



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 975 OF 2017

DANIEL ONYANGO ONYIMBO.....CLAIMANT

VERSUS

CHINA WU YI CO. LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant lodged a claim against the Respondent on the 10th May, 2017, seeking a declaration that his dismissal from the service of the Respondent is unlawful and unfair. He further seeks payment of a total sum of Kshs. 537,300/=, comprising house allowance, one-month salary in lieu of notice, pay in lieu of leave, service pay and 12 month salary in compensation for wrongful dismissal. The Claimant also seeks orders directing the Respondent to issue him with a certificate of service and costs of the suit and interest.
2. The Respondent filed a response to the claim on the 27th of June, 2017.
3. During the trial, the Claimant testified in support of his case by adopting his witness statement dated 10th May, 2017 and his bundle of document of similar date.
4. The Respondent testified through a substituted witness one Mr. Allan Orondo Olweny who adopted the witness statement of Mr. Lin Jiadong, who the court was informed had left the employ of the Respondent. He also adopted the bundle of documents filed on 27th June, 2017.
5. Both parties put in their submissions.

The Claimant's Case

6. The Claimant's case is that he was employed by the Respondent in May, 2014 as a surveyor earning a daily wage of Kshs. 500/= per day until December, 2016 when the Respondent terminated his services.
7. It is the Claimant's case that he signed a labour agreement with the Respondent which agreement provided his wage as Kshs. 500/= per day.
8. The Claimant states that as opposed to the Respondent's assertion, he was neither paid nor did he utilize his leave days. He further states that he was not paid a house allowance throughout his time in the service of the Respondent.
9. The Claimant denies having been a probationer at the Respondent's company and instead, asserts that he was a full-time employee of the Respondent.
10. The Claimant's further case is that although he was employed under a project of the Respondent, the project had not come to the end at the time of his termination and that it ended in 2019 while he was terminated in December, 2016.
11. It is the Claimant's case that he was terminated without notice and that he was neither notified of the reasons for his termination nor allowed an opportunity to make representation on the termination.
12. The Claimant states that he reported his dismissal to the Labour Officer who issued a demand letter to the Respondent to pay him his

final duties but that the Respondent did not heed the demand of the labour officer.

13. The Claimant prays that the court makes a declaration that his termination from the service of Respondent is unlawful and unfair and further award him Kshs. 537,300/=, comprising house allowance, one month salary in lieu of notice, pay in lieu of leave, service pay and 12 month salary in compensation for wrongful dismissal.

The Respondent's Case:

14. The Respondent states that the Claimant was employed in May, 2014 as a mason earning a daily wage of Kshs. 400/= which rose to Kshs.900/- at the time of termination.

15. The Respondent states that the Claimant was on a probationary contract and that he was employed under a project the Respondent was undertaking which came to an end in December, 2016.

16. The Respondent further states that all statutory deductions in respect of the Claimant's employment were made and remitted to the respective agencies.

17. It is the respondent's assertion that the daily pay of the Claimant included his house allowance and that this formed part of the agreement between the him and the Respondent.

18. It is the Respondent case that the Claimant and other employees had been declared redundant when the project they served under ended.

19. The Respondent further states that the Claimant had been issued with notice of the said termination.

20. The Respondent further states that the Claimant though notified of his termination earlier (8th November, 2016), got his termination notice extended to 22/12/2016 for the defect liability period of the project and hence he served the latter days of that month knowing that he will leave on the 22/12.2016 and not 7/12/2016 December, 2016 as indicated in an earlier notice of termination.

21. The Respondent case is that it allows its employees to choose between taking their leave or be paid in lieu thereof and that the Claimant elected to be paid for his leave and the payment was made when it fell due during his time with Respondent.

22. It is the Respondent further case that the Claimant served his full notice period plus a 15 days extension and that he was paid his salary and dues up to the 22/12/2016, which was his last day of service with the Respondent.

23. The Respondent asserts that it does not owe the Claimant and prays that this suit be dismissed.

The Claimant's Submissions

24. It is submitted for the Claimant that the termination is unfair and unlawful. He sought to rely on the case of **David Gichana Omuya v Mombasa Maize Millers Limited (2004) eKLR**.

25. It is further submitted for the Claimant that he was employed as a surveyor and a full-time employee of the Respondent and not a probationer as the Respondent would like to portray to the court.

