



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2108 OF 2016

ERIC KIBUTU.....CLAIMANT

VERSUS

ASSOCIATED CONSTRUCTIONS COMPANY (KENYA) LIMITED.....RESPONDENT

JUDGMENT

1. INTRODUCTION

1.1. This is a fairly straight forward matter. Vide a memorandum of claim dated 10th October 2016 and filed in Court on 13th October 2016, the Claimant seeks a declaration that Claimant's termination by the Respondent was unfair and unlawful; compensation for unlawful termination; unpaid salary; one month's salary in lieu of notice; unpaid house allowance; compensation for leave days not taken; and costs of the suit.

1.2. The particulars of the claim and the quantum thereof are set out in the memorandum of claim and reiterated in the filed written submissions.

1.3. After filing the claim in Court, the Claimant, through his Advocates, served the same together with summons to enter appearance upon the Respondent and there is an affidavit of service on record to that effect.

1.4. However, the Respondent failed to enter appearance and file response to the claim and the matter was subsequently certified as ripe for hearing on 7th March 2019 and the same directed for hearing by way of formal proof.

1.5. Subsequently, the matter was set for formal proof on 27th July 2021 when the Claimant testified as the only witness in support of his cause. Counsel for the claimant was directed by Court to address the issues by way of written submissions, which were duly filed in Court and dated 3rd May, (sic!) 2021. The Court takes judicial notice that the same should have been correctly dated 3rd August 2021 and takes the correct date thereof to be 3rd August 2021. That is an obvious error apparent on the face of the record and the court duly corrects the same as such.

2. ISSUES FOR DETERMINATION

2.1. From the memorandum of claim, the oral testimony, and the written submissions filed, the following issues manifest for determination:-

- a) Was the Claimant in the employment of the Respondent?
- b) What were the terms of employment if (a) above is in the affirmative?
- c) Was the termination of the employment of the Claimant by the Respondent procedural, fair, and lawful?
- d) If the termination was unlawful, what reliefs is the claimant entitled to and in what quantum?
- e) Who bears the costs of this cause?

3. EMPLOYMENT

3.1. At paragraph 3 of the memorandum of claim, the Claimant states that “the claimant was employed by the respondent on 14th June 2010.” The Claimant at paragraph 5 of the memorandum of claim further states that “the claimant served the respondent passionately and diligently, and excelled in his duties until 4th May 2016, when, by way of an internal memo dated 4th May 2016, the respondent unlawfully sent the claimant on unpaid leave together with 3 of his colleagues.”

3.2. Again, in a demand letter dated 2nd August 2016, that was produced as exhibit during trial, the Advocates for the Claimant addressed the Respondent at paragraph 2 thereof thus “that you employed our client on or about the year 2010 for monthly gross salary of Kshs.19,788”.

3.3. In their letter of 4th August 2016 and the internal office memo of May 4th 2016, the Respondent admits that they had engaged the Claimant as their employee.

3.4. Conspicuously, none of the above documents, including the pleadings disclose or discern the type of work or services that the Claimant undertook during his employment with the Respondent. Even in his oral testimony the claimant did not detail the type of work he undertook or the title thereof or the job description. Be that as it may, the pleadings, the exhibits produced in Court, and the oral testimony confirm that the Claimant was an employee of the Respondent at a monthly salary of Kshs.19,788/=.

3.4. Although in their letter of 4th August 2016 the Respondent disputes the date and hence the period within which the Claimant worked for them, no pleadings were filed or oral evidence tendered to affirm their position. In the circumstances, the Court is inclined to go by the pleadings filed in the memorandum of claim, the exhibits produced in Court, and the unchallenged oral testimony by the Claimant.

3.6. On this issue therefore, the Court finds that the Claimant was a permanent employee of the Respondent, in an undisclosed capacity, at a monthly salary of Kshs.19,788/=. Were it not for the admissions on the part of the Respondent vide their letter of August 4th 2016 and the internal memo of May 4th 2016, both of which were produced as exhibits in Court, the Court would have dismissed the Claimant’s cause without further ado.

3.7. On the issue of the period of engagement of the Claimant by the Respondent, the Court finds that through the pleadings filed, the oral testimony, coupled with the exhibits produced, on a balance of probability, the Claimant was an employee of the Respondent for the period from 14th June 2010 to 4th May 2016.

4. TERMS OF EMPLOYMENT

4.1. This issue is to a large extent disposed of in view of the Court’s findings in the foregoing paragraphs. It suffices to add here that the Claimant was engaged by the Respondent on permanent basis. The lack of written contract between the Claimant and the Respondent leaves this Court to discern and infer the nature of the relationship (See Robai Musinzi V Mohammed Safdar Khan (2012) eKLR.)

5. TERMINATION

5.1. Through the pleadings and oral testimony in Court, the Claimant states that following the internal memo dated May 4th 2016, which was produced in Court as an exhibit, the Claimant and his other three colleagues were sent on unpaid leave with immediate effect. This evidence stands unchallenged either by way of opposing, pleadings, exhibits or oral testimony in Court from the Respondent.

5.2. The Claimant testified that after taking the “unpaid leave”, which he had not applied for, he was never recalled, although he alleges that his three colleagues were recalled. Counsel for the Claimant in his written submissions posits that the termination was irregular, unknown to the law, hence unlawful, and unfair.

5.3. The Employment Act No. 11 of 2007 (the Act) provides specifics on how an employer/employee relationship may be legally terminated. Except for the natural termination through death, an employee may be terminated on basis of redundancy (Section 40 of the Act) misconduct (Section 41 of the Act), or summary dismissal (Section 44 of the Act). Therefore, counsel for the Claimant is accurate in submitting that there cannot be dismissal or termination by way of compulsory unpaid leave.

5.4. The circumstances under which the Claimant was terminated are not tenable in law. It is neither redundancy, summary dismissal, nor termination in any other form known to law.

5.5. The evidence by the Claimant is that once he was unlawfully sent out on a forced unpaid leave, he was never recalled, and so to this day.

5.6. One of the cardinal rules on termination or dismissal is that the employee should be notified in writing and accorded a hearing in line with the rules of natural justice, the Fair Administrative Actions Act, and Article 47 of the Constitution of Kenya. In aggregate, no employee shall be dismissed without valid and clear reasons, and in all situations, unless an employee fails or refuses to attend, after proper notice, each and every employee must be accorded a hearing.

5.7. The Claimant testified that he was not notified of the termination to this day, and that he was not given a hearing.

5.8. In the circumstances, the Court on this issue finds that the termination was unlawful, unprocedural, irregular and hence

unlawful and offending the provisions of Sections 35, 41, 45, 46, 47 and 48 of the Act.

6. RELIEFS

6.1. Having found that the Claimant was in employment of the Respondent for the period from 14th June 2010 to 4th May 2016, and that the termination was unprocedural, unfair, and unlawful, the question that remains is on the reliefs awardable to the Claimant and the quantum thereof.

6.2. The remedies that this Court may award upon finding that termination is unlawful are to be based on Section 49 as read with Section 50 of the Act, and Section 12(3) of the Employment and Labour Relations Court Act No. 20 of 2011.

6.3. The reliefs sought by the Claimant are set out in paragraphs 15 and 18 of the memorandum of claim. The same are reiterated in the filed written submissions. Since a party to a suit is bound by the pleadings filed, the Court shall go by paragraphs 15 and 18 of the memorandum of claim in analysing and determining the reliefs awardable and the quantum thereof.

6.4. In respect of prayer (a) in the memorandum of claim, a declaration is hereby issued that the Claimant's termination by the Respondent was unfair, unprocedural and hence unlawful for reasons detailed in the foregoing paragraphs of this Judgment.

6.5. In respect of compensation for unlawful termination in prayer (b) of the memorandum of claim, the Court is not able to identify any good reason to award the maximum of 12 months envisaged under Section 49(1)(c) of the Act. One, as stated elsewhere in this Judgment, the nature of the employment of the Claimant has not been disclosed. The skills held by the Claimant are unknown to the Court and as such it is difficult to estimate, even in the remotest way, how much time the Claimant may have reasonably taken to obtain a similar job. Doing the best that the Court can do in the circumstances, I find an award of three (3) months' compensation based on the gross salary to be fair under this head as follows:-

$Kshs.19,788/= \times 3 = 59,364/=.$

6.6. In respect of "unpaid salary for the month of May" as in prayer (c) of the memorandum of claim, the Court finds this request contradictory. This is because, at paragraph 15 of the memorandum of claim the Claimant has pleaded for four (4) days worked in the month of May 2016 and this position is again articulated at paragraph 13 of the written submissions, although here the Claimant asks for five (5) days. The Court finds that the only logical approach to this issue is to take the position that the evidence on record and the pleadings indicate that the Claimant was terminated on 4th May 2016 and hence had worked for only four (4) days in the month of May 2016. Under this head therefore, the Claimant is awarded salary for four (4) days on prorata basis as follows:-

$Kshs.19,788/= \times 4/30 = Kshs.2,638/=.$

6.7. The evidence on record, which is unchallenged, is to the effect that the Claimant was not issued with a written notice for termination as required by law. In the circumstances the Court returns that the Claimant is entitled to one month's salary in lieu of notice as follows and as prayed in prayer (d):-

$Kshs.19,788/= \times 1 = Kshs.19,788/=.$

6.8. Prayer (e) is on unpaid house allowance for the period of employment. The period of employment is from June 2010 to May 2016. That is a period of six (6) years. The unchallenged evidence on record is that the Claimant was not paid house allowance or given accommodation during the entire period of employment as required under Section 31 of the Act. Under this head the Court awards the house allowance as hereunder:-

$15/100 \times Kshs.19,788/= \times 6 \times 12 = Kshs.213,710/=.$

6.9. Prayer (f) is on leave days not taken during the entire period of employment. The evidence on record, which stands unchallenged, is to the effect that the Claimant was denied leave days for the entire period. Under this head the amount due is as follows:-

$21 \times Kshs.19,788/= \times 6 = Kshs.83,110/=.$

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7. AWARD AND DISPOSAL

7.1 The Court has come to the conclusion that the claimant was able, on a balance of probabilities, to prove his claim, and makes the following Judgment in disposal of this cause.

a) A declaration be and is hereby issued that the termination of Claimant's employment by the Respondent was unfair, unprocedural, and hence unlawful.

b) Compensation for unlawful termination be awarded in the sum of three months' gross salary in the sum of Kshs.59,364/=.

- c) Unpaid salary for four days worked in the month of May 2016 is Kshs.2,638/=
- d) One month's salary in lieu of notice is Kshs.19,788/=
- e) Unpaid house allowance is awarded in the sum of Kshs.213,710/=
- f) Compensation on leave days is awarded in Kshs.83,110/=.
- g) Total monetary award is Kshs.378,610/=.
- h) Interest on the amount in (g) above shall accrue interest at Court rates from the date of this Judgment till payment in full.
- i) The Respondent is ordered to issue the Claimant with a certificate of service in accordance with Section 51 of the Act.
- j) The Claimant is awarded costs based on the awards given as the court has no reason to depart from the general rule that a successful litigant may be awarded costs or that costs follow event.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2021.

DAVID NDERITU

JUDGE