



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.588 OF 2017

KELVIN OTIENO RAPONDI.....CLAIMANT

VERSUS

BAGDA'S AUTO SPARES LIMITED.....RESPONDENT

J U D G M E N T

1. The dispute before the court arises from termination of employment contract between the parties. By memorandum of claim dated 27th March 2017 the Claimant sought the following reliefs:-

- a. Two month's in lieu of notice – Kshs. 80,000/-
- b. Salary for the month of August 2016..Kshs. 40,000/-
- c. Prorated annual leave from January to July 2016(40000/26 days *12 days)..Kshs. 18,461.54/-
- d. House allowance (Kshs.40,000 *90months *0.15)..Kshs.540,000/-
- e. Twelve months compensation for unfair and unlawful termination (Kshs.40,000/- *12 months) Kshs.480,000/-
- f. Certificate of service
- g. Costs of the claim
- h. Interest on award and on costs from date of filing claim till payment in full.

2. The Claimant filed together with the claim, list of witnesses, list of documents, claimant's witness statement and bundle of documents of the same date of 27th March 2017.

3. The Respondent entered appearance and filed memorandum to the Reply, list of witnesses, Respondent's list of documents, Respondent's witness statement, Respondent's further list of documents all dated 25th April 2017.

4. The case was heard exparte on the 6th August 2021 with the Respondent absent. An affidavit of service was filed as proof of service of the hearing date on the Respondent's advocates on record Kerandi Manduku & Company Advocates.

5. The Claimant testified in his case and was the only witness. The Claimant adopted his witness statement dated 27th March 2017 as his evidence in chief and produced bundle of documents under list of documents dated 27th March 2017 as his evidence.

6. The Claimant's submissions are dated 13th August 2021. The Respondent did not file submissions.

7. The matter was mentioned before the DR Hon. Kyany'a on the 31st August 2021 for confirmation of the filing of the submissions and it is noted that the Claimant has filed the submissions on the 13th August 2021 and filed return of service.

The Claimant's case

8. The Claimant, Kelvin Otieno Rapondi, states that he was employed by the Respondent in January 2009 and worked until 14th July 2016 when he was called to the office of Bagdas, director of the Respondent, who told him to proceed on leave and that he would be told when to resume duty. The Claimant testified that he was given a leave form of which he completed and dated 14th July 2016 and that the leave form was signed by Wanjohi who was in charge of the warehouse and his supervisor and approved by Bagda's. The leave form is Exhibit No. 6 of the Claimant's bundle of documents. The leave form indicated that the Claimant would be told when to resume duty as from 15th July 2016 when leave took effect. The reason of the leave is indicated as annual leave. The Claimant told the court that the practice was for employees to choose when to go on leave as per agreed plan at the warehouse and that they would pick the leave form from the secretary. The Claimant stated that he had not planned to go on annual leave.

9. The Claimant told the court that after he completed the form Bagdas called the cashier to issue him with Kshs. 2000/- which he received. He then went home at the usual time and proceeded on the leave.

10. The Claimant told the court that he received his July salary into his bank account while on the leave. That he did not receive August salary. The Claimant stated that he called the secretary who informed him that Bagdas does not wish to talk to him. That he called again in September and Bagdas spoke to him and told the Claimant that he was lost and that they do not see him at work and that he was no longer with them(the employer). The Claimant told the court that Bagdas told him to go and pick his dues. The Claimant told the court that he was not told to report to work in August.

11. The Claimant told the court that in January 2017 he visited the company and found Bagdas present and he was received by the General Manager. The General Manager asked him where he went and whether he did not know his leave days. That the General Manager took him upstairs and told him he had absconded. That when he returned downstairs he found that Bagda's had left. The Claimant told the court that instead he met the son of Bagda's who told him he had absconded duty and requested security to escort him out.

12. The Claimant told the court that no letter was sent to him to return to work. That Bagdas knew his family as the Claimant's father was a former employee. The Claimant told the court that Bagdas did not call any of the family members.

13. The Claimant told the court that his consolidated salary was Kshs. 25,000/- but gross pay would increase or decrease ranging from Kshs. 49,000/- to 31,8000/- depending on performance reward. The Claimant salary for June 2016 payslip before he proceeded on leave was for Kshs. 40,000/- never to resume duty. The Claimant produced the payslip as exhibit no. 4 of the claimant's documents.

14. The Claimant in response to the Respondent's witness statement attaching a letter dated 5th September 2017 addressed to the Trustees of BASL Pension Scheme which stated he had left employment in August 2016 and requesting to process his pension dues, the Claimant stated that he was asked to write the letter by the Trustee called Mutua in order to access his pension. The Claimant added that in September Bagdas had told him he had left work when they talked on phone.

