



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1874 OF 2016

ANTHONY KANGETHE KANJA.....CLAIMANT

VERSUS

OILFIELD MOVERS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant instituted the suit vide a Memorandum of Claim dated 9<sup>th</sup> September 2016 against the Respondent for the unfair termination of his employment. He avers that in October 2014, the Respondent employed him as a Truck Driver within the operations department by a contract of employment and that he received a letter of confirmation of employment dated 17<sup>th</sup> April 2015. The Claimant averred that his monthly salary was Kshs. 47,000/- and that he diligently performed his duties throughout his employment with the Respondent. The Claimant avers that by a letter dated 24<sup>th</sup> February 2016 the Respondent by its directors, supervisors and/or agents unlawfully terminated his employment without a valid and fair reason and because of his continued illness and that the Respondent has also refused and/or neglected to pay him his lawful dues. He thus seeks 3 months' salary in lieu of notice, service pay for 1 year at 15 days for each year worked, 12 months' salary as compensation for unlawful termination and full salary payment from December to April 2016. The Claimant prays to judgment against the Respondent for: the sum of Kenya Shillings Nine Hundred Forty Nine Thousand One Hundred and Fifteen only (Kshs. 949,115/-); interest and costs incidental to this suit; Certificate of Service; and any such other or further relief as this Honourable court may deem fit and just go to grant.

2. In his written Statement, the Claimant asserts that on 22<sup>nd</sup> September 2015 at around 4.00pm, he was undertaking his duties at the Respondent's place of work in Turkana and while loading the truck he stretched his spine and developed numbness in the lower limb. That he underwent treatment at a clinic but on 24<sup>th</sup> September 2015 his condition worsened and he was airlifted to Aga Khan University Hospital in Nairobi where he was treated and admitted by Dr. Olunya Oluoch and that he was thereafter operated on and later discharged on 7<sup>th</sup> October 2015. He further states that he received a letter dated 24<sup>th</sup> February 2016 from the Respondent indicating that his employment term had expired on 13<sup>th</sup> January 2016 but which position was not true as his employment had been confirmed for a period of 12 months by a letter dated 17<sup>th</sup> April 2015. He also asserts that at the time of termination of employment, the Respondent did not offer him three months' salary in lieu of notice as per the terms of the contract and neither did it pay him his full salary from December 2015 to April 2016 when his contract was expected to expire. He states that in support of his claim he has annexed copies of his contract of employment, confirmation of employment, termination letter, demand letter and payslips.

3. The Respondent was opposed to the claim and filed an Answer to Claim dated 13<sup>th</sup> December 2016 denying to have confirmed the Claimant's employment with a monthly salary of Kshs. 47,000/- or that it unfairly terminated his employment. It avers that prior to the Claimant's termination it accorded to him all the privileges owing to an ailing employee as under the Employment Act and the contract of employment between them in addition to catering for his medical expenses. The Respondent avers that the Claimant is not deserving of the amounts pleaded in his Claim and that it further owes no outstanding amount to him. The Respondent prays that the Claimant's Claim be dismissed with costs. The Respondent also filed a witness statement made on 15<sup>th</sup> November 2018 by a Senior Associate in its Human Resource Department, Japheth Mushira who states that when the Claimant was employed by the Respondent on 13<sup>th</sup> October 2014, the terms of his employment were that he was on three (3) months' probation and a one (1) year contract thereafter. It avers that following the Claimant's hospitalization and treatment, the Respondent accepted his sick leave as advised by the hospital upon production of the relevant medical certificates showing he was to be on sick leave up to 29<sup>th</sup> January 2016. That the Claimant was subsequently paid sick leave by the Respondent as follows: Full pay for 30 days sick leave from 7<sup>th</sup> October 2015 to 6<sup>th</sup> November 2015; Half pay for the months of November and December 2015. The Respondent avers that the above said provisions for sick leave were above the provisions of Section 30 of the Employment Act requiring payment on sick leave to be seven days on full pay and seven days on half pay. The Respondent avers that it acknowledges that the Claimant is entitled to compensation under the Work Injury Benefits Act for the injuries he sustained and even took up the matter with their insurer First Assurance/AON and that there is an ongoing suit on the matter being **Milimani Civil Suit No. 5421 of 2006**. It avers that the dispute between the Claimant and the Respondent arose when the Respondent made a decision to take the Claimant off sick pay and which have culminated in the instant suit. It is his statement that the Claimant was not unlawfully or unfairly terminated but that his contract of employment with the Respondent was for a defined period of time and which thus terminated as a result of effluxion of time.

