



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2022 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

ALOYCE ODONGO OWIDI.....CLAIMANT

VERSUS

SPIRE BANK LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed a memorandum of claim dated 30th September, 2016. He states that he was employed by the Respondent for 7 years as a parking attendant at a salary of Kshs.15000/= per month.

He says that on 26th July, 2016 the Respondent without any reason and in blatant violation of Employment Act 2007 he terminated his services.

2. The Claimant says that as a result of the unlawful and malicious termination of his employment he suffered damages.

3. He prays for a declaration that his termination was unlawful and malicious and prays for the following awards:-

(a) (i) Compensation of Kshs.380,195/=

(ii) One month pay in lieu of notice Kshs.15,000/=

(iii) Unpaid leave for 7 years Kshs.10,500/=

(iv) Damages out of a loan facility Kshs.27,695/=

(v) 15 days service pay for 7 years

worked Kshs.52,500/=

(b) He also prays for interest on the above amount at court rates from the date of termination.

(c) Severance pay

(d) General and aggravated damages for unlawful termination.

(e) Certificate of service

(f) Costs of suit and interest at court rates.

4. The Respondent in his memorandum of response of states that the Claimant was employed on a contract of 3 months which had automatically expired.

5. The Respondent further states that the Claimant breached a loan facility granted to him by the Respondent and avers he will counter claim for the said amount.

6. In the Respondent's counter claim he states that on 18th September, 2014 they advanced the Claimant a loan of Kshs.100,000/= repayable in 24 equal monthly instalments.

7. The Respondent further states that when the Claimant's employment terminated he defaulted in making the payments and as a result it fell into arrears of Kshs.37,413.57/= as at 31st May, 2017 and the same continues to accrue interest.

8. The Respondent therefore prays that the Claimant's suit be dismissed with costs and interest. He also prays that Judgment be entered against the Claimant for Kshs.37,413.57/= as at 31st May, 2017 together with interest at court rates till full payment.

He also prays for costs of the suit and counterclaim and interest.

9. The two parties did not file any submissions. The court therefore considered the respective pleadings and the oral evidence adduced by the Claimant. The Respondent opted not to call a witness.

10. The issues for determination are whether the Claimant's employment was unfairly terminated as per his allegation.

If the court finds his employment was unfairly terminated then the next issue will be if the Claimant is entitled to the reliefs sought.

The court will also determine if the Respondent is entitled to his counter claim for balance of the loan advanced to the claimant.

DETERMINATION

11. The evidence adduced orally, as well as from the Claimant's pleadings is to the effect that the Claimant was employed by the Respondent for 7 years.

A letter produced as an exhibit by the Claimant indicate the Claimant was given services of a parking attendant by the bank in 2008 November and the same was terminated on 22nd July, 2016. He was informed that his services would cease from 1st August, 2016.

12. The Respondent has not rebutted the evidence of the Claimant that he was his employee. The letters produced refer to provision of parking services which the Respondent said was for three months. The Respondent indirectly implied that the Claimant was his employee. Indeed in his response the Respondent says the Claimant had a three months contract.

13. That however the Respondent is not being very truthful because in 2016 the Respondent terminated claimant's services. That was to confirm what the Claimant had stated to the effect that he worked for the Respondent for 7 years.

14. Furthermore the Respondent gave him a loan of Kshs.100,000/= from September, 2014 to pay in 24 equal monthly instalments.

Claimant had an employee/employer relationship for all that period and the claim by the Respondent that the contract was for three months is blatant falsehood.

15. Having established that the Claimant was a permanent employee of the Respondent from 2008 to 2016. I now want to establish if the Claimant was unlawfully and maliciously terminated from employment.

In his evidence the Claimant says he was terminated from employment without any reason.

16. The Respondent did not call for any oral evidence and he did not produce his witness statement.

In the circumstances there was no evidence given by the Respondent to controvert the evidence by the Claimant.

Furthermore the claim by the Respondent that the Claimant was on a fixed contract of three months which expired when the claimant left employment is not true.

The Claimant was on permanent employment from 2008 until 2016 when the Respondent terminated his services for reasons that the bank was "reviewing its services and making changes where necessary".

17. That reason seems very unconvincing and is not clear if it is termination for a cause or is redundancy. The Respondent failed the test as provided in Section 45 (1) and (2) of the Employment Act 2007.

Section 45 (1) provides that no employer shall terminate the employment of an employee unfairly.

Section 45 (2) provide that the termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid.

18. The Respondent also failed to justify that the grounds of termination of employment of the Respondent were valid as provided in Section 47 of the Employment Act 2007.

In the case of **KENFREIGHT (E.A) LIMITED VS BENSON K. NGUTI (2016) eKLR** the court held that the employer is duty bound to explain to an employee in the presence of another employee or a union official in a language that the employee understands the reason or reasons for which the employer is considering termination of the contract. In addition an employee is entitled to be heard and his representation if any, considered before the decision to terminate his contract of service is taken. The court therefore held that no reason was given at all why his services were terminated and he was not informed of his transgressions. Neither was he given an opportunity to explain himself.

In this instant case, I am as well convinced the Respondent gave no valid reason why he abruptly terminated the Claimant's employment and without notifying him and/or giving him an opportunity to explain himself.

The court declares the termination of the Claimant's employment under the circumstances was unlawful and unfair.

19. The last issue for determination by this court is whether the Respondent is entitled to their counter claim for Kshs.37,413.57/= with interest. The Claimant admitted he owed the Respondent some money when he exited from the respondent's employment.

That amount is therefore due and owing and so should be recovered. The court will not go into calculations of interest of the loan as the Respondent did not substantiate about the interest.

RELEIF AWARDED

20. Having entered judgment in favour of the Claimant the court awards him the following awards:-

(i) 1 month salary in lieu of notice Kshs.15,000/=

(ii) Unpaid leave days for 7 years – Respondent did not controvert that prayer so is awarded Kshs.105,000/=

(iii) Damages out of loan facility is not proved and is declined.

(iv) Service pay for each year worked is awarded since Respondent did not produce records for statutory payments Kshs.52,500/=

(v) Compensation for unlawful termination is awarded 4 months Kshs.60,000/=

CONCLUSION

21. The Claimant is awarded a total of Kshs.232,500/= less the Kshs.37,413.57/= owed to the Respondent.

Costs follow the event and so the same are awarded to the Claimant.

Interest is also awarded until payment to the Claimant.

22. Certificate of service to be given to the Claimant without delay.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 9TH DAY OF DECEMBER, 2021.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE