



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 895 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

EVANS MUSIOMI.....CLAIMANT

VERSUS

SOFTWARE TECHNOLOGIES LIMITED.....RESPONDENT

JUDGMENT

1. Vide his statement of claim dated and filed in Court on 25th May, 2015, the Claimant avers that his employment was unfairly and unlawfully terminated by the Respondent, a registered limited liability company.

2. His case is that he was employed by the Respondent on or about 1st July, 2004 in the capacity of cook/caterer on a 2 year contract which was renewable, at a monthly salary of Kshs.8,380/- which amount was later increased and was Kshs.19,500/- at the time of his separation with the Respondent herein.

3. The Claimant further contends that he worked diligently, faithfully and to the Respondent's satisfaction until 23rd February, 2015 when the Respondent issued him with a letter dated 23rd February, 2015 informing him of the immediate termination of his employment contract.

4. He maintained that he was neither given a reason nor accorded a hearing before the termination. The Claimant further maintained that there was no payment made in lieu of notice.

5. Aggrieved by the decision to terminate his employment unfairly the Claimant filed the instant claim seeking the following reliefs:

- i) Kshs.19,500 being the outstanding salary*
- ii) Kshs.58,500/- being the salary in lieu of notice owed to the Claimant.*
- iii) Kshs.1,150,150/- being the Leave days from 2004 to 2015*
- iv) Kshs.107,250/- being severance pay for the period worked.*
- v) Damages for unfair and unlawful termination of employment*
- vi) Interest on above from the date of filing*
- vii) Certificate of Service*
- viii) Costs*
- ix) Any other or further relief that this Honourable Court may deem fit and just to grant.*

6. In response to the Claim, the Respondent in its Reply to Statement of Claim dated 7th March, 2018 and filed in Court on 8th March, 2018, admits having engaged the Claimant albeit on a periodic fixed term contract of two (2) years subject to renewal.

7. The Respondent avers that the Claimant's employment contract was terminated on 23rd February, 2015 and the reason for the same clearly communicated to the Claimant. It contended that the reason for the termination was performance, insubordination and the Claimant's conduct while on duty as evidenced by the written warnings issued to the Claimant on 20th July, 2004, 21st March, 2007 and 18th September, 2009.

8. The Respondent maintained that having issued the Claimant with warning letters on diverse dates, it had no option but to terminate the Claimant's employment contract.

9. It further maintained that the Claimant's termination was as a result of the breach of Contract and he is therefore not entitled to the reliefs sought in his Memorandum of Claim.

10. The Respondent contended that the Claimant had utilized all his leave days between the year 2004 and December 2014 at the time of his separation with it. It maintained that he is only entitled to 25.88 days that were pending at the time of the Claimant's termination.

11. The Respondent averred that the prayer for payment of Severance pay cannot be awarded as the Claimant's employment contract did not provide for it.

12. In conclusion the Respondent contends that the instant Claim lacks merit and that the same ought to be dismissed with costs to the Respondent.

13. On 23rd November, 2020 when the matter was schooled for hearing. The parties agreed to have the matter disposed of by way of written submissions.

Submissions by the Parties

14. It is submitted on behalf of the Claimant that his termination from the Respondent's employment was wrongful, unfair and unlawful as he was neither informed of the reason for his termination nor given an opportunity to defend himself of any wrongdoing prior to his termination.

15. He further submitted that he was condemned unheard contrary to the Rules of Natural Justice of *audi alteram partem*. He maintained that the Respondent's actions were in contravention of the provisions of Article 47 of the Constitution of Kenya 2010. To buttress this argument, the Claimant relied on the Court findings in the case of **Kenneth Njiru Njorani v Dodhia Packing Limited Cause No. 431 of 2010**.

16. The Claimant further submitted that his termination was contrary to the provisions of Sections 41 and 45 of the Employment Act, 2007. To fortify this argument, the Claimant relied on the Court of Appeal decision in the case of **Jared Aimba v Fina Bank Limited (2016) eKLR** where Court held *that for a termination to be fair it must be done in compliance with the provisions of Section 41 and 45 of the Employment Act, 2007*.

17. The Claimant further cited the cases of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited (2014) eKLR** and **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology (2014) eKLR** where Court emphasised *on the need to comply with the provisions of Section 41 of the Employment Act for a termination to be fair and valid*.

18. In conclusion the Claimant submitted that he is entitled to the reliefs sought in his Memorandum of Claim and urged this Court to allow it as prayed.

