, 18th July 2012 and 25th October 2012 demonstrating the Claimant's negligence in performing his duties. The Respondent submitted that the Claim should be dismissed as the Claimant was aware he had signed a discharge voucher and the claim for days worked on Sundays is filed out of time.

9. In response to the Respondent's submissions, the Claimant submitted that signing of a Discharge Voucher *per se* does not absolve an employer from statutory obligation and that such discharge voucher cannot preclude the Court from inquiring into the fairness of termination in any given case. He cited the Court of Appeal case of **Thomas De La Rue (K) Limited v David Opondo Omutelema [2013] eKLR**. The Claimant submitted that in the case of **Dennis Kipngetch Koech v MKPPA Kenya Limited [2018] eKLR**, Mbaru J. found the Declaration of Final Dues signed by the claimant did not in any manner, style or edict bar the him or the court from addressing any claim(s) made and which have a basis. The Claimant nevertheless denies that he signed a Discharge Voucher as alleged by the Respondent and submitted that the authorities cited by the Respondent in support of the said submission do not apply to this case. He further submitted that the authorities cited by the Respondent in support of its submission on continuing injury are distinguishable and do not apply to the facts of the claim herein and therefore not applicable to this suit. The Claimant submitted that the show cause letters referred to by the Respondent were spent and incapable of affording the Respondent a defence on the claim herein. He relied on the decision of Linnet Ndolo J. in the case of **Geoffrey Nyandusi Oeri v Security Guards Services Limited & Another [2015] eKLR** that:

“20. As held by this Court in **Banking Insurance and Finance Union (Kenya) vs. Kenya Commercial Bank Limited [2015] eKLR** once a distinct disciplinary action is taken against an employee, the allegations forming the subject matter of the disciplinary action cannot be made the subject of future disciplinary action. The offence thus becomes a spent cartridge and cannot be used save for the determination of the employment record of the employee. To rule otherwise would be to subject employees to a state of anxiety over disciplinary processes *ad infinitum*. For there to be industrial peace at the work place, there must be a conclusive end to each and every disciplinary process.”

10. The Claimant was terminated for no fault of his own from all the evidence adduced before me. The Respondent feebly tried to resist the claim by asserting the Claimant had been subject of previous disciplinary action. As held by Ndolo J. in the case of **Geoffrey Nyandusi Oeri v Security Guards Services Limited & Another (supra)**, once a distinct disciplinary action is taken against an employee, the allegations forming the subject matter of the disciplinary action cannot be made the subject of future disciplinary action. The offence thus becomes a spent cartridge and cannot be used save for the determination of the employment record of the employee. The Learned Judge went on to add that to rule otherwise would be to subject employees to a state of anxiety over disciplinary processes *ad infinitum*. The Claimant was therefore right in his surmise that the show cause letters produced by the Respondent had no meaning in relation to the dismissal of the Claimant. It was quite telling that the Respondent had no response to the claims by the Claimant that it hardly serviced its vehicles leading to the regular breakdowns which the Respondent's transport manager repeatedly failed to correct. This policy of the Respondent not to service its vehicles is what led to the termination since the produce was late for off-loading due to the mechanical failure of the contraption used to ferry the goods to the cargo area. The dismissal of the Claimant was unfair and unlawful for all intents and purposes. The Respondent asserts that the Claimant signed a discharge voucher. There is no discharge voucher produced by either the Respondent or the Claimant. The letter of termination advised the Claimant to collect his terminal dues from the Human Resources Office upon signing a discharge voucher tabulated as hereunder. It then went on to indicate the following:

1. Days worked
2. Pending off (if any)
3. Accrued leave (if any)
4. Service Pay (if any)
5. One month's salary in lieu of notice.

11. The Respondent having failed to prove there was a discharge or waiver, the Claimant is entitled to recover for the unfair and unlawful

termination. The Claimant is however not entitled to claim for continuing injury. As the Respondent correctly pointed out, the claims for Sundays worked ought to have been made in respect of previous years (between 1990 and 2012). As such, granted the claims in respect of a continuing injury are capped at 1 year, the only claims that would hold given the Respondent's records would be for the Sundays in the year spanning June 2012 to June 2013 which were 53. In relation to the Claimant's claim for compensation for the unlawful dismissal, the Respondent terminated the Claimant without affording him a hearing contrary to the cardinal principles of natural justice and the salutary provisions of Section 41 of the Employment Act. Under the rubric of the Employment Act, an employer should show justification for the dismissal. There was no justification for the dismissal that the Respondent meted out. Given the dismissal was on account of no fault on the part of the employee, the Court holds that the maximum compensation is sufficient recompense for the unfair and unlawful termination. He is thus entitled to compensation for 12 months. In the final analysis, the Claimant is entitled to:-

- i. A declaration that the termination of his services on 24th June 2013 was unfair and wrongful;
- ii. Compensation to the maximum 12 months – Kshs. 539,028/-
- iii. Kshs. 119,035.35 (44,919/30x1.5x53 Sundays) for Sundays worked
- iv. Costs of the suit
- v. Interest on ii) and iii) above at court rates from date of filing suit till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2021

NZIOKI WA MAKAU

JUDGE