



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT NAIROBI

CAUSE NO.2536 OF 2016

CHRISTOPHER OPONDO MULANGA.....CLAIMANT

VERSUS

DATA RUSH SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. By statement of claim dated 6th December 2016 the Claimant sought the following reliefs:-

a. Damages for unfair termination under section 49 of the Employment Act Kshs.16377.40vvx 12 months = Kshs. 196,528.80/-

b. House allowance calculated at 15% of the Basic pay 14,241.20 x 15% x 98 months = Kshs. 209,345.64

c. Service pay (16 days gross salary for each year worked) = Kshs. 69,876.90

Total Kshs. 475,751.35/-

d. A declaration that his termination was unfair

e. Costs of the cause

2. The Claimant filed together with the statement of claim dated 6th December 2016 list of witnesses, list of documents, Claimant's witness statement and bundle of documents marked as 'Com 1, COM 2, COM 3 a & b, COM4, COM 5 a & b, COM 6(a and b)' and Reply to statement of response dated 2nd March 2017.

3. The Respondent entered appearance and filed Response dated 26th January 2017 with documents marked as DRSL1, DRSL2, DRSL3, DRSL4, DRSL5, list of witnesses dated 17th December 2018, Respondent's list of documents dated 17th December 2018(1-12), Respondent's undated witness statement of Kevin Sunguti with authority to act and the minutes, Respondent's substituted list of witnesses dated 30th July 2021 and Respondent's witness statement of Daniel Odwisa dated 30th July 2021 together with authority to swear affidavit and minutes.

4. The case was heard on the 6th August 2021 with each party calling one witness. The Claimant was represented by the law firm of Simiyu Opondo & Kiranga & Co. Advocates. The Respondent was represented by the law firm of Muiruri & Wachira Advocates.

5. The parties agreed to file written submissions. The Claimant's written submissions are dated 12th August 2021. The Respondent's written submissions are dated 26th August 2021.

THE CLAIMANT'S CASE

6. The Claimant Christopher Mulanga Opondo testified on oath in Kiswahili language. He told the court that he was formerly employed as a rider by the Respondent. The Claimant adopted his undated witness statement filed in court on the 9th December 2016 as his evidence examination in chief. The Claimant produced his filed bundle of documents marked as exhibit COM1-COM6 under Claimant's list of documents dated 6th December 2016 as his evidence in examination in chief.

7. The Claimant told the court that he was employed by the Respondent on the 10th April 2007 and the employment terminated on the 9th February 2016. The Claimant states that he was not given the reasons for the termination and was not called for hearing. The Claimant told the court his gross salary as at time of termination was Kshs. 16, 3777.40.

8. The Claimant denied that he was not entitled to a hearing under his contract of employment. The Claimant states that the contract wording was not in accordance with the procedure where it was stated he was entitled to 1 months' notice.

9. The Claimant on cross examination agreed that his employer paid for NSSF and admitted that he was paid all benefits under the contract. The Claimant denied that the last contract he got was for one year ending August 2016. The Claimant noted that the last contract he signed was under the union which was active at time of termination but no current contract with employer.

10. On re-examination the Claimant told the court that his first contract was dated 1st October 2009 to 31st October 2011. That he signed another contract exhibit COM3(b) dated September 2011 expiring in August 2012. That he did not sign another contract thereafter. The Claimant told the court that he continued working and receiving salary without a contract and produced pay slips upto last payment.

11. The Claimant told the court that he was not give reasons for the termination.

12. The Claimant told the court that he was paid all dues for leave and days worked.

The Respondent's case.

13. The Respondent called one witness Daniel Odwisa (RW) who said he was the Respondent's Human Resource and Administration Manager. RW adopted his statement dated 30th July 2021 as his evidence in examination in chief.

14. RW marked and produced as the Respondent's evidence in examination in chief exhibits 1-11 the list of documents dated 17th December 2018 .

15. RW told the court that he knew the Claimant as a former employee employed as a rider by Respondent. That his contract was confirmed after 3 months of probation after which he was given a contract for 2 years from 1st October 2009. Later he was given a contract of one year from September 2011 to October 2012. The Claimant was not issued with another contract and the Respondent assumed it was thereafter renewed after every year.

16. RW told the court that the Claimant's employment was terminated in 2016. That he was terminated as per his contract. The termination letter was dated 9th February 2016 but effective 11th February 2016.

