



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 2271 OF 2015**

(Before Hon. Justice Hellen S. Wasilwa 27<sup>th</sup> February, 2020)

**WYCLIFF OLUOCH.....CLAIMANT**

**VERSUS**

**UNITED BAGS MANUFACTURERS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant was employed by the Respondent as a Senior Machine Operator. However, his employment was terminated on 31/12/2014. Aggrieved by the termination, the Claimant instituted this suit seeking the following prayers:-

- a. 1 months' salary in lieu of notice of KShs. 33,500.00.**
- b. Severance pay amounting to KShs. 167,500.00.**
- c. 12 months' pay as compensation for wrongful/ unfair termination amounting to KShs. 402,000.00.**
- d. Interest on (a) (b) (c) above.**
- e. Costs and interest.**

2. The Respondent filed a Memorandum of Reply on 25/8/2015 and sought the following prayers, that:-

- a. The claim against it be dismissed.**
- b. The Respondent be awarded as against the Claimant the sum of KShs. 33,500.00 being 1 months' salary in lieu of notice.**
- c. A declaration that the Claimant has no valid claim against the Respondent.**
- d. A declaration that the contract between the parties herein lapsed by effluxion of time, thus the Claimant is not entitled to the reliefs sought.**
- e. The Respondent be awarded the cost of this cause.**

**The Claimant's Case**

3. The Claimant avers that the termination of his employment was unlawful and malicious. Further, that the Respondent failed to pay him his terminal dues.

4. During trial, it was his testimony that he worked for the Respondent until 2016. He stated that when his first contract lapsed in 2013, they entered into another 3-year contract which was to lapse in 2016. He stated that he was never issued with a copy of the contract.

5. It was his evidence that when he came back to work in January 2015, his supervisor informed him to wait for communication from their senior on whether his contract would be renewed. He came back at a later date and the supervisor denied him entry.

6. The Claimant stated that NSSF rejected the Respondent's letter of 7/4/2015 since it did not state the exact time he had commenced his employment, and when he resigned. It is his evidence that the letter of 10/4/2015 indicated that his employment was terminated because he absconded duty. He stated that he was not issued with a show cause letter prior to the termination of his employment.

7. During cross-examination, he maintained that the contract he signed indicated that it would lapse in 2016. He also maintained that he came back to work on 5/1/2015.

8. Upon re-examination, it was his testimony that he did not sign any other contract other than that of 1/3/2010.

### **The Respondent's Case**

9. The Respondent contends that the initial contract was entered into on 1/3/2010 and was to lapse on 31/3/2013. However, before the said termination they entered into another contract, which commenced on 1/1/2012 and was to terminate on 31/12/2014.

10. The Respondent avers that the Claimant proceeded on leave in December 2014 for a period of 21 days. However, the Claimant never resumed work but came back in May 2015. At this time, the contract had terminated by effluxion of time.

11. The Respondent avers that the Claimant's absenteeism was brought to his attention vide the letter of 10/4/2015 even though the contract had already lapsed by effluxion of time.

12. The Respondent denies terminating the Claimant's employment and contends that the Claimant never notified it of his intention to renew the contract.

13. The Respondent is of the position that the Claimant is not entitled to payment in lieu of notice as he absented himself from work. Further, that the Claimant is not entitled to severance pay as the Respondent remitted all the necessary payments to NSSF on the Claimant's behalf.

14. The Respondent avers that the Claimant is not entitled to compensation for unlawful termination as his contract lapsed by effluxion. It is averred that the Respondent paid the Claimant all his terminal dues hence he is not entitled to any further benefits.

15. Ramnikhal Shah, testified as RW1. He adopted his witness statement dated 7/9/2017 as his evidence and relied on the bundle of documents filed, as his exhibits.

16. He contended that the Claimant was employed on 1/3/2010 and not 1/1/2010 and was paid a salary of KShs. 17,500.00 and a house allowance of KShs. 2500.00. The salary was later increased to KShs. 24,000.00, his house allowance increased to KShs. 4,000.00 and he was added travelling allowance of KShs. 2,500.00.

17. It was his testimony that the Claimant went on leave and never reported back. The contract ended on 31/12/2014 and no notice of renewal was received from the Claimant. However, he reported back in May 2015 but he couldn't be allowed back since his contract had lapsed. He concluded his examination in chief by asserting that the Claimant was paid some money as service pay hence not entitled to the reliefs sought.

18. During cross-examination, it was his testimony that they had worked with the Claimant from 1/1/2010 before the Claimant was issued with a contract. When presented with the certificate of service, he conceded that the same indicated that the Claimant had worked with the Respondent from 1/1/2012 to 31/12/2014.

