



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 138 OF 2015

**CHARLES CHEBON KIPTOO.....CLAIMANT**

**VERSUS**

**GOLDOX KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed a Memorandum of Claim dated 15<sup>th</sup> May, 2015 on the 18<sup>th</sup> May, 2015 through the firm of Munene Chege and company advocates claiming wrongful dismissal and unpaid terminal dues. He therefore sought for the following reliefs;

**a. That the Honourable Court be pleased to declare the Respondent termination of the claimant's employment wrongful and unfair hence unlawful.**

**b. The Respondent to pay the claimant Kshs 1,146,306.80 being salary arrears for the Month of December, 2013, salary in lieu of Notice, Overtime, Public Holidays, Gratuity and compensation under section 49 of the Employment Act.**

**c. Refund of Kshs. 10,000/-.**

**d. The Honourable Court be please to issue an Order directing the Respondent to issue certificate of service to the Claimant.**

**e.General damages for damage of character.**

**f. Interest at Court rate.**

**g. Costs of this cause.**

**h. Any other order the Honourable Court may deem fit to grant.**

2. The Claimant avers that he was employed by the Respondent on 1<sup>st</sup> February, 2010 as a manager earning a monthly salary of Kshs. 12,080/- which he served the Respondent with diligence till 19<sup>th</sup> December, 2013 when he was sacked from employment.

3. The claimant states that he worked for the Respondent from 8am till 10pm clocking 6 hours of overtime each day which was never paid. Also that the respondent did not pay his NHIF and 14 months of NSSF not paid between 2011 and 2013.

4. He stated that he was assigned duties in other parts of the country and outside such as Tanzania but the Respondent failed to pay for the allowances as agreed.

5. The claimant states that in the month of December, 2012 the Respondent's director terminated all its employee's services and were paid terminal dues on the premise that the Respondent's director was going to China and the Respondent close its establishment. Upon return in April, 2013 he was summoned by the Respondent to resume work and sign new contracts on condition that he could return the Kshs. 59,180 which had earlier been paid as terminal dues which he agree and starting paying in instalment however in September, 2013 the Respondent set off the balance of Kshs. 35,000/- which he had used to buy skins for the Respondent.

6. That between September and October, 2013 the Respondent's director went back to China for a business trip and instructed the claimant to

report to work for only 2 hours each day which the claimant obliged only for the Respondent to allege that the claimant had absented himself from duty without permission.

7. He also stated that he paid fine of Kshs. 6,000/- to Nyando SPM Court on account of the Respondent's driver over speeding which the Respondent authorized but has failed to refund to date.

8. On 31<sup>st</sup> November, 2013 the claimant stated that he was instructed to relocate from Nakuru town to Mogotio Town where he rented a house and soon thereafter his services were terminated without any cause or Notice.

9. The Respondent entered appearance on the 11<sup>th</sup> June, 2015 and filed its statement of defence on the 2<sup>nd</sup> September, 2015.

10. The Respondent admitted that it employed the Claimant on 1<sup>st</sup> February, 2010 until 31<sup>st</sup> December, 2012 when it experienced financial difficulties causing it to close the company however paid all its employees their terminal dues.

11. That in May, 2013 the Respondent got back on its feet and re-employed the claimant as its manager with effect from 1<sup>st</sup> May, 2013 for a fixed term of 8 months on a month pay of Kshs. 12080 and House allowance of Kshs.1,800/-.

12. It is stated that on 8<sup>th</sup> December, 2013 the claimant left employment and never reported back and on 11<sup>th</sup> December, 2013 the Respondent inquired about the claimant whereabouts to no avail. Another reminder was written to the claimant on the 17<sup>th</sup> December, 2013 and on 19<sup>th</sup> December, 2013 the managing director of the respondent met with the claimant in Mogotio Market where the claimant expressed his intention of not returning to work again, that this was done in the presence of the Respondent's driver.

13. The Respondent contends therefore that the claimant's services were not terminated as alleged rather that the claimant absconded duty.

14. The Respondent denied ever sending the claimant to work out of the Country, or ever working excess hours. He contends that the Respondent offices open at 8am to 5pm with one hour lunch break.

15. He stated that it paid the claimant for public holiday for 1<sup>st</sup> June, 2013 thus the prayer for public holiday is without basis.

16. The Respondent stated that the claimants contract began on 1<sup>st</sup> May, 2013 and had worked for 8 months not 3 years as alleged since the first employment had been terminated in December, 2012 and claimant paid his terminal dues which it denied ever asking to be refunded before employing the claimant.

17. It is stated that the Respondent remitted NSSF deductions as required.

### **Hearing**

18. This case commenced for hearing on the 30<sup>th</sup> October, 2018 with the claimant, **Charles Chebon Kiptoo** testifying that he was the employee of the Respondent which was involved in hide and skin trade. He testified that he was first employed by the Respondent on 1<sup>st</sup> February, 2010 on a salary of Kshs.12080 and deployed to the purchase and sales department as the manager whose duties was to source for skin and hide from the county and abroad. He stated that he travelled to Tanzania with the consent of the Respondent to source for skin and hides. That the first employment was terminated in December, 2012 and he was paid terminal dues of Kshs. 59, 180/- .later on in April, 2013 he was re-employed by the Respondent. In August, 2013 while the Respondent driver was ferrying goods towards Kisumu he was arrested for over speeding and fined Kshs. 6,000/- which he was forced to pay. That Business went under and the respondent looked for other businesses and finally settled at selling Donkey Meat. The Respondent then bought land in Mogotio area and relocated him to the area. However, on 9<sup>th</sup> December, 2013 he was fired without any Notice or pay.

