



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 790 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

RICHARD MUEMA PETER.....CLAIMANT

VERSUS

ADDED PERFORMANCE KENYA LIMITED.....1ST RESPONDENT

MR. SHIRAZ LAJI (M/D).....2ND RESPONDENT

MR. SULTAN LAJI (M/D).....2ND RESPONDENT

JUDGMENT

The claim herein was instituted vide the claimant's memorandum of claim dated 13th May, 2014 and filed on 14th May, 2014. It is the claimant's averment in the memorandum of claim that he was employed by the 1st Respondent herein, a Limited Liability Company with the 2nd and 3rd Respondents as its directors.

The Claimant avers that he was employed verbally by the Respondents on or about 15th February 2002 in the position of a driver at a monthly salary of Kshs.13,202/-. He avers that he performed his duties diligently and to the Respondents' satisfaction until 31st March 2014 when he was unlawfully terminated on account of redundancy vide the Respondents' letter dated 31st March 2014.

The Claimant avers that the Respondents failed to adhere to the mandatory provisions of Sections 40, 41 and 43 of the Employment Act, 2007 and therefore his termination was unlawful, wrongful and unfair.

Aggrieved by the decision to unfairly terminate his services, the Claimant filed the instant Claim seeking the following reliefs: -

1. The Respondents to pay the Claimant's remaining years before attaining retirement age of 60 years that is $60 - 55 = 5$ years; Kshs.16,732 x 5 years = Kshs.83,660/-.
2. The Respondents to pay the Claimant his full and final dues/benefits as sum of Kshs.540,251.60/-.
3. The Respondents to pay costs of this suit.

The Respondents in their Reply to the Claimant's Memorandum of Claim dated 8th September 2014 and filed in Court on 9th September, 2014 admitted having employed the Claimant as a driver for Motor Vehicle Registration Number KBR 977Z. It however denies that the Claimant worked with diligence during the subsistence of his employment.

The Respondents in particular aver that the Claimant admitted having

loaded six (6) extra batteries in a vehicle he was in charge of prompting the Respondent to serve him with a notice to show cause dated 26th March 2014.

The Respondent contends that the Claimant's termination was lawful and within the meaning of Sections 41 and 44 (4) (g) of the Employment Act, 2007 and that he was paid all his dues at the time of his separation. It contends that the instant Claim is void of merit and

therefore urges this Court to dismiss the same with costs to the Respondents.

The matter proceeded for hearing with the Claimant testifying on his own behalf. The Respondents however closed their case without calling any witnesses. Both parties thereafter agreed to file written submissions.

Claimant's Case

The claimant, testified that he was employed by the 1st Respondent from February 2002 in the position of a driver. He testified that he was assigned a turn boy and a storekeeper who were responsible for loading of the truck before the same was closed and locked at the depot. He further testified that the depot manager was the one responsible for opening of the truck on arrival.

The claimant testified that he worked diligently and to the Respondent's

satisfaction until 31st March 2014 when his services were terminated. He admitted having been issued with a show cause letter which he responded to on 27th March 2014. He stated that his response was not responded to by the Respondents herein and instead received a letter of dismissal.

The claimant maintained that his termination was unfair and urged this Court to allow his Claim as prayed.

On cross examination the claimant confirmed that he was employed by the 1st Respondent and that the 2nd and 3rd Respondents are directors of the 1st Respondent.

The claimant testified that he was paid his salary on a monthly basis and that NSSF and NHIF deductions were also made. He admitted that 5 batteries were lost and that his services were terminated following the loss.

The claimant maintained that his termination was unfair as he was not accorded any disciplinary hearing. He further maintained that he is entitled to the reliefs sought in his Claim and therefore urged this Court to allow the same as prayed.

The claimant testified that he was paid leave on a monthly basis.

On re-examination the claimant stated that his termination was for no reason as he was not the one who loaded the batteries into the vehicle and that he also did not keep the key and was therefore not responsible for the loss.

The Respondents closed their case without calling any witnesses. Parties were thereafter directed to file and exchange written submissions to the Claim.

Submissions by the Parties

The Claimant submitted that his employment was unfairly terminated without notice, justification or following procedure as provided under the Employment Act and that the termination was unfair and unlawful.

The Claimant further submitted that the Respondents failed to establish that they accorded him a disciplinary hearing prior to his termination as no minutes of any disciplinary hearing were availed to the Court.

The Claimant urged this Court to find in his favour and allow his Claim in terms of the reliefs sought therein. The Claimant relied on the cases of **Mwende Mbiti v Citrus Inn Limited (2018) eKLR**, **Paul Mumo Kitavi v ACM Containers Limited (2019) eKLR** and **Josephine Ayemba Musonye v Jitendra Rishi (2019) eKLR**.

Respondent's Submissions

The Respondents submitted that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim. It is further the Respondents' contention that they did satisfy the procedural fairness requirements as enshrined under Section 41 of the Employment Act, 2007 as the Claimant was accorded a hearing.

The Respondents' further submitted that the Claimant was summarily dismissed for the theft of company batteries and that his termination was in compliance with the provisions of Section 44(4)(g) of the Employment Act. That at the time of separation he was paid all his dues. The Respondents therefore maintained that the Claimant has no claim as against them.

The Respondents further submitted that the 2nd and 3rd Respondents are directors of the 1st Respondent and should therefore not be sued. It is further submitted that the said directors are mere representatives of the Company and could not be joined in their personal capacities. This Court was urged to dismiss the Claim against the 2nd and 3rd Respondents with costs on this basis.

With regards to the reliefs sought it was submitted that the Claimant is not entitled to payment in lieu of notice his employment having been summarily terminated.