15. The Claimant denied signing the leave cash voucher dated 14th July 2016 at page 12 of his bundle of documents which states that the Claimant was to resume duty on the 13th August 2016. He stated that the signature in the document was not his.

16. The Claimant told the court that his termination of employment was malicious. He told the court the malice was founded on the fact that he kept on asking the Respondent's directors for payment of his father's loan of Kshs.2,000,000/- to the company and as pleaded under paragraph 11 of the claim. In response to this allegation the Respondent filed witness statement by Jatin Maru where under paragraph 10 the allegation on outstanding loan was denied. The Respondent stated that no document was attached in prove. The Claimant told the court that malice is presumed between him and the Respondent as he kept on asking for the payment all the time. The Claimant did not attach evidence of existence of the debt.

17. The Claimant forfeited the claim on leave as he went on leave. He reiterated all the other reliefs sought under the claim and asked for certificate of service from the Respondent.

The Respondent case.

18. The Respondent did not attend the hearing. Return of service of the hearing date was placed before the court by way of affidavit of service. The Respondent entered appearance and filed response dated 25th April 2016. The Court did not give weight to the Respondent's witness statement filed as the witness did not appear before the court to produce the same as evidence for the Respondent.

19. The Respondent admitted under its paragraph 4 of response that the Claimant was employed in 2009 as a junior clerk and rose through the rank role to warehouse keeper in 2015. The Respondent pleaded that the Claimant was due for leave in July 2016 and was to resume duty on the 13th August 2016. That transport allowance was paid and the Claimant proceeded on leave. The petty cash voucher is attached as exhibit A.

20. The Respondent in paragraph 8 of response states that the Claimant did not resume duty as expected and calls to him went unanswered and therefore the Claimant was deemed to have absconded duty. There was no evidence filed to support the alleged calls.

21. The Respondent states that the Claimant returned to the Respondent's premises about 6 months later, he caused commotion, insulted his former superiors and left in huff. The Respondent denies that the Claimant was violently or disgracefully ejected from the premises.

22. The Respondent in paragraph 11 of the response denies that the termination was based on malice due to unpaid dues to the father of the Claimant and attaches documents showing settlement in full of dues to the claimant's father being exhibit B.

23. The Respondent in paragraph 14(i) of response states that Claimant cannot be paid 2 months' notice as he left employment and was not terminated. That the notice is not founded on any terms of employment between the parties.

24. The Respondent in paragraph 14(ii) states that the claim for one month's salary is misconceived. That the Claimant's pay was Kshs. 25,000/- per month and not Kshs. 40,000/-. the Kshs15,000/- as allowance in June was a one off payment made to all employees as performance incentive. That any additional amounts paid to the Claimant varied from time to time as the company paid out discretionary allowances to the Claimant based on different factor like good performance or as performance incentives.

25. The Respondent in paragraph 14(iii) states that the Claimant had already gone on leave for the said year and therefore cannot claim for leave days.

26. The Respondent in paragraph 14(iv) states that the prayer for house allowance is alien as the Claimant had been paid consolidated salary of Kshs. 25,000/-.

27. The Respondent in paragraph(14(v) states that the claim for unfair termination is unfounded as it is the Claimant who went on leave and never came back.

28. The Respondent in paragraph 15 takes issue with paragraph 13 of the Claimant's witness statement to effect that his signature on the Petty Cash Voucher was forged. The Respondent states that Claimant stated in paragraph 7 of his witness statement that he took Kshs. 2000/- from the accountant, which would not have been released to him if the petty cash voucher had not been signed both by him and by the Director of the Respondent. Therefore, the Claimant signed the same and he was fully aware of the expected date of return after his leave.

29. The Respondent denies all other claims and states the claim ought to be dismissed with costs to the Respondent.

Legal analysis and findings

30. The Claimant identified the following as issues for determination in the document filed in court on 20th May 2018 titled 'Claimant's proposed pre-trial directions' :-

- a. Whether the reasons for the termination of the claimant's employment were valid and fair.
- b. Whether the Respondent adhered to the due procedure verbally and constructively dismissing the Claimant from employment. Was the procedure fair and lawful?
- c. Depending on the finding above issues what orders should the court grant in relation to the prayers sought in the Memorandum of claim?

The Respondent did not file any issues in their response.

After carefully analyzing the Claimant's list of issues and the parties' respective cases it did appear to this court that the issues that had really been placed before it for determination were as follows:-

- i. Whether there were valid and justifiable reasons for termination
- ii. Whether the procedure for termination of employment was fair and lawful
- iii. Whether Claimant is entitled to reliefs sought.

31. The Claimant filed submissions dated 13th August 2021. The Respondent did not file submissions. The Claimant filed return of service on the submissions served on the Respondent's advocates.