19. On cross examination he maintained that he travelled abroad for the Respondents Business inventory. He affirmed that he was employed a second time on contract from May to December, which contract was renewable. He stated that the driver was driving to Kisumu with authority of the Respondent.

20. The Respondent's case could not proceed in a timely manner as the Respondent sole director passed on together with his driver. Therefore, the Respondents case proceeded for hearing on the 29<sup>th</sup> June, 2021, with the Respondent substituting its witness with, **George Ogolla**, the Respondents current manager who testified that he was employed by the Respondent in the year 2011 as the restaurant attendant for the Respondent's sister company as such conversant with the facts leading to this case. He testified that the claimant absconded duty in December, 2013 and efforts to reach him were in vain. That the company had earlier closed down in December, 2012 due to financial constrains and re-opened in May, 2013 when the Respondent rehired the claimant together with other employees. He testified that he does not recall any single time the Claimant was send abroad for work as the muster roll produced herein says otherwise. Also that the Kshs 53,000 refunded to the Respondent was a loan the claimant had borrowed.

21. On cross examination by the Claimant, the witness testified that the refunded money was a loan advances to the claimant which was deducted every month and not the refund of the terminal dues as alleged.

### **Submissions**

22. The claimant submitted that the Respondent's witness, Mr. George Ogolla was not working at the Respondent company rather at the Respondent's sister company a restaurant; Ming Yue restaurant located at Kenyatta Avenue in Nakuru town therefore cannot be privy with

the activities of the Respondent Mogotio office thus his statement ought to be disregarded.

23. The Claimant submitted that that he was unfairly terminated from employment when he was issued with termination letter on 19<sup>th</sup> December, 2013 at Ming Yue Restaurant and was not paid any terminal benefits.

24. The Respondent on the other hand submitted that the claimant was employed twice by the Respondent with the first contract running from 1<sup>st</sup> February, 2010 to 31<sup>st</sup> December, 2012 after which the claimant and all other employees were paid their terminal dues and discharge from work, therefore there was no claim in relation to the 1<sup>st</sup> Contract.

25. The 2<sup>nd</sup> Contract commenced on 1<sup>st</sup> May, 2013 for 8 months which was to expire in December, 2013 however that the claimant absconded duty on 17<sup>th</sup> November, 2013 and never reported to work therefore his termination was occasioned by desertion of duty and in this he cited the case of **Dickson Matingi –v- DB Schenker Limited [2016] eKLR**

26. The Respondent argued that it tried on several occasions to request the Claimant to report to work to no avail only for the claimant to expressly state that he was no longer interest with work when the Respondent's director physically met him at Mogotio Chief Office.

27. The Respondent therefore submitted that the claimant was never unfairly terminated and therefore does not deserve the reliefs sought.

28. I have examined all the evidence and submissions of the parties herein. The issues for this court's determination are as follows:-

**1. Whether the claimant was dismissed by the respondents or he absconded duty.**

**2. If he was dismissed, whether the respondents had valid reasons and followed due process.**

**3. Whether the claimant is entitled to the remedies sought.**

#### ISSUE NO. 1

29. The claimant told court that he was employed by the respondent on 1/2/2010 and was a manager earning 12,080/= per month and served until 19<sup>th</sup> December, 2013 when he was sacked.

30. The claimant gave evidence that he was fired without any notice or pay.

31. The respondents on the other hand maintained that the claimant was not fired but that he absconded duty on 9<sup>th</sup> December, 2013 and efforts to trace him were fruitless.

32. Despite the respondent averring that the claimant absconded duty and that they tried to trace him without success, no evidence was adduced to show this aspect.

33. There is no letter, Email or even phone call data to show the respondent sought the claimant in order to subject him to a disciplinary process for absenting himself from duty.

34. The claimant exhibited a document from Goldox Kenya Ltd (App 1) dated 3/12/2012 indicating that the claimant's services had been terminated and he was then paid kshs.59,180/= as his terminal dues on 4/12/2012.

35. He was actually then reemployed on a contract on the 1/5/2013 to 31/12/2013. It is not clear what happened before the expiry of the contract but given that the contract was due to expire on 31/12/13, the claimants could not abscond duty as alleged.

36. There is no evidence the respondents looked for him to find out why he had absented duty.

37. I find the explanation that he absconded duty not plausible and I find that he was dismissed by respondents.

#### ISSUE NO. 2

38. On this issue, given that the respondents had absconded duty, they agreed in principal that the claimant was not terminated and therefore there were no valid reasons established from his termination and that no due process was followed.

39. This in effect implies that the termination of the claimant was unfair and unjustified as provided under Section 45 (2) of the Employment Act 2007 which states as follows;

**“45. (1).....**

**(2) A termination of employment is unfair if the employer fails to prove-**

- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason-
  - (i) related to the employee's conduct, capacity or compatibility; or
  - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure”.

3. REMEDIES

1. The claimants contract was due to expire on 31/12/13. Since the claimant was terminated before the expiry, I award the claimant salary payable to the end of the contract period = 12,080/=.

2. I also award the claimant:

a. 1 month salary in lieu of notice = 12,080/=

b. Leave pay of 24 days for the year =  $24/30 \times 12,080 = 9,664/=$

c. Public holiday for the year = 10 days =  $10/30 \times 12,080 = 4,020/=$

d. Gratuity equivalent to 15 days served for the year

=  $\frac{1}{2} \times 12,080$

= 6,040/=

e. 3 month salary as compensation for the unfair termination

=  $3 \times 12,080 = 30,240/=$

TOTAL awarded = 80,124/= plus costs and interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED VIRTUALLY THIS 21<sup>ST</sup> DAY OF OCTOBER, 2021

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant – present

Ochang for Respondents – present

Court Assistant - Fred