17. RW told the court the contents of the termination letter was that the last working day was 11th February 2016, he was to be paid for days working including 11th February , payment of accrued leave if any, payment of 1 month salary in lieu of notice as per contract and was to be issued with certificate of service. The Claimant cleared and was issued with cheque for final dues dated 4th march 2016 for Kshs, 19,854/-. The Claimant picked the cheque and appealed to the Union.

18. RW told the court that the Respondent 's management was summoned by the union vide letter dated 17th may 2016 and they responded on the 23rd June 2016. Later the union secretary arbitrated between the parties as the union office, they negotiated and agreed to pay the Claimant Kshs. 77,000/- ex gratia less statutory deductions. The cheque was prepared, the Claimant did not pick the cheque and instead sued them. The cheque minus tax is under exhibit DRSL9.

19. RW told the court damages for unfair termination should not be granted as the Claimant was terminated as per contract and paid notice. On claim for house allowance, RW told the court that the Claimant was paid consolidated amount meaning there was a percentage for basic and house allowance. He referred the court to look at the pays slip which indicated that (exhibit 11 of the Respondent's bundle of documents). On service pay RW told the court that the Claimant was paid for NSSF. RW asked court to dismiss case with costs to the Respondent.

20. On cross -examination RW told the court the reason for the termination was due to the end of the contract. The certificate of service for Claimant was prepared and not picked. The Claimant failed to pick from the Respondent the cheque for Kshs.77,000/- less statutory deduction which was ready. RW told the court that they notified the Claimant of the cheque through the secretary general union in letter dated 12th October 2016. RW could not explain why the letter at the bottom indicated the Claimant declined to pick cheque and opted to sue the company yet the demand letter was dated 28th October 2016. RW told the court that there was no provision for service pay in the contract and that the Respondent provided for NSSF.

21. On re-exam RW told the court that they filed witness statement after the case was filed in court. That there was a difference between what was demanded being Kshs. 475,751.35 and the union arbitration award of Kshs. 77,000/- less statutory deductions.

Legal analysis and findings

22. The parties identified the following as issues for determination in the document filed in court dated 20th May 2019 titled list of agreed issues signed by both law firms: -

a. Whether the termination letter dated 9th February 2016 enumerated the reasons for terminating the Claimant's employment?

b. Whether the Claimant was accorded a formal hearing before his employment was terminated?

c. Whether the termination of the Claimant's employment by the Respondent was fair?

d. Is the Claimant entitled to the reliefs sought in the memorandum of claim?

23. The Court addressed the issues as follows: -

Whether the termination letter dated 9th February 2016 enumerated the reasons for terminating the Claimant's employment

24. The Claimant led evidence that he was employed on contract on 10th April 2007 (exhibit marked 'COM1') and placed on probation for 3 months. He told the court that he was thereafter confirmed to employment vide letter dated 30th July 2007 for a contract of 2 years renewable (Exhibit marked 'COM2'). He told the court his contract was further renewed on 1st October 2009 for two years (Exhibit marked 'COM 3A') with last letter of renewal for 1 year dated Sep 2011(exhibit marked 'COM3B'). The Claimant was not issued with another letter after August 2012 when his last contract expired. He however continued in employment upto 11th February 2016 when his employment was terminated vide letter dated 9th February 2016 to be effective 11th February 2016. In total he had served over 8 years.

25. The Claimant was terminated vide a letter dated 9th February 2016 issued by Rono Robert of the Respondent's Human Resources and Administration. The Claimant produced the letter as his evidence being Exhibit marked 'COM4' by the Claimant. The Respondent also produced the same letter as exhibit 'DRSL5'. The letter does not disclose the reasons for the termination of the employment. It simply states in part. 'Data Rush has decided to terminate your employment as per your employment contract.'

The court finds the reasons for termination of the employment of the Claimant by the Respondent were not disclosed in the letter of termination of employment dated 9th February 2016.

Whether the Claimant was accorded a formal hearing before his employment was terminated?

26. In answer to this issue, it is apparent from the proceedings and pleadings the Claimant was not accorded any hearing before his employment was terminated by the Respondent.

Whether the termination of the Claimant's employment by the Respondent was fair?.