26. It is submitted for the Claimant that the Respondent did not adhere to the provisions of *Section 40 of the Employment Act, 2007* when declaring the Claimant redundant. He sought to rely on the holding of Ndolo J in the case of **Bernard A. Kagasi v For You Chinese Restaurant (2014) and Narry Philemons Onaya – Odeck v Technical University of Kenya (2017) eKLR**

27. It is further submitted for the Claimant that there was an implied confirmation of the Claimant as 12 months is the legal maximum for an employer to confirm an employee employed on probationary terms of service.

The Respondent's Submissions

28. It is submitted for the respondent that the Claimant was fully aware that he was serving on a project, which project was bound to come to an end and which had ended resulting in the termination of the Claimant. The respondent sought to rely on the case of **Wario Haro & 13 others v Jiangxi Zhonmu Engineering Construction Limited (2019)eKLR** where the court held that the Claimant could not remain employed in a project indefinitely.

29. It is submitted for the Respondent that the Claimant was issued with notice of termination and that he served and was paid for the entire notice period.

30. The Respondent submits that the daily payment made to the Claimant included his statutory deductions and house allowance and further, that this was expressly provided as a condition in the labour agreement between the Claimant and the Respondent.

31. It is submitted for the Respondent that the Claimant was paid all accrued leave days for all the years he was in the service of the respondent.

32. The respondent sought to rely on the cases of *Manuel Anidos v Kinangop Wind Park Limited (2019) eKLR* and *Jane Muthoni Muya v John T. Kempro Co. Limited (2019) eKLR*.

Issues for Determination:

33. The issues for determination in the matter are:

- i. Whether the Claimant was a probationer or a full-time employee of the Respondent
- ii. Whether the Claimant's termination was lawful and fair
- iii. Whether the Claimant is entitled to the reliefs sought
- iv. Who should bear the costs of the suit.

Whether the Claimant was a probationer or a full-time employee of the Respondent

34. The Claimant's case is that he had a labour agreement with the Respondent which did not provide the term of the contract between them.

35. The Respondent asserts that the Claimant was on probation until his termination in December, 2016. The agreement between the parties provides at paragraph 2 thereof, that the Claimant would be on probation for a period of three months and does not provide for extension of this period for whatever reason.

36. The Respondent's witness was not clear on the nature of the Claimant's employment during his service with the Respondent. At one point, he refers to the relationship as probationary service while at another point, he tells the court that the Claimant was serving in a specific project which came to the end at around the time the Claimant was terminated, triggering the termination of the Claimant and a few other employees on ground of redundancy.

37. The Employment Act, 2007, defines a probationary contract as follows:

“means a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period.”

38. Arising from this definition, the provision of the contract between the parties herein and the period the Claimant was in the service of the Respondent, the employment relationship between the Claimant and Respondent, could not have been probationary.

39. The Claimant's probation ended after his third month in the service of the Respondent and although no letter of confirmation was issued to him by the Respondent, the employment stood confirmed by operation of law immediately the Claimant served in the employ of the Respondent for the three (3) months given in his contract or at worse the 12 months allowable under the Employment Act. The court finds and holds that the Claimant was for all intents and purposes a full-time employee of the Respondent.

Whether the Claimant's termination was lawful and fair

40. The Claimant admitted receiving a termination notice from the Respondent on the 7th of November, 2016, which notified him of his termination effective 8th December, 2016. It was the evidence of both parties that the notice was extended at the request of the Claimant so as to take effect on the 22nd of December, 2016, instead of the 8th of December, 2016 as had earlier been communicated.

41. The evidence before court is that the Claimant served the full notice period and that he was paid his salary until his last day in the service of the Respondent. The question for the court to answer is whether this contract was terminated fairly and within the law by dint of this notice.

42. That notice was given and that the Claimant served and was paid his salary during the notice period is undisputed. The issue becomes whether notice alone is a fair and lawful manner of terminating an employment contract. Articles 41 and 47 of the Constitution have set new parameters in the way in which employers handle separation with their employees. Notice alone is no longer sufficient ground to terminate a contract of employment. The rules of natural justice must be adhered to; an employer must show that both substantive and procedural fairness coloured the steps of a termination or dismissal process.