The Court addressed the issues considering the case by both parties and the submissions by the Claimant and application of the law as follows :-

Whether there were valid and justifiable reasons for termination.

32. The Claimant told the court that he was asked to proceed on annual leave on the 14th July 2016 having completed a leave form and was paid travel allowance. The leave form was produced in court as exhibit at page 6 of the Claimant's bundle of documents. The form gives reason as annual leave effective 15th July 2016 and on dates states, 'to be told when to resume as from date 15th July 2021.' The leave form was approved by the Respondent's representatives. The Claimant told the court that he was not called on the date to resume duty hence continued to stay away from work. The Respondent in their documents produced the leave travel allowance form for Kshs.2000/- issued to the Claimant. The form indicated that the Claimant was to resume duty on the 13th August 2016. The Claimant denied the said document and stated that the signature therein did not belong to him. A comparison between the signature on the said form and on the signature of the Claimant in his letter to Trustee BASL pension scheme produced by the Respondent and which the Claimant admitted to have written indicates that the alleged signatures of the Claimant are at variant. The court believes the Claimant's assertion that he did not sign the form for the leave travel allowance. Further the court notes that the Respondent did not produce evidence to prove it called or attempted to call the Claimant to resume duty.

The Claimant in the letter dated 5th September 2017 to the Trustees BASL Pension Scheme states that he left employment August 2016 with the Respondent and requested for access to pension. The letter is not relevant on this issue as it is written way after the termination of employment and in any case the pension is based on paid salary. The Claimant was last paid salary in July. The court does not attach weight to the said letter in determination of this issue for the reason that it is written way after the termination and it concerns access to pension.

In his submissions the Claimant states that he was not called to work until September 2016 when Bagda Bendra informed him on phone that his employment had been terminated for absconding work. Was this a valid reason for termination? There was no show cause letter issued to the Claimant during the period he is alleged to have absconded duty. The Respondent in the form for leave indicated the Claimant would be informed when to resume duty. There was no evidence produced to prove the Respondent called the Claimant. The Claimant to buttress his case that he did not desert duty cites the case of **Boniface Nkubi Karagania v Protective Custody limited (2019) eKLR** on desertion of duty where Judge Hon. Nzioki wa Makau found there was no evidence of desertion of duty. In view of the fact that the Claimant was not informed of the date to resume duty as indicated in the leave form the employer cannot be justified to terminate the Claimant for absconding duty. The attempt to produce the alleged travel allowance for leave form as allegedly signed by Claimant failed as the signature did not match that of the Claimant, on the face value, as signed in other documents and the Claimant also denied the signature. The Respondent did not appear in court to prove that the Claimant signed the travel allowance form. There was no valid reason proved by the Respondent for the termination of the employment of the Claimant.

Whether the procedure for termination of employment was fair and lawful

33. The Claimant told the court that on the 5th January 2017 when he went to collect his dues as instructed by Director of the Respondent Bagda's Kumar, he was violently ejected from the premises by the security men on the instructions of the employer. The Respondent in their memorandum of Reply dated 25th April 2017 states that, ***'when the Claimant returned to the Respondent's premises, about 6 months later, he caused commotion, insulted his former superiors and left in a huff. The Claimant was escorted off the premises but was not disgracefully or violently ejected from the premises as alleged.'***

The Claimant told the court he was not given a letter to show cause nor was he afforded a hearing on the absence. The Respondent's in the pleadings did disclose letter of disciplinary or the proceedings. The court is satisfied there was no disciplinary proceedings or hearing before the termination of the Claimant's employment.

The Respondent cited reasons for the termination to be absconding of work which reason the court has already found as not valid. The Claimant was entitled to hearing under section 41 of the Employment Act.

The Claimant submits that the Respondent was procedurally required to warn the Claimant that it intended to terminate his employment on grounds of desertion of work and thereafter invite him for a disciplinary hearing with his witness for the dismissal of the Claimant to have passed the test of fair procedure. To buttress his position the Claimant relied on the ***Court of Appeal in Postal Corporation of Kenya v Andrew K. Tanui (2019)*** where the court pronounced itself on procedural fairness as herein under:-

'...four elements must thus be discernable for the procedure to pass muster:

i. An explanation of the grounds of termination in a language understood by the employee;

ii. The reason for which the employer is considering termination

iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made and

iv. Hearing and considering any representations made by the employee and the person chosen by the employee...'

The court adopts the above decision of the Court of Appeal and finds that the Claimant was not accorded a fair hearing before the termination of his employment with the Respondent. The termination was unfair and unlawful.