On service pay, the Respondents submitted that the Claimant having been a member of NSSF and statutory deductions made on a monthly

basis is not entitled to service pay by dint of Section 35(6)(d) of the Employment Act, 2007.

It was further submitted that the Claimant has failed to prove his case by way of documentary evidence as exhibits to prove his case and therefore the entire claim fails in its entirety. The Respondents urged this Court to be guided by the decisions in the cases of **Kennedy Maina Mirera v Barclays Bank of Kenya Limited (2018) eKLR** and **Kennedy Ochieng Ochuka v Wilham Kenya Limited (2019) eKLR** in which the Court dismissed the matters both Claimants having failed to prove their cases to the required standard and dismiss this instant Claim with costs.

In conclusion the Respondents urged this Court to dismiss the instant **claim with costs**.

Analysis and Determination

Having considered the facts of this cause, evidence adduced by the parties

hereto, submissions and authorities cited by both the Claimant and the Respondent, the following are the issues for determination:

1. Whether the termination of the Claimant's employment was valid both procedurally and substantively
2. Whether the 2nd and 3rd Respondents have been wrongly joined in this matter
3. Whether the Claimant is entitled to the reliefs sought

Unfair termination

Under Section 45(2) of the Employment Act termination of an employee's contract of service is unfair where the employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employee's conduct, capacity or compatibility and that while arriving at the decision to terminate the services of such an employee fair procedure was followed.

The statutory burden for a complaint of unfair termination of employment or wrongful dismissal is contained in section 47(5) of the Employment Act. The section provides that –

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.

Reason for Termination

The reason cited for the termination of the Claimant herein was gross misconduct having been charged with the alleged loss of batteries. The Respondent further contends that the Claimant was accorded a hearing having been issued with a notice to show cause.

The Claimant on the other hand contended that the process of loading of trucks was done by his turn boy and the truck locked and was to be opened on arrival by the manager and that he was therefore not involved in any alleged misconduct.

He further maintained that he was not accorded a fair hearing and therefore averred that his termination was unlawful and unfair in the circumstances.

The Respondents despite maintaining that the Claimant was accorded a fair hearing failed to avail to this Court any minutes of a disciplinary hearing or other evidence to support the said assertion.

In absence of any evidence in rebuttal to the claimant's evidence, I find that the Claimant's termination was unlawful and unfair as it failed to comply with the mandatory provisions of Section 41 of the Employment Act, 2007.

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.”

Further, Section 45(2) provides that where the employer fails to prove either procedural fairness or validity of reason the termination of employment is unfair.

In the circumstances I find that the termination of the claimant's employment was unfair.

Whether the 2nd and 3rd Respondents have been wrongly joined in this matter

The Claimant in his pleadings averred that the 2nd and 3rd Respondents are directors of the 1st Respondent, a fact that was confirmed by the Respondents.

The Respondents maintained that the said 2nd and 3rd Respondents are wrongly joined in this matter as they cannot be sued in their personal capacity as they are agents of the 1st Respondent.

In the case of **Joseph Kobia Nguthari v Kiegoi Tea Factory Company Limited and 2 Others (2016) eKLR**, the court held that–

“... the greatest legal innovation of separate corporate legal entity which was formulated in the case of **SALOMON vs. SALOMON [1897] AC 78**, that:-

“The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act”.

Further in the case of **Victor Mabachi & Another vs. Nurturn Bates Limited (2013) eKLR**, the Court held that a Company

“...as a body corporate, is a persona juridica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil”.

In the instant case there is no indication or evidence warranting the lifting of the corporate veil. There is further no claim against the 2nd and 3rd respondents in their personal capacity. Therefore, I find that the 2nd and 3rd Respondents were wrongly enjoined and/or sued herein and discharge the claims against them.

Whether the Claimant is entitled to the reliefs sought

The Claimant is entitled to the following:

(i) Salary in lieu of notice = Kshs. 13,202/-

The Claimant is entitled to one (1) month's salary in lieu of notice by dint of Sections 36 and 49(1) of the Employment Act, 2007.

(ii) Accrued leave days and Overtime worked

The Claimant maintained that he is entitled to the above reliefs and the Respondent on the other hand averred that the same was duly paid to him at the time of his separation, a fact that was not disputed by the Claimant at the hearing. I therefore find that the Claimant did not prove the same and is not entitled to the said reliefs.

(iii) Service Pay

The Respondent maintained that the Claimant is not entitled to this relief having been a member of National Social Security Fund and deductions were made on a monthly basis. The Claimant confirmed being a member of NSSF and monthly deductions having been made and remitted to the statutory body. The Claimant is therefore not entitled to this relief by dint of Section 35 of the Employment Act, 2007.

(iv) Compensation for unfair termination

Having found that the Claimant's termination was unfair he is entitled to compensation under this head. Given the length of service and the fact that he was not taken through a disciplinary hearing, I award him 10 months' salary as compensation in the sum of **Kshs.132,020/-**.

(v) Remaining years to retirement age Kshs.83,660/-

The payment of dues up to the date of retirement is not provided for in law and neither was it provided in the claimant's contract which also did not provide for a retirement age.

In the case of **D. K. Njagi Marete v Teachers Service Commission – Industrial Cause No 379 of 2009** Rika J. held that:-

“What remedies are available to the Claimant “This Court has advanced the view that employment remedies must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way.”

The Claimant has thus not proved that he is entitled to payment of salary to retirement date and the prayers is dismissed.

(vi) Costs

Having found that the termination of the claimant's employment was unfair, he is entitled to costs of the claim.

Conclusion

I thus enter judgment for the claimant against the 1st respondent in the sum of Kshs.145,222/-.

The 1st respondent shall also pay the claimant's costs.

Interest shall accrue from the date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF APRIL 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due

to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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