Respondent's Submissions

19. The Respondent on the other hand argued that the Claimant was engaged by it on a fixed term contract of two years and whose renewal was not automatic. To buttress this argument the Respondent relied on the case of **Rajab Barasa & 4 Others v Kenya Meat Commission (2017) eKLR** where the Court held *that the renewal of a fixed term contract was not automatic even if there existed a clause on its renewal*.

20. The Respondent argued that the Claimant was well aware of the expiry of his employment contract as it did not notify him of any intention to renew the same as was previously done. For emphasis the Respondent quoted and relied on the case of **George Onyango v Board of Directors Numerical Machining Limited & Others (2014) eKLR**.

21. The Respondent maintained that the Claimant cannot claim unfair and unlawful termination as his employment contract with the Respondent had lapsed and he is therefore not entitled to any compensation as prayed. For emphasis the Respondent relied on the case of **Stephen M. Kitheka v Kevita International Limited (2018) eKLR**.

22. The Respondent contended that it acted well within its powers not to renew the Claimant's employment contract. It further argued that the use of the word termination in its letter does not necessarily refer to summary dismissal but was rather its way of communicating to the Claimant that his services were no longer needed. For emphasis the Respondent cited the case of **Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited & Another (2012) eKLR** where the Court held *that an employer is under no obligation to give reasons to an employee why a fixed term contract of employment should not be renewed*.

23. The Respondent contended that the Claimant did not suffer unlawful termination as alleged and can therefore not claim any damages or dues in that regard.

24. On the Claim for severance pay, the Respondent contended that the same cannot be awarded as this is not a case of redundancy whereby such a relief may be payable. To buttress this argument, it relied on the case of **Julius Arisi & 90 Others v Research International East Africa Limited (2019) eKLR**.

25. On the claim for unpaid leave days, the Respondent maintained that at the time of his separation the Claimant had only 25.88 days left as the other days were utilized in the course of his employment contract.

26. In conclusion the Respondent submitted that the Claimant's Claim for unlawful termination is unmerited and has no legal basis as his contract lapsed naturally at the expiry of the contract period.

27. It further maintained that the Claimant is not entitled to the reliefs he seeks from this Court save for the Claim for unutilized 25.88 leave days.

Analysis and Determination

28. Having considered the facts of this cause, evidence, submissions and authorities cited by the parties, the following are the issues for determination:

(i) Whether the Claimant's employment contract was renewed after the expiry of the fixed term contract;

(ii) Whether the termination of the Claimant's employment was valid both procedurally and substantively;

(iii) Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's employment contract was renewed after the expiry of the fixed term contract

29. The Claimant averred that he was employed by the Respondent on a fixed term contract of two years subject to renewal on 1st July, 2004. He further averred that the contract was renewed and that he worked continuously for the Respondent for a period of 11 years before the termination of his employment.

30. The Claimant maintained that his termination was unfair and unlawful as he was neither given reasons for his termination nor accorded an opportunity to be heard prior to the termination.

31. The Respondent on the other hand contended that the Claimant was in fact not terminated but rather his employment contract lapsed following its expiry.

32. The Respondent further argued that it was not obligated to notify the Claimant of the expiry of his contract given that it was a fixed term contract relying on the Court's findings in the case of **George Onyango v The Board of Directors Numerical Machining Limited & Others (Supra)**.

33. The Respondent further argued that it was not obligated to give any reasons for the Claimant's termination given that his employment contract was for a fixed term.

34. I disagree with the Respondent's submissions. The Claimant's letter of termination dated 23rd February, 2015

states as follows:

"Name: Evans Musiomi

Date: 23rd February, 2015

RE: TERMINATION OF YOUR EMPLOYMENT

Dear Mr. Musiomi,

We regret to inform you that your employment at Software Technologies Limited is hereby terminated with immediate effect.

This is despite all the verbal and written warnings about your performance and conduct. You continually repeat the same mistakes. Please return your id badge to the security desk. You will be paid to February 2015 salary in

full.

Software Technologies Limited wishes you well in your future endeavours.

Regards,

For Software Technologies Limited

Signed

Stephen Omwenga

Finance and Administration Manager”

35. The Claimant’s contract in fact lapsed on 19th January, 2015 as evidenced by the last letter of renewal of employment contract dated 18th January, 2013.

36. The Claimant therefore continued in employment after the expiry of his employment contract on 19th January, 2015 without a contract until 23rd February, 2015 when his employment was terminated by the Respondent.

