



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 444 OF 2018

SAMMY MWENDWA MUSYOKA.....CLAIMANT

- VERSUS -

SIMBA COACH LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th November, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 28.06.2018 through M/S Otieno Asewe & Company Advocates. The claimant pleaded that the respondent employed him as booking clerk and as at separation in July 2017 he earned Kshs. 10, 000. 00 per month. His boss was Mr, Rashid Suleiman who owned and managed Interstate 2000 Ltd, Falcon Coaches Ltd and later Simba Coach Ltd, the respondent. He alleged that the respondent changed names frequently to avoid statutory obligations to the employees. The claimant alleged that he brought a request for medical leave to work which his boss rejected and instead the boss fired the claimant. The dismissal is alleged to have been unfair for want of due process. He claimed for:

- 1) One month pay in lieu of notice Kshs. 19, 909.00.
- 2) Unpaid leave for year 1996 – 2017 Kshs. 321, 720.00.
- 3) Service pay for 21 years of service Kshs. 241, 290.00.
- 4) Underpayment for:
 - a) May 2013 – April 2015 Kshs. 140, 616.00.
 - b) May 2015 to April 2017 Kshs. 182, 928.00.
 - c) May 2017 – July 2017 Kshs. 18, 818.00.
- 5) Public holidays worked 2000-2010 Kshs. 153, 200.00.
- 6) Public holidays for 2010 to 2017 Kshs. 117, 964.00.
- 7) Compensation for unfair termination 12months x 19, 909 = Kshs. 238, 908.00.
- 8) Total Kshs. 1, 435, 353.00.

The claimant alleges the dismissal was unfair, unconstitutional and unlawful for breaching sections 35, 41, 43, 45, and 49 of the Employment Act. He prayed for judgment against the respondent for:

- a) Payment of Kshs. 1, 435, 353.00.
- b) A declaration the termination was unfair, unjust and wrongful.

c) Costs of the claim and interest at Court rates.

d) Any other relief the Honourable Court may deem just and fit to grant.

The respondent filed a reply to the memorandum of claim on 19.07.2019 through M/s Sherman Nyongesa & Mutubia Advocates. The claimant admitted employing the claimant as a booking clerk at Kshs. 10, 500.00 per month as at termination in July 2007. The respondent denied that it changed its name to avoid statutory duties to the employees and as alleged for the claimant. The respondent further pleaded as follows:

a) It initially employed the claimant on annual contract of employment after he applied for employment by the letter dated 01.11.2008 and parties signed the contract of service on the same 01.11.2008.

b) The respondent is a stranger to Interstate 2000 Ltd and Falcon Coach Ltd.

c) Rashid Suleiman is not a shareholder or director of the respondent and was never involved in respondent's decision making.

d) In July 2017 the claimant absconded from his duties and wilfully deserted from employment without serving notice to the respondent of intention to terminate employment. The respondent terminated the employment because in any event the claimant was not available for any due process. The termination was not unconstitutional, unfair and unlawful.

e) The respondent prayed that the suit be dismissed with costs.

The claimant testified to support his case. The respondent's witness (RW) was Jumaan Awadh, the Senior Clerk. Final submissions were filed for the parties. The Court has considered all material on record and finds as follows.

To answer the **1st issue** for determination the Court returns that parties were in a contract of employment. The claimant testified in cross-examination that he was employed by the respondent by a contract in 2008. He also testified that he had no exhibit showing directors of the companies he alleged were predecessors of the respondent. The Court finds that per the claimant's own evidence, there is no reason to doubt the respondent's case and evidence that the claimant applied and was employed by the respondent by the contract dated and signed on 01.11.2008 duly exhibited for the respondent. The last gross pay was Kshs. 10, 500.00 per month and as per the payment vouchers exhibited by the claimant.

To answer the **2nd issue** the Court returns that the claimant's employment was terminated by the respondent's letter of dismissal dated 17.07.2017 and on account of the claimant staying away from duty from 05.07.2017 to 17.07.2017. He was dismissed with loss of all privileges. The claimant testified that he received the dismissal letter.

The **3rd issue** for determination is whether the dismissal was unconstitutional, unlawful and unfair. The respondent's case is that the claimant absconded duty, he was unavailable for any form of disciplinary process, and he was dismissed accordingly.

The claimant testified in chief that he sought 14 days of paternity leave which was granted and while on leave he developed an eye problem. He returned to work and asked for more time but he was moved from office to office and was later told there was no more work for him. In cross-examination he testified that he received the letter of termination after he returned from paternity leave. He further testified thus, **"No one called me asking me why I was absent... my wife was delivering. I got 14 days' leave. My written statement says 4 days. I received letter of termination on return. I had been away for 13 days."**

RW testified that prior to the claimant's termination, the claimant used not to come on duty and he was dismissed per the letter of dismissal on record.

The Court has considered the evidence. The claimant's evidence is found not coherent. It is not clear whether he was given a 14 days', 4 days' or 13 days' paternity leave. He has not exhibited any documents to justify the alleged paternity leave then sick off on account of eye problem. In the circumstances, the Court returns that as per the letter of dismissal the respondent has established per sections 43, 45 and 47 (5) that as at termination the claimant had indeed absconded duty and it was without permission or reasonable cause. It is true that no show cause notice and disciplinary hearing took place per section 41 of the Employment Act, 2007. To that extent the termination was unfair procedurally. However, the Court considers that in view of the numerous days the claimant was absent, he contributed to his predicament 100% and he is undeserving of any compensation under section 49 of the Employment Act, 2007. Nevertheless, in consideration of the procedural refraction each party will bear own costs of the suit. In view of the established gross misconduct, the Court finds that the respondent was entitled to dismiss with a shorter notice than was agreed contractually provided and per section 44 of the Act. The prayer for one month pay in lieu of termination notice is therefore declined.

The **4th issue** for determination is whether the claimant is entitled to the other remedies. The Court finds that the respondent cannot be liable for the claims and prayers prior to the employment contract between the parties coming into effect on 01.11.2008.

The Court has reconsidered the pleadings, evidence and submissions. The claimant has not laid basis of the alleged underpayments by showing the relevant wage orders as they applied to him and how he arrived at the computation as claimed and prayed for. As submitted for the claimant it was the duty of the respondent to maintain employee records under section 74 of the Act and to prove terms of the contract of service per section 10(7) of the Act. However, the cited provisions did not redeem the claimant's duty to specifically plead the basis of the underpayment and the particulars of alleged underpayment, especially, once the monthly payment had been established.

The Court has similarly reconsidered the claimant's witness statement and the oral evidence in Court and no evidence was provided to support the claim and prayer on payment for alleged work on public holidays. The claim will therefore fail.

The claimant was a member of NSSF per the payment vouchers and the claim for service pay is found barred under section 35 (6) of the Act.

In conclusion, judgment is hereby entered for the parties for:

- 1) The declaration the termination was unfair for want of a notice and hearing under section 41 of the Employment Act, 2007.
- 2) Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 5TH NOVEMBER, 2021.

BYRAM ONGAYA

JUDGE