19. He conceded that in his response to the demand letter, he indicated that the Claimant had been dismissed for misconduct. He stated that the Claimant was not issued with a notice when his contract was terminated but contended that they had a meeting with the Claimant.

20. Upon re-examination, it was his testimony that the contract was for a 3-year period and lapsed on 31/12/2014.

21. David Hunja, testified as RW2. He adopted his witness statement dated 7/9/2017 as his evidence. He maintained that the Claimant commenced his 2<sup>nd</sup> contract in 1/3/2010 and not 1/1/2010. It was his evidence that the Claimant's name only started appearing in the Respondent's NSSF Contribution list in 1/3/2010. He stated that the Claimant started the 2<sup>nd</sup> contract on 31/1/2012.

22. It was his testimony that the contract provided that 1 months' notice was to be issued if a party wished to renew the contract. He maintained that the Claimant's employment was not terminated on 31/12/2014 as the Respondent re-opened its office in 5/1/2015.

23. He testified that they had a meeting with the Claimant in May 2015 and he was informed that the reason the Respondent could not renew his contract was because he had absented himself from work and never requested for a renewal of the contract.

24. During cross-examination, he contended that there was no one working in December save for the guard but conceded that he had no document to prove the same. He admitted that he had not seen the contract of service prepared for the Claimant. There was no re-examination of the witness.

### **The Claimant's Submissions**

25. In his submissions filed on 4/12/2019, the Claimant submits that the Respondent did not discharge the burden of proof required under

Section 43 of the Employment Act. It did not have valid reasons for terminating his employment neither was due procedure followed, as such, his termination should be declared unfair within the meaning of Section 45 of the Employment Act. He relies on the cases of **Fredrick Muriithi vs. Five Forty Aviation Limited [2013] eKLR** and **Walter Ogal Anuro vs. Teachers Service Commission [2013] eKLR**.

26. It is the Claimant's position that the evidence given by the Respondent regarding the termination of his employment was contradictory. It is further submitted that the Respondent's allegation that his employment was terminated upon the expiry of his contract is an afterthought.

27. The Claimant submits that he is entitled to the reliefs sought. He also submits that he was never issued with a notice hence entitled to 1 months' salary in lieu of notice. Having been paid severance pay by the Respondent, the Claimant sought 12 months' compensation for wrongful and unlawful termination of employment.

### **The Respondent's Submissions**

28. In its submissions filed on 9/12/2019, the Respondent submits that the Claimant did not deny the execution of the impugned contracts or executing them. It is submitted that though the Respondent issued contradictory letters, the employment relationship was governed by the employment contract.

29. The Respondent further submits that since the Claimant did not work in 2015, no contract could be implied and as such, in the absence of the Claimant's renewal request, the contract terminated by effluxion of time. Consequently, there was no need to justify the reasons for termination. It relies on the cases of **Bernard Wanjohi Muriuki vs. Kirinyaga Water and sanitation Company Limited & Another [2012] eKLR** and **Samuel Chacha Mwita vs. Kenya Medical Research Institute [2014] eKLR** where the Courts held that there was no obligation for an employer to give reasons to an employee why a fixed term contract should not be renewed as the termination had not been occasioned by an employer's act.

30. The Respondent submits that the Claimant is not entitled to any of the reliefs sought as his termination was by effluxion of time thus not unlawful.

31. I have examined all the evidence and submissions of both Parties. From the evidence of the Claimant, he was initially a casual worker but from 2013, he was placed on a 3 year contract. The contract document was never given to him.

32. He indicates that he worked until January 2015 when the Respondent terminated his services. He sought to rely on his payslip and letter of termination, which shows that he was terminated on 10/4/2015 by the Respondent ostensibly for absconding duty.

33. The Respondent had maintained that the Claimant's contract was terminated on 31/3/2013 but they had entered into another contract, which commenced on 1/1/2012 which contract the Respondent did not submit before Court.

34. From the letter of termination, the Claimant was terminated for absconding duty and not because the contract elapsed.

35. The Respondent's contention that the contract ended by effluxion of time is not therefore true. I therefore find that the Claimant was terminated without following due process and I award him as follows:-

**1. 1 month salary in lieu of notice = 33,500/=**

**2. 8 months' salary as compensation for unlawful termination = 33,500 x 8 = 268,000/=**

**Total = 301,500/=**

**Less statutory deductions**

**3. The Respondent will pay costs of this suit.**

**Dated and delivered in open Court this 27<sup>th</sup> day of February, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ndegwa holding brief Kangethe for Claimant – Present

Ogondi for Respondent – Present