37. A fixed term contract which expires and continues without a renewal becomes a month to month contract and is therefore governed by the provisions of the Employment Act. Termination of such contract must therefore comply with both Section 35 and 41 of the Employment Act. Reference is made to the case of **Benson Odhiambo Onyango v Instarect Company Limited (supra)**.

38. Further in the defence to the claim, the Respondent pleaded that the Claimant’s contract was terminated due to non-performance, insubordination and misconduct as evidenced by the warning letters dated 20th July 2021, 18th September 2009 and 21st March 2007.

39. Parties are bound by their pleadings.

40. I therefore find that at the time of termination, the Claimant was on a month to month contract

Whether the termination of the Claimant’s employment was valid both procedurally and substantively

41. Section 41 of the Employment Act provides for the procedure for termination while Section 43 of the Employment Act provides that the employer must prove valid reason.

42. The Claimant submitted that the termination of his services was unfair as the Respondent failed to give any reasons for the termination and that he was never invited for any disciplinary hearing prior to termination.

43. The Respondent on the other hand in his Reply to the Claim indicated that the Claimant had been issued with several warnings which included verbal and written warnings prior to his termination. The Respondent however failed to avail any evidence in terms of warning letters or disciplinary meeting minutes to substantiate this assertion.

44. The statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is provided for in Section 47(5) of the Employment Act. The Section states –

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

45. 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.”

46. Further in the authority of **Francis Mbugua Boro v Smartchip Dynamics Ltd (2017) eKLR** it was held:

“...It was mandatory for the Respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 AND Missing that essential ingredient and a hearing the court teaches the conclusion that the summary dismissal of the Claimant was procedurally unfair.”

47. I find that the Claimant’s employment was unfairly terminated by the Respondent.

Whether the Claimant is entitled to the reliefs sought

48. The Claimant in his statement of claim sought the following reliefs:

(i) Kshs.19,500 being the outstanding salary

49. From the Claimant’s letter of termination it is clear that he was terminated on 23rd February, 2015. No evidence was adduced to confirm

payment of his salary for the days worked in February, 2015. He is therefore entitled to payment under this head which I award him at $23/26$ days x Kshs.19,500 = **Kshs.17,250/-**

(ii) Kshs.58,500/- being salary in lieu of notice owed to the Claimant

50. The Claimant is only entitled to one month's salary in lieu of notice as provided for under Clause 6(I) of his employment contract. I award him **Kshs.19,500/-**

(iii) Kshs.1,150,150/- being the leave days from 2004 to 2015

51. The Claimant did not avail any evidence to support this prayer.

52. The Respondent on its part maintained that the Claimant utilized all his leave days between the year 2004 and 2014 and is only entitled to compensation of 25.88 days. It produced a leave form to prove the same

53. I therefore award the Claimant compensation under this head for the 25.88 leave days that were not utilized as admitted by the Respondent being Kshs. $19,500/26 \times 25.88$ days = **Kshs.19,410/-**.

(iv) Kshs.107,250/- being Severance pay for the period worked

54. This head arises as a result of a redundancy. The facts of the instant case do not constitute a termination by redundancy. This claim is therefore not proved and is dismissed.

(v) Damages for unfair and unlawful termination of employment

55. The Claimant is entitled to compensation under this head. Considering the length of his service with the Respondent and the fact that there was no hearing or establishment of the grounds for dismissal, further considering all relevant factors under Section 49(4) of the Employment Act, the Claimant is entitled to maximum compensation of 12 months which I award him at Kshs.19,500/- x 12 months = **Kshs.234,000/-**.

(vi) Certificate of Service

56. The Claimant is entitled to certificate of service by dint of Section 51 of the Employment Act, 2007.

(vii) Costs and Interest

57. The Respondent shall pay Claimant's costs for this suit and Interest shall accrue from the date of this Judgment until payment in full.

Conclusion

58. In conclusion the Judgment in favour of the Claimant as against the defendant is entered in the following terms:

- (i) Outstanding salary Kshs.17,250
- (ii) One month's salary in lieu of notice Kshs.19,500
- (iii) Untaken leave days Kshs.19,410
- (iv) Damages for unlawful termination Kshs.234,000

Total award Kshs.290,160

59. The Claimant is also awarded costs. Interest shall accrue at Court rates from the date of this Judgment until settlement in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF NOVEMBER 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered

through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE