



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC CAUSE NO. 210 OF 2016

ELIJA MUTHURI.....APPELLANT

VERSUS

NANAK TRUCKING COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The suit is premised on an amended memorandum of claim filed on 12th June, 2018 in which the claimant prays for an award against the Respondent for:-

(i) An order that the failure to allow back and reinstate the claimant to his previous position of employment as per the contract dated 21st October, 2015 and pay him his salary as ordered by the Court on 16th February, 2016 amounted to unlawful, unfair and wrongful termination of the claimant's contract of employment.

(ii) An order for the respondent to pay the claimant:-

(a) Salary for the period from February, 2016 to *September, 2016.*

(b) 12 months' salary as compensation for unlawful and unfair termination of employment.

(c) Interest on item (a) and (b) above.

3. An order for the respondent to give the claimant a Certificate of Service.

4. Costs of the claim.

2. C.W.1, the claimant adopted his witness statement dated 12th June, 2018 as his evidence in Chief. The claimant produced annexures attached to his statement of claim in support of the claim.

3. The claimant testified that the Court ordered that he be reinstated to his employment vide an order dated 16th February, 2016. That in a ruling dated 29th September, 2016, the Court found the respondent was in contempt of Court and the respondent was ordered to purge the contempt by paying all the due salaries from February, 2016 to July, 2016. That the respondent paid the salaries ordered by the Court but did not reinstate the claimant.

4. The testimony of the claimant contained in the witness statement adopted by the Court is that the claimant was employed by the respondent by a contract dated 21st October, 2015 and commenced working on 2nd November, 2015.

5. That the claimant worked continuously and diligently until the 6th February, 2016 when the respondent through a verbal directive of one Mr. Manjit told the claimant that he stood dismissed and should not come back to work. This was done through a telephone text message.

6. On 10th February, 2016, the claimant wrote a demand letter to the respondent which demand letter was not responded to. The claimant testified that the termination of his employment was unlawful and unfair since the respondent had no valid reasons to terminate his employment and the respondent did not follow a fair procedure in terminating the employment of the claimant.

7. The claimant testified that he suffered loss and damage due to the abrupt loss of income and had a family to take care of.

8. That he had a good record at work and had no previous warnings.

That the order injuncting the respondent from terminating the claimant's employment was blatantly violated by the respondent despite service on 18th February, 2016 on Mr. Manjit Gulzera and Mr. Monty. That the claimant offered himself to work on 1st August, 2016 as per the Court order but he was totally mistreated by the respondent's officers by being sent to the workshop to do manual work which was contrary to the claimant's contract of employment as a Senior accountant.

9. The claimant testified that he wrote a letter to Mr. Teji, a director of the respondent complaining about the mistreatment. The claimant produced a report of what took place on that day.

10. The advocates for the respondents wrote a number of letters to the company and its advocates advising the respondent to abide by the Court order but they refused to obey the orders.

11. That on 29th September, 2016, the Court found Mr. Parminder Singh Sandhu, Tajinder Singh Grewal, Mr. Manjit Gulzera and Mr. Monty who are directors, officers, agents or servants of the company guilty of contempt of Court and ordered them to pay the claimant an equivalent of 6 months' salary to purge the contempt. The payments were made on 3rd October, 2016 but to date, the respondents have not reinstated the claimant back to work.

12. As a result of the failure by the respondent and its officers to reinstate the claimant to work, the claimant testified that his employment was effectively terminated and he became jobless and has had to look for alternative employment.

13. The claimant reiterates that the termination of his contract was unlawful, unfair and wrongful in that he was not accorded a fair hearing as set out under Section 41 and 45 of the Employment Act, 2007. That no notice was issued to the claimant nor was he paid in lieu of notice in terms of Section 36 of the Employment Act, 2007. That the claimant has not been issued a letter of termination nor issued a Certificate of Service to date.

14. The claimant prays that he be awarded as prayed.

15. The respondent did not attend the hearing of the suit despite being notified of the hearing date. The hearing proceeded *ex parte* on 8th June, 2021.

16. The testimony by the Claimant Mr. Muthuri is uncontroverted therefore.

17. That notwithstanding the claimant has the onus of demonstrating that the termination of his employment was wrongful as provided under Section 47(5) of the Employment Act.

18. The primary onus of proving that the termination was for a valid reason lies with the respondent in terms of Section 43(1) and (2) as read with Sections 45 and 47(5) of the Act.

19. Indeed, the Supreme Court in **Kenfreight (E.A) Limited –v-s Benson K. Nguti [2019] eKLR** held that the burden of justifying the grounds of termination rests on the employer as provided under Section 45(2) of the Employment Act, 2007. The Court stated that where an employer has failed to provide justifiable reasons for the termination of an employment, the termination is deemed unfair.

20. The Court of Appeal in **Kenya Revenue Authority –vs- Reuwel Waithaka Gitahi** [page 11 to 23 of the bundle] relied on Halsbury's Laws] of England, 4th Edition Vo. 16 (1B) paragraph 642, holding that:-

“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts. It must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. “

The basis of this approach (the range of reasonable responses tests, is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take view and another quite reasonably take another; the function of a tribunal as an industry jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, then dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

21. In the present case, there is a disturbing aspect emanating from the ruling of the Court in respect of an application to hold the employer in contempt for failing to comply with interlocutory orders granted *ex parte* by Hon. Ndolo J. in respect of a notice of motion filed under Certificate of Urgency dated 15/2/2016.