43. The Claimant as per the evidence before court was serving in a project that was undertaken by the Respondent. A project of this nature would usually have a time line within which it is expected to be finalized. It is not clear why the Respondent did not give the Claimant a fixed term contract tied to the term of the project which would then have ended fairly within its own terms.

44. For reason that the contract subject of this suit did not have a fixed period within which the Claimant would have expected to leave the service of the Respondent, the requirements of Section 43 and 45 of the Employment Act, 2007 were bypassed by the Respondent simply issuing notice and expecting the Claimant to quietly leave its employ.

45. Secondly, the Respondent's case was that the Claimant and a few other employees were declared redundant by reason of finalization of the project they were attached to. Even so, did the Respondent adhere to the provisions of Section 40 of the Employment Act, 2007 on

redundancy? (*see Woodsome Ochwo Mwanika v A To Z Transporters Limited [2021] eKLR*). It did not. The notice issued was a notice of termination not notice of redundancy. There was also no notice issued to the labour officer and no evidence of payment of service pay for the two and a half years the Claimant served the Respondent.

46. In whole, the court finds and holds that the Respondent in terminating the services of the Claimant, did so contrary to Sections 40, 41, 43 and 45 of the Employment Act, 2007 and Articles 41 and 47 of the Constitution and hence the termination is unlawful and unfair.

Whether the Claimant is entitled to the reliefs sought

47. The Claimant seeks the following remedies:

- i. A declaration that his dismissal from the service of the Respondent is unlawful and unfair.
- ii. House allowance,
- iii. One-month salary in lieu of notice,
- iv. pay in lieu of leave,
- v. service pay; and
- vi. 12 month salary in compensation for wrongful dismissal.

House Allowance

48. The Labour agreement signed between the Claimant and the Respondent, provides at paragraph 3 thereof, that the daily salary payable to the Claimant includes statutory deductions and house allowance. The court has no reason to prescribe new terms between parties on issues that they have addressed in a contract between themselves. This prayer fails and is dismissed.

One-Month Salary in Lieu of Notice

49. Salary in lieu of notice is applicable where either party terminates a contract of employment without notice or with less notice than that which is prescribed by law or contract of service. The Claimant herein was issued with notice of termination, served to the end of the notice period and was paid for the period worked. The claim is without merit and is dismissed.

Pay in Lieu of Leave

50. The Respondent produced documentary evidence showing that the Claimant was paid for the accrued and unutilized leave days. The Respondent bundle of documents adopted in evidence before this court show that the Claimant was paid Kshs. 7,310/- as leave pay for the year 2014, Kshs. 11,490/- being leave pay for the year 2015 and Kshs. 23,260/-, being payment of salary and leave pay for the year 2016. This evidence was not rebutted and for this reason this prayer likewise fails and is dismissed.

Service Pay

51. The Respondent's testimony is that the Claimant was declared redundant. Service pay is a condition precedent for a declaration of redundancy. No evidence was tendered to show that the Claimant was paid service pay for his years of service with the Respondent and the same is awarded as per the claim.

12 Months' Salary in Compensation

52. A declaration that the termination of the Claimant is unfair, entitles him to compensation per Section 49 of the Employment Act, 2007. The court in awarding compensation, considers the fact that the Claimant was evidently employed under a project that though the court was not told its actual timeline, was bound to end at one point or the other. The Claimant was therefore in the opinion of this court, aware that this was an engagement that had a definite end and he did not expect to permanently serve the Respondent. Having said that, the Claimant deserves compensation for failure by the Respondent to adhere to the dictates of the Constitution and the Employment Act, in terminating his services and is accordingly awarded 4 months' salary in compensation for unfair termination.

Costs of the suit

53. It is trite that costs shall follow the event. This suit has partially succeeded and for this reason the Claimant is awarded the costs of the suit.

54. In conclusion, judgment is entered for the Claimant against the Respondent as follows:

- i. A declaration that the Termination of the Claimant was unlawful and unfair
- ii. That the respondent to pay the Claimant 4 months' salary in compensation for unfair termination at Kshs. 108,000/-

iii. Service pay at Kshs. 36,000/-

iv. Costs of the suit and interest at courts rates from the date of this judgment.

v. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 14TH DAY OF OCTOBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Claimant

N/A for the Respondent

Christine Omollo – Court Assistant.