27. The Claimant submits that it is considered unfair to terminate a contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair. The Respondent led evidence to the effect that the Claimant was terminated in compliance with the terms of the contract and company policy. The Respondent called Danie Odwisa as its witness who adopted his statement dated 30th July 2021. The witness confirmed the Claimant's evidence on the contracts of service as true. RW told the court after last contract expiring October 2012 (the court notes the contract was to expire august 2012 exhibit DRSL4), the Claimant was not issued with another contract and they assumed it was renewed every year. RW told the court the Claimant on termination was not to be paid 1 month's salary in lieu of notice, salary for days worked inclusive of 11th February 2016 and accrued leave if any and to was be issued with certificate of service. The Respondent submits that the termination was in compliance with the contract and that the only test by courts where terms are reduced to written contract is whether termination was within the terms of the contract and cites two cases being:- *National bank of Kenya Ltd v Pipe Plastic Samkolit (k)ltd and another (2001)eKLR* and *Pius Kimaiyo Langat v Cooperative Bank of Kenya (2017)eKLR* to effect parties are bound by their contract unless it is proven to be tainted by fraud, coercion or undue influence. The Respondent submits that the contract dated 30th July 2007 and the Respondent's policy provides that the contract could be terminated upon issuance of 1 months' notice or payment in lieu of notice or in event of gross misconduct summary dismissal. The Respondent submits that the letter of termination invoked the contractual rights to terminate upon payment of 1 month salary in lieu of notice whereupon clearance the Claimant accepted the termination of his employment by receiving without protest the final dues paid to him. The Claimant submits that exfacie the Respondent complied with the terms of the contract by paying the Claimant the sum of Kshs. 19,854.80/-, the latter's one month salary in lieu of notice. The Claimant submits that, notwithstanding the payment as per contract, the termination of his employment was unfair. The Respondent avers that the contract was terminated pursuant to a contractual notice under section 35 and 36 of the Employment Act and not on grounds of misconduct, poor performance or physical incapacity. The Respondent submits that in the circumstances the Claimant was not entitled to reasons for the termination or fair hearing under section 41 and that the termination was fair having been contractually agreed and statutory permitted. The Respondent submits that on or about 9th February 2016 and at the time when the Claimant's contract had ended the Respondent decided to terminate the contract. This was also in the statement of the witness. The court finds that this is not factual or true as the Claimant had no active written contract the last one having been indicated to expire in august 2012 (exhibit DRSL4). The Claimant was offering services in employment without a contract from September 2012 to date of termination.

To buttress its claim the Respondents cites the decision of the Court of Appeal in *Kenya Revenue Authority v Menginya Salim Mungai(2010)eKLR* where inter alia the Court of Appeal then held that, '*indeed a contracting party does not have to rely on a misconduct in order to terminate a contract of service and a party can terminate such a contract without giving any reason*'(the Respondent states emphasis theirs). The decision was an appeal from the decision of Justice Ojwang (as he then was) in H.C.C.NO.1139 of 2002 which is a case filed before the enactment of the 2007 Employment Act. The Court finds that the jurisprudence in that case was based on the principles of common law on the freedom of contract a position which has since changed on enactment of the Employment Act in 2007 and passing of the 2010 Constitution which adopts best international practices under the treaties of which Kenya is a member to apply as law. The decision cited by the Respondent of the Court of Appeal in *Kenya Revenue Authority v Menginya Salim Mungai(2010)eKLR* is no longer applicable

to defeat requirement of fairness in termination of employment contracts of service.

The Claimant relies on the Court of Appeal decision *Kenfreight (E.A) Limited v Benson K. Nguti (2016)eKLR* where the Court of Appeal at page 4 of the decision grappled with the issue whether the employer(the Appellant in that case) could elect to terminate the employee's (the Respondent in that case)employment outside the provisions of the Employment Act and rely solely on the contract of employment as the Respondent attempts to do in the instant case. In that case the Respondent submitted it was not bound by the fair procedure but by the terms of the contract of employment only. The Court of Appeal in the decision found that the position by the Appellant in that case was based on freedom of contract and common law principles which position was before the enactment of the 2007 Employment Act. In that case, just like the instant case, the Appellant paid the Respondent one month's salary in lieu of notice in compliance with the terms of employment contract. The Court of Appeal at page 10 of the said decision states in the 6th paragraph, '**apart from issuing proper notice according to the contract (or payment in lieu of notice as provided)an employer is duty bound to explain to the employee in the presence of another employee or union official, in a language the employee understands, the reasons or reasons for which the employer is considering termination of the contract. In addition, the employee is entitled to be heard and his representations, if any, considered by the employer before the decision to terminate his contract of service is taken**'. This is now the current law and the provisions of section 45 of the Employment Act are couched in mandatory terms.

Section 45(1) provides, '**no employer shall terminate the employment of an employee unfairly.**' Section 45(3) provides that '**an employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated**'.

It is not in dispute the Claimant served from 10th April 2007 to 11th February 2016. The court finds that the Claimant is within the law to complain that his termination was unfair for lack of reasons for the termination and for lack of hearing before the termination.