22. In the said ruling dated 29th September, 2016, Hon. Mbaru, J. made the following orders:-

“Based on the above, I find the respondents in contempt of Court orders; I also find the claimant as at 1st August, 2016, frustrated his own employment with the respondent; without going into the merits of the main claims and defence I order and direct, as follows:-

(a) The Respondent shall purge the contempt and pay the claimant all the due salaries going back to February, 2016 and July, 2016 within the next 3 working days;

(b) Failure to abide, an appropriate Sanction shall issue, the above order put into account;

(c) Mention on 6th October, 2016 to confirm compliance.

(d) The claimant shall keep off the Respondent’s premises

(Emphasis mine).

(e) Costs to the claimant.

23. The aforesaid order took special importance in view of the amended memorandum of claim dated 12th June, 2018 and filed on the instant date in which the original remedies sought by the claimant were abandoned and substituted with the new ones set out herein.

24. The remedies sought in the amended suit changed the focus of the suit and by implication the basis of the cause of action in a substantial manner in that the claimant sought an order, that failure to allow back and reinstate the claimant to his previous position of employment as per the contract dated 21st October, 2015 and pay him his salary as ordered by the Court on 16th February, 2016 amounted to unlawful, unfair and wrongful termination of the claimant’s contract of employment.

25. From the claimant’s own testimony, the claimant was reinstated to work but was given unsuitable work following the Court order on 16th February, 2016. There was a specific finding by Hon. Mbaru J. regarding this aspect of the case by specifically finding:-

“(a) The claimant has at 1st August, 2016 frustrated his own employment with the respondent.

(b) The claimant shall keep off the Respondent premises.”

26. The finding by the Court regarding the issue of reinstatement of the claimant and then directing that the claimant keep off the respondent’s premises, predetermined the claim by the claimant and the remedy now sought in the amended statement of claim is in a conclusive manner.

27. That finding by the Court, unless reviewed or appealed was to the effect that the claimant refused to be reinstated and that he should keep off the premises of the respondent until the suit is heard and determined.

28. This Court has not heard anything new from the claimant to change the view taken by the Court in that ruling of 29th

September, 2016.

29. The view urged by the claimant that failure by the respondent to reinstate the claimant to his previous position of employment as per the contract dated 21st October, 2015 and as ordered by the Court on 16th February, 2016 amounted to unlawful, unfair and wrongful termination of the claimant's contract of employment is untenable in view of the contradictory finding by the Court in its ruling dated 29th September, 2016.

30. Secondly, the claimant prays in their amended statement of claim, that the Court orders the respondent to pay salary as ordered by the Court on 16th February, 2016. Testimony by the claimant before Court is that he was paid six (6) months' salary pursuant to the Court order dated 16th February, 2016 enforced by the subsequent ruling of the Court on 29th Septembers, 2016. The Court is clearly *functus officio* in respect of this limb of the final prayers sought by the claimant in the amended statement of claim.

The only live issue from the amended statement of claim is whether the claimant is entitled to 12 months' salary as compensation for unlawful and unfair termination of employment of the claimant by the respondent vide a text message on 6th February, 2016.

31. The testimony by the claimant that he had served the respondent diligently from 2nd November, 2015 to 9th February, 2016, a period of about three (3) months is not in dispute. Further, the testimony by the claimant that his employment was abruptly terminated without any valid reason assigned and without being given any opportunity to be heard is also uncontroverted.

32. In terms of the Contract of Service dated 21/10/2015 produced by the claimant himself, the claimant was placed on six (6) months probation from 2nd November, 2015 for a period of six months. It is therefore beyond per adventure that at the time the employment of the claimant was terminated on 6th February, 2016, the claimant was still serving on probation.

33. Section 42 of the employment Act, 2007 provides:-

“(1) The provisions of Section 41 shall not apply where a termination of employment terminates a probationary contract.

(2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.”

34. It is the Court's finding that the provisions of Section 41 of the Employment Act, did not apply to the claimant herein. The respondent was not bound to provide the claimant with a hearing before terminating his probationary contract. The Court finds that the claim that the termination of the contract of employment of the claimant was unlawful and unfair lacks merit.

35. The particular contract did not provide for a different termination

notice by either party during the probation period. Clause 14 of the contract on termination provided for provision of 30 days' notice by either party and or payment of 30 days in lieu of notice.

36. The Court finds that the claimant is entitled to payment of 30 days salary in lieu of notice since he did not serve any termination notice.

37. In the final analysis, the Court awards the claimant as against the respondent Kshs 160,000 in lieu of one month notice. The Court also orders the respondent to provide the claimant with a Certificate of Service within 30 days from to date. The same is payable with interest at Court rates from 6th February, 2016, the date of termination of his employment.

38. The rest of the claim is dismissed in its entirety.

39. The respondent to pay the costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 28TH DAY OF OCTOBER, 2021.

MATHEWS N. NDUMA

JUDGE

Appearances

Hamilton Harrison and Mathews Advocates for the claimant

Wanam Sale Advocates for the respondent

Ekale – Court Assistant