Is the Claimant entitled to the relief sought

34. In view of my findings above, I make declaration that the Respondent's action of terminating the Claimant's employment contract was unfair and unlawful. The court is not persuaded there was malice which led to the termination on part of the Respondent based on the alleged debt to the Claimant's father of Kshs. 2,000,000/-. The court finds that the unfair termination of the Claimant's employment with the Respondent violated the provisions of section 41 of the employment Act.

35. Notice period— the Claimant had claimed for 2 months' salary in lieu of notice. The Claimant submits he is entitled to one month's salary payment for Kshs. 40,000/ as per his gross salary of June 2019. The Respondent in its reply denied the gross salary was Kshs. 40,000/- stating the consolidated salary was Kshs. 25,000/- and the allowance was payable as performance incentive. The Claimant's payslip of June 2016 was produced by the Claimant as exhibit marked no. 4. It indicates Consolidated pay Kshs. 25,000/- and June allowance Kshs. 15,000 making gross pay Kshs.40000/-. The Claimant's payslip for March 2016 exhibit marked no. 3 indicates Consolidated Pay Kshs. 25,000/- and allowance Kshs. 5000/-. Total Kshs.30,000/-. The allowance thus varied month to month and the court believes the Respondent's position in the pleadings that this allowance is pegged on performance. The court finds that the gross pay for the purposes of notice is the consolidated pay. The court is guided by the ***Court Of Appeal, Nairobi, In Richard Erskine Leakey and 2 others v Samson Kipkeoch Chemai (2019) Eklr*** where the court stated as follows on the issue of the salary to apply:-

‘55. In our view, there are certain allowances that are dependent on actual performance of the contract of employment. When calculating damages due to an employee in the event of unfair or wrongful termination, it is only the emoluments or gross salary of the employee that should be taken into account not allowances and privileges dependent on actual service and performance of the contract.’

The court adopts the above Court of Appeal decision and finds that the allowance of Kshs. 15,000/- reflected in the June 2016 payslip was dependent on actual performance of contract and was a performance reward. The Claimant is thus not entitled to the allowance.

The court finds the Respondent is liable to pay the Claimant notice pay of 1 month being consolidated pay for the amount of Kshs. 25,000/- .

36. With respect to the compensation for unfair termination, I have already made a finding that the termination was unfair and unlawful and as such by dint of section 49(1)(c) of the Employment Act, I award 12 months gross salary as compensation considering the long length of service of 8 years, the blatant disregard of fair labour practices by the Respondent and also the fact that the Claimant has not been able to secure another similar job or gainful employment post termination and reinstatement is not an option available to the Claimant due to time lapse. The gross salary for this purpose as found above is the consolidated pay of Kshs. 25,000/-. The total compensation for the unfair termination awarded for 12 months is for the total sum of Kshs. 300,000/-(Kenya Shillings Three Hundred Thousand) being Kshs.25,000 x 12= Kshs. 300,000/- .

37. The Claimant prayed for Kshs.540,000/- as house allowance for the 8 years of service. The Respondent in paragraph 14(iv) of its reply to the claim stated that the Claimant was paid consolidated pay hence claim for house allowance is alien. The Claimant’s payslip of June 2019 indicates consolidated pay. Section 31(2)(a) of the Employment Act excludes housing allowance claim where the salary is a consolidated pay. The claim for accrued housing allowance fails.

38. Claim for accrued leave is not proved—The Claimant in his submissions states the claim for leave was dropped at the hearing.

39. Issuance of certificate of service under section 51 of the Employment Act is granted.

40. Costs follow the event. The Claimant has substantially succeeded in his claim and is awarded costs of the claim as against the Respondent.

41. Interest from date of judgement till payment in full on the award amounts.

CONCLUSION AND DISPOSITION

42. I have found that the termination of the Claimant’s employment contract by the Respondent was procedurally unfair and unlawful. I further found that the Claimant is entitled to compensatory damages. Consequently, I enter judgment for the Claimant against the Respondent in the following terms:

a. Notice pay for the sum of Kshs. 25,000/-

b. Compensation for unfair and unlawful termination granted for 12 months being Kshs. 25,000 x 12 = Kshs. 300,000/- . The compensatory award is of the total sum of Kshs. 300,000/- .

The award in (a) and (b) above is subject to statutory deductions.

c. Issuance of certificate of service under section 51 of the Employment Act.

d. The Claimant will have costs plus interest at court rate from the date of this Judgment until payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF SEPTEMBER 2021

HON. J.W. KELI,

JUDGE.

Read in the presence of :

Nyangena for Respondent

Mudao for Claimant.

Respondent

I apply for stay of 30 days.

Claimant : Opposed. Respondent is in process of transferring assets to another Company.

Court:

Stay of Judgement for 30 days is granted.

It is so ordered.

HON. J. W. KELI

JUDGE

30.9.2021.

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

HON. J. W. KELI,

JUDGE.