



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC NO. 252 OF 2016

SAMSON IRUNGU KARUMA.....CLAIMANT

VERSUS

KENYA NUT COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The claimant sued the respondent for unlawful termination, payment of off days and public holidays worked, unpaid leave for 7 years, unpaid salary for 18 days worked in the month of march 2016, payment in lieu of Notice and issuance of certificate of service.
2. It is stated that the claimant was employed by the Respondent on the 10th February, 2008 as a tractor driver earning a salary of Kshs. 6,000/- which salary was increased to Kshs. 9,000/- in July, 2014 and Kshs. 10,139.85 from January, 2015 till his termination in March, 2018.
3. That the claimant was working for 8 hours every day from 8am to 5pm all days of the week that is from Monday to Sunday without any off days or Holidays given or paid for all the 8 years the claimant worked for the Respondent.
4. The claimant stated that he worked diligently for the Respondent till 18th March, 2016 when he was summoned by the Respondent's manager, one Mr. Kibet to sign a handwritten letter which he learnt later that it was for his consent to change his employment terms to contractual basis. That the claimant requested for an explanation of the said letter since he did not know how to read but the respondent declined to explain the contents thereof or give him a copy of the letter as requested.
5. After signing the letter, the claimant was instructed to go home as their terminal dues were being calculated and would be paid before the new contracts would be entered between him and the Respondent, which he obliged and went home awaiting the Respondent's call.
6. That the next day, the Claimant was informed that their services had been terminated and they should await to be paid their terminal dues which according to the claimant was never paid to date.
7. That the abrupt nature in which his service were terminated put him in financial difficulties in that he is not able to provide for his family, him being the sole bread winner.
8. He stated that the termination was not preceded by Notice or disciplinary hearing as provided for under the Employment Act therefore the termination was unfair and thus prays for judgment against the Respondent to pay claim for; -

a) Off duties of Kshs. 213,975.90.

b) Public holidays 38,247.40

c) Leave for 7 years of Kshs. 38.093.70.

d) Salary for 18 days of march, 2016 of Kshs. 6,084.00

e) One month salary in lieu of Notice of Kshs 10,139.85.

f) Compensation for unfair termination of Kshs. 121,678.20.

g) Certificate of service based on section 51 of the Employment Act

9. The respondent entered Appearance through the firm of Iseme Kamau & Maema Advocates on the 5th September, 2017 and filed a reply to the memorandum of claim and denied all the allegations contained therein and put the claimant into strict proof thereof.

10. The respondent conceded that the claimant was employed by it sometime in February, 2008 as a driver, however that sometimes in March, 2016, it was established that some produce was missing from the farm and upon investigation it was discovered that some employees were stealing from the farm. That the claimant was implicated as one of the person who stole the produce and when he was confronted by the Respondent he tendered his resignation letter dated 18th March, 2016 and was paid all his terminal benefits earned including the 18 days worked in the month of march 2016.

11. It is stated that the claimant never worked during any public holiday and any leave earned was taken by the claimant and the utilized leave was paid for together with his terminal dues upon resignation.

Claimant's case

12. The claimant, **Samson Irungu Karuma, CW-1** gave sworn testimony and sought to adopt his witness statement of 17th May, 2016 which basically reiterated his claim and sought to be awarded the claim together with costs of suit.

13. On cross examination by **Athman Advocate**, he testified that he was forced to sign the resignation letter and that he was not paid the terminal dues as evidence in the cheque in the Respondent list of documents.

Respondent's case

14. The Respondent called one witness, **Nancy Wefwafwa RW-1**, the Human resource officer at the Respondent's employ, who also sought to rely on her witness statement filed on 24th January, 2018 together with list of Documents of 30th May, 2018 and testified further that the claimant was employed in June, 2012 as a driver and prior to the employment he was a shamba boy at the Respondents farm. That the Claimant resigned on 24th March, 2016 when he was being investigated for theft of farm produce and that he was not forced to sign the letter but signed it voluntarily. She also testified that the claimant was paid the terminal dues as evidence in the documents produced.

15. On cross examination by **Kairu Advocate**, she testified that the claimant was employed in June, 2012 but was not issued with any employment Letter. That in March 2016 investigations on the loss of farm produce commenced against the claimant and other farm employees leading to the resignation and that no disciplinary hearing was conducted against the claimant. She testified that on termination the claimant earned Kshs 10,139.85. It was stated further that the claimant was paid the 3 days leave days earned for the year 2016 and that he took all his leave for the other years worked as evidence in the muster roll.

Claimants submissions

16. It is submitted on behalf of the claimant that the Respondent at paragraph 3 of its reply to memorandum of claim affirmed that the claimant was employed in February, 2008 as a driver only to contradict that statement and claim that the Claimant was employed in June, 2012. He argued that the contradiction is an indication that the Respondent is not being truthful and therefore urged the court to find that the claimant was employed on 10th February, 2008 and the Court should therefore calculate his dues from February 2008 and not June 2012.

17. It was submitted that the master roll produced by the Respondent purporting that the Claimant took his leave days is a document that was made and kept by the Respondent and bound to be manipulated by the Respondent to favour it's case, therefore urged the Court not to place any value to the said evidence.

18. It was submitted that the Respondent never paid the terminal benefits as alleged and if any was paid then the same was paid when the suit had already been filed in Court.

19. It is the Claimant's submissions that the Respondent failed to produce Mr. Tom and Mr. Kibet to affirm the allegation that the claimant signed the said letter of resignation, he further argued that the resignation letter was never read to him or explained and that the claimant was instructed to only sign without understanding the contents of the said letter.

20. He urges the Court to allow the claim arguing that the termination of the Claimant from employment was unfair in the circumstances.

Respondent's submissions.

21. The Respondent maintains that the Claimant resigned from its employment by the letter of resignation dated 18th March, 2016.

22. On the veracity of the said letter, it was submitted that the respondent was served with a resignation letter which it accepted only to be alleged in Court that the letter was never drafted by the claimant but by the security guards. He argued that the allegation that the letter was drafted by the Respondents security guard was brought forward by the claimant who is under a duty under section 70 and 107 of the Evidence Act to prove that the letter was drafted by the said security guard and that he was forced to sign. He reinforced his argument by citing the case of **Dama Charo –v- Municipal Council of Mombasa Taib Alubajaber & another [2018] eklr.**

23. On the argument that the respondent failed to call the security guards as witnesses, the Respondent argued that the burden of proof lies with the claimant and not the Respondent in proving the claim which will only shift when the claimant has proved his claim on a balance of probability on the existence of the facts alleged as was held in **Ahmed Mohammed Noor –v- Abdi aziz Osman [2019] eklr** and affirmed further in the **Presidential Election petition No. 1 of 2017 between Raila Amolo Odinga & Another –v- IEBC & 2 others [2017] Eklr.**

24. Accordingly, he submitted that the evidentiary burden still vests with the claimant who needs to discharge it to the required standard.

25. On the prayers sought, it was submitted with regard to off duty days and public holidays that the claimant was paid for the said off days and the public holidays worked were compensated. Further that the claimant has failed to establish the exact holidays and off days worked as such is not entitled to the same as was held in **Fancy Jeruto Cherop & another –v- Hotel Cahay Limited [2018] eKLR**.

26. On the leave days, it was submitted that an employee under section 28 of the Employment Act is entitled to 21 working days' worth of leave in a year and that between June 2012 and March 2016 the Claimant had taken a cumulative of 84 working days which are in excess of the days the law provides for.

27. The Respondent also submitted that section 74 of the Employment Act mandates it to keep records of employees at its employ which records include the master roll which document can only be made and kept by an employer. Further that the Claimant challenged the said roll in submission stage when during hearing he did not challenge neither did he challenge the production of the same during pre-trial as such the challenge at this stage is baseless.

28. The Respondent in conclusion submitted that the claimant resigned from his employment as evidence in the letter of resignation dated 18th March, 2016 and was paid his terminal dues as evidence in the cheque produced thereof, therefore the claim before Court is without merit and the same ought to be dismissed with costs to the Respondent.

29. I have examined all the evidence and submissions of the parties herein. From the claim and response, the claimant was employed by the respondent on 10/2/2008 as a driver. He was never issued with any appointment letter.

30. As per the letter dated 18/3/2016, the claimant resigned from the respondent's employment. The claimant had averred that he was forced to sign a letter which he later discovered terminated his services.

31. The claimant having signed the letter whether to his knowledge or not, he cannot recant the contents thereof.

32. The general rule is that a party of full age and understanding is normally bound by his signature to a document, whether he reads it or not.

33. This was the decision of the **Court of Appeal in C.A No. 27/2017** at Mombasa by JJA Visram, Karanja & Koome (as they were then).

34. The learned JJA, referred to **Levison VS Patent Steam Carpet Cleaning Company LTD (1977) 3 ALL ER 498** and stated that;

“Putting it another way, he is estopped by his/her signature thereon from denying his consent to be bound by the provisions/terms contained in that document”.

35. This rule has exceptions though where there is a plea of *non est factum* – see Halsbury's Law of England Vol 22 (2012) at paragraph 285 thus;

“where, however the plea of non est factum is available, the provisions contained in the document are completely void as against the signatory entitled to plead the defence, no matter into whose hands that document may come. The reason is said to be that the mind of the signatory did not accompany his signature so that the mistake renders his consents as represented by his signature as complete nullity.”

36. This is actually the defence of the claimant herein when confronted with the letter he signed resigning from his job.

37. He stated that he was forced to sign the said letter by respondent's head of security.

38. He insisted that the letter was written by the security officer but he signed it.

39. In my view, if indeed the claimant had intended to resign from work, he didn't need another to write his resignation letter for him.

40. It is true that the letter bears his signature but was not written by him.

41. I therefore start from the premise that the claimant never resigned from work but was terminated accordingly.

42. Having been terminated, it was important that the respondents follow the procedure envisaged if indeed the claimant was guilty of some misconduct as envisaged under Section 41 of the Employment Act 2007 which states as follows;

“Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop

floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

43. No disciplinary process was instituted against the claimant and therefore he was condemned unheard.

44. In terms of remedies, I find for the claimant accordingly and I award him as follows;

1. 1 month salary in lieu of notice = 10,139.85/=

2. Salary for 18 days worked in March 2016 = $18/30 \times 10,139.85 = 6,083.91/=$

3. 8 months salary as compensation for unlawful termination

= $8 \times 10,139.85 = 81,118.8/=$

4. Leave pay for 3 years the rest of the year being time barred

= $3 \times 10,139.85 = 30,419.55/=$

5. The rest of the claim is not proved

Total payable = 127,762.11

Less statutory deduction

6. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 29TH DAY OF JULY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kairo for claimant present

Mr. Asman for respondents present

Court Assistants – Wanyoike and Fred