



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2010 OF 2015

PAUL NYAGENA OKIBERO.....CLAIMANT

-VERSUS-

HON.MOHAMED YUSUF HAJI....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 9th April, 2020)

JUDGMENT

The claimant filed the statement of claim on 11.11.2015 through Nyabena Nyakundi & Company Advocates. The claimant alleged unfair termination and failure by the respondent to pay him terminal dues. The claimant alleged terminal dues as follows:

- a. One month notice in lieu of notice Kshs. 9, 781.00.
- b. 30 sheep at Kshs. 6,000.00 Kshs.180,000.00.
- c. Leave balance for 20 years at Kshs.11, 248 x 20 = Kshs.224, 960.00.
- d. Service gratuity Kshs.5, 624 x 20 years = Kshs.112, 480.00.
- e. Overtime worked $4 \times 6 \times 4 \times 12 \times 50 \times 1.5 \times 20 =$ Kshs.1, 728, 000.00.
- f. Salary underpayments for 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, and 2015 Kshs.252, 709.00.
- g. Public holidays $10 \times 20 \times 2 \times 402 =$ Kshs.160, 800.00.
- h. Off duty $4 \times 12 \times 20 \times 402 =$ Kshs.385, 920.00.
- i. 12 months compensation Kshs.134, 978.00.
- j. Certificate of service.
- k. Sum claimed Kshs.3, 189, 628.00.

The claimant prayed for judgment against the respondent for:

- a. A declaration that the claimant's termination from employment was unlawful and unfair.
- b. The respondent to pay Kshs.3, 189, 628.00.
- c. Certificate of service per section 51 of the Employment Act, 2007.
- d. Such orders and directions as the Court may deem fit to meet ends of justice.

e. Costs of the claim.

f. Interest at Court rates.

The claimant's case is alleged as follows:

- a. In April 1996, the respondent employed the claimant as a Gardener at the respondent's Tikosh Farm at Kshs. 4,000.00 per month.
- b. In 2010 the claimant was promoted to a Farm Manager at Kshs.6, 000.00 per month.
- c. The respondent provided the claimant with housing accommodation.
- d. The contract of service was oral as there was no written contract per section 9 of the Employment Act, 2007.
- e. On or about 06.06.2015 the respondent unlawfully and unfairly terminated the claimant's employment. The termination was not in writing. No reasons for termination were given by the respondent and no termination notice was given. At termination the claimant had served for 19 years. Section 41 of the Employment Act on notice and hearing was not given per section 41 of the Act.
- f. The claimant had a flock of 30 sheep at the farm which, upon his termination, the respondent confiscated and retained illegally. The value of each sheep is Kshs.6,000.00 hence a claim of Kshs.180,000.00.
- g. The claimant worked from 6.00am to 6.00pm being 12 hours per day and no overtime was paid for the extra hours. He also worked on public holidays but was not paid at all.

The respondent filed the response to the claim on 25.02.2016 through Brian Otieno & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs. The respondent pleaded as follows:

- a. The respondent denied that he entered a contract of service with the claimant, orally or in writing. The respondent's further case was that the claimant resided at the respondent's home out of the respondent's benevolence.
- b. The claimant did not keep any sheep at the respondent's farm and he lived at the farm solely at the respondent's altruism.

The **1st and main issue** for determination is whether the parties were in a contract of service. The respondent offered no witness at the hearing. The claimant testified to support his case. The claimant testified as follows, **"....Respondent employed me as a gardener. I was employed 1996. I was a young man. I was paid 4,000.00 per month. In 1996 to 2010 I was gardener in his numerous homes – Lavington, Kileleshwa, Mountain View, Riverside, and then Fedha Estate. In 2010 he deployed me to Tikosh Farm in Kajiado County....At the farm I was the Farm Manager. It was initially only an empty farm."** The claimant further testified that in June 2015 he was given permission of 3 days to attend to a funeral and upon return, the respondent's son told the claimant to go away and not to work at the farm again. The claimant further testified thus, **"....The respondent Yusuf Haji employed me. I was not given accommodation."**

The Court has carefully considered the claimant's evidence against his own pleadings. While alleging that he was employed at Tikosh Farm as a gardener then as a Farm Manager (see Paragraph 3 of the statement of claim) the claimant's evidence was contradictory to that pleading when he testified that he was initially employed to serve in the respondent's numerous homes. Further he pleaded that he was provided housing but in his testimony he contradicted that pleading and stated that he was not housed and then, he was housed. Further the claimant stated that when he went to the farm in 2010 it was an empty place but he gave no account of the purportedly assigned activities at the farm he was involved in as a gardener then as a farm manager. The Court finds that the claimant has failed to offer testimony on his roles and therefore work performed in the alleged positions of a gardener and then farm manager but instead, his only evidence was that the land was fallow or empty. In view of that evidence, the Court finds that the claimant has not established that he worked for the respondent as was alleged and in the two alleged capacities and for the alleged tenure at Tikosh Farm. Further, while alleging that the respondent terminated him without notice and reason, in his evidence the claimant testified that he got 3 days' leave (from a person he did not identify or name) and when he resumed after the alleged leave the respondent's son terminated his alleged employment. The Court returns that the claimant was bound by his pleadings and his evidence was at glaring variance with the pleadings and cannot therefore be trusted as establishing a claim of employment and termination by the respondent at Tikosh Farm as a gardener and then a farm manager. Taking the claimant's evidence into account, the Court finds that the claimant has failed to show that the respondent employed him as was pleaded in the statement of claim and that the respondent terminated the alleged contract of service as was alleged. Thus the Court finds that the claimant has failed to show that there existed a contract of service and which was terminated as alleged in the statement of claim. The suit will therefore fail.

The Court has considered that the claimant offered no evidence of existence of the sheep in issue and the basis of the alleged price per sheep. Further the claim relating to the sheep was collateral to the primary employment relationship which the claimant has failed to establish. The claims and prayers as relates the sheep will therefore fail.

The Court has considered all the circumstances of the case and returns that each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for:

1. Dismissal of the suit.
2. Each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Thursday, 9th April, 2020.**

BYRAM ONGAYA

JUDGE