Section 43 of the Employment Act places the burden to prove the reasons or reasons for the termination on the employer and where the employer fails to do so the employment shall be deemed to be unfair. The Claimant told the court he was not given reasons for the termination nor was he heard before the termination of his employment. The Respondent admitted it did not give reasons in the termination letter nor did it hear the Claimant before the termination as required under the law.

Consequently the court finds that the termination of the employment of the Claimant by the Respondent was unfair for lack of reason or reasons and for lack of procedural fairness in violation of sections 43 and 45 of the Employment Act.

Is the Claimant entitled to the relief sought?.

28. In view of the foregoing holding above, I make declaration that the Respondent's action of terminating the Claimant's employment contract vide the letter dated 9th February 2016 without reason and hearing was unfair and unlawful.

29. **With respect to the claim for compensation for unfair termination**, the Claimant submits that the Claimant worked for the Respondent for a period of over 8 years. That his record was unblemished and this is a compelling factor for such an employee to qualify for a maximum award. That his last gross salary was Kshs. 16,377.40 /-That also taking into account the Respondent's failure to afford the Claimant an opportunity to be heard the Claimant submits that 12 months' salary award will be in order as damages for unfair termination. The Respondent submits that the Claimant is only entitled to damages if the termination of contract is unjustified. The Respondent submits that the termination was lawful, fair, legal and justified thus the Claimant is not entitled to damages for unfair termination. The Court already found that the termination of the Claimant's employment by the Respondent was unlawful. The Claimant had served for over 8 years being from 10th April 2007 to 11th February 2016. The Claimant was not given reasons for termination, it is safe to assume his conduct as employee had no contribution towards the termination. The Claimant confirmed to court that he was paid all his dues for leave and days worked but was not given certificate of service. The Court finds that considering the length of service, fact that the option of reinstatement is not available and the innocence of the employee on the matter of termination the court finds a 12 months gross salary compensation for unfair termination is justified. The Claimant last salary payslip attached indicates he was paid gross salary of Kshs. 16,377.40 /-(exhibit COM5 A) thus Kshs. 16,377.40x 12 months = Kshs. 196,528.80/- is awarded as compensatory damages for unfair termination with interest at court rate from the date of judgment.

30. **On the claim for House allowance calculated at 15% of the Basic pay 14,241.20 x 15% x 98 months = Kshs. 209,345.64.** The court notes that house allowance was paid in the payslip produced for January 2016 of which is used to calculate damages. The Respondent submits that the Claimant was under fixed terms of contract under the duration of employment with consolidated salary. Each contract issued subsequently covered its term and the previous contract thus covered. The Claimant submits that the Claimant concedes that he was paid his final dues save for service pay and certificate of service. The court finds that the Claim for house allowance is not proved as the Claimants concedes only outstanding dues are for service pay.

31. **On claim for Service pay (16 days gross salary for each year worked) = Kshs. 69,876.90.** The Respondent submits that the Claimant is not entitled to service pay as he was under NSSF. This is a correct position of law under section 35(6)(d) of the Employment Act. The court adopts with approval the decisions cited by the Respondent in submissions being *Hassanath Wanjiku v Vanela House of Coffee (2018) eKLR* and *John Magiri Heho v Kenya Interntaional Limited (2018) eKLR* to effect that a member of NSSF is not entitled to service pay. The claim for service pay is dismissed.

32. **Claim for Issuance of certificate of service** under section 51 of the Employment Act is granted.

33. Cost of the claim to be borne by the Respondent.

CONCLUSION AND DISPOSITION

34. I have found that the termination of the Claimant's employment contract by the Respondent was unfair and unlawful. I further found that the Claimant is entitled to compensatory damages the equivalent of 12 months' gross salary. I have dismissed the claim for housing allowance and service pay. Consequently, I enter judgment for the Claimant against the Respondent in the following terms:-

a. Compensatory damages for 12 months (Kshs. 16377.40x 12 months) = total sum of Kshs. 196,528.80/- is awarded.

The award above is subject to statutory deductions.

b. I also award the Claimant interest on the award sum above at court rates from the date hereof until payment in full.

c. Issuance of certificate of service under section 51 of the employment act.

d. Costs of this suit shall be borne by the Respondent

WRITTEN AND DATED THE 11TH NOVEMBER 2021 AT BUNGOMA

.....

J.W. KELI

JUDGE

DELIVERED AND DATED THIS 16TH NOVEMBER 2021 AT NAIROBI

.....

Judge

In the presence of

No appearance for the parties.