4. The Claimant testified as did the Respondent's witness Japheth Shijenje Mushira who was the Respondent's Kenya HR Associate at the material time. The Claimant testified that his probation was for 3 months but he did not receive the letter of confirmation until 3 months after the end of his probation period meaning it took 6 months for the Respondent to confirm him to employment. He stated that the injury occurred while he was working for the Respondent and he was airlifted to Aga Khan Hospital and his medical expenses covered by the Respondent. He testified that the Respondent then terminated his services without following the law on account of his condition. The Respondent's witness on his part testified that the Respondent employed the Claimant on 13<sup>th</sup> October 2014 as a truck driver and confirmed him into employment for a one year contract. He stated that the Claimant suffered an injury while in the oilfield where Tullow Oil was prospecting for oil and he was airlifted to Nairobi for treatment at Aga Khan Hospital and that the Respondent covered his medical bills through his medical cover. He stated that the Claimant's contract provided for 30 days sick leave, 14 days thereafter on half pay and that the Claimant was given sick off commensurate with his contract. He stated that the disability was assessed and was 48% meaning the Claimant could no longer work for the Respondent. He testified that the contract the Claimant had expired on 13<sup>th</sup> January 2016 which is when the relationship between the company and the employee was severed.

#### 5. Claimant's Submissions

The Claimant submits that pursuant to clause 3.4 of the employment contract, the Claimant was confirmed on 17<sup>th</sup> April 2015 and there was legitimate expectation that the contract would expire on 17<sup>th</sup> April 2016. He submits that however, the period between confirmation and termination of the contract is nine months and the Respondent's witness also confirmed in cross examination that the Claimant's termination was done before the end of one year as stipulated in the contract. The Claimant submits that it is therefore safe to conclude that he was terminated prematurely as a result of his medical condition. He submits that in the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** the Court held that: "... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination." The Claimant submits that Section 45(2)(c) of the Employment Act, 2007 subjects all terminations to the test of a fair procedure while Section 41 provides the procedure to be followed when terminating the services of an employee on the grounds of misconduct, poor performance or physical incapacity. The Claimant submits that however the Respondent did not follow the said due procedure and the termination of his employment was unlawful as his incapacity was not put to test. The Claimant further submits that the Respondent did not address the question of the substantive fairness of his termination and only opined that the contract had lapsed. He submits that Section 35(1)(c) of the Employment Act provides for notice or payment in lieu of notice and clause 13 of the contract of employment provided for termination through giving two months' notice or two months' pay in lieu of notice but which term the Respondent did not comply with. It is submitted by the Claimant that as a consequence of the breach of contract he is entitled to two month's pay in lieu of notice in the sum of Kshs. 94,000/- and twelve months' pay compensation for damages and loss of employment in the sum of Kshs. 564,000/-. That he did testify not receiving salary for the months of December 2015 to April 2016 being a period of five months when the employment contract was still active. The Claimant submits that the Respondent did not controvert this evidence considering it is the custodian of all employment records including payment of salary pursuant to Section 10(2) (h) and (i) and only produced the December 2015 payslip which does not prove any payments to him. The Claimant relies on the case of **Joseph Ouko Lwambe v Royal Garment Industries EPZ Limited [2018] eKLR** where the Court while awarding unpaid salary observed as follows:

"The question then follows is the payslip conclusive evidence of payment of salary? In my view the answer is NO. The Payslip is a document prepared by the Respondent Company indicating the amount payable as salary for work done on a given period. There is no evidence as to whether the Claimant received the salary and the fact that there is a payslip for October, 2013 builds a lot of doubt as to whether the same is a true reflection of what transpired. I opine that the Claimant's claim for unpaid salary be allowed in the circumstances."

6. No submissions were filed by the Respondent and this decision is rendered on the basis of the pleadings filed, the testimony adduced and the submissions as well as the law. In the case, the Claimant was injured and was subsequently let go on 13<sup>th</sup> January 2016. The reason given for the termination was the injury suffered by the Claimant. Under the provisions of Section 41, the Claimant was entitled to some degree of safeguard. He should have been notified of the intention to terminate his services on account of incapacity. His contract ran from 13<sup>th</sup> October 2014 and he was apparently given a letter of confirmation 6 months after his employ. He then served the full one year under the contract. His contract would have lapsed on 13<sup>th</sup> October 2015 but he continued to serve till 13<sup>th</sup> January 2016 when he was let go ostensibly as the confirmation of the contract in January 2015 meant in the mind of the Respondent that his contract ran from then till January 2016. This was incorrect as the actual expiry of contract was in October 2015 and he was deemed to have received a renewal of contract to October 2016. The premature termination of his second contract was without due regard to Section 41 as he should have been notified that the employer intended to terminate the contract as he was incapacitated. This would entitle the Claimant to some recompense by way of 3 months salary as compensation. In relation to the injury it is indicated that there is a suit pending where he is pressing the claim for compensation for the injury and the Court will say no more.

7. In the final analysis, I find and hold that the termination of the contract on 13<sup>th</sup> January 2016 was unfair and unlawful as the Respondent did not afford the Claimant a hearing in terms of Section 41 for which I enter judgment against the Respondent for:

- a. 3 months salary as compensation – Kshs. 120,000/-
- b. Costs of the suit
- c. Interest on a) above at court rates from the date of judgment till payment in full.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2021**

**NZIOKI WA MAKAU**

**JUDGE**