



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1559 OF 2015

RONALD WITUKA MBOYL.....CLAIMANT

-VERSUS-

NATURE EXPEDITIONS AFRICA LIMITED....RESPONDENT

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

JUDGMENT

The claimant filed the memorandum of claim on 04.09.2015 through Cyrus Maina & Company Advocates. On 23.01.2019 the claimant changed his advocates to Litoro & Omwebu Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's summary dismissal or termination by the respondent was unfair and unlawful.
- b) Compensation for unlawful termination.
- c) Accrued arrears being pay for full time work for 48 Sundays Kshs.29, 529.60; pay for full time work for 40 public holidays in 2004 to 2008 Kshs.24, 608.00; salary arrears for March 2014 Kshs.15,000.00; salary in lieu of notice Kshs.15, 000.00; 29 hours overtime worked Kshs.21, 750.00; 167 accrued and unpaid leave days Kshs.83, 500.00; and total being Kshs.213, 995.00.
- d) payment of unpaid statutory deductions to NSSF for the years between 2004 to 2014.
- e) Certificate of service.
- f) Costs of the suit.
- g) Any other relief as the Honourable Court may deem fit and just to grant.

The response to the statement of claim was filed on 10.11.2016 through Kenyatta Odiwuor & Company Advocates. The respondent prayed that the claimant's claim is dismissed with costs.

To answer the **1st issue** for determination the Court returns that parties are in agreement that they were in a contract of service. The respondent employed the claimant in October 2005 as a support staff. The claimant was promoted through the ranks to a fleet driver as at termination in March 2014. As at termination the claimant earned Kshs.15,000.00 per month.

To answer the **2nd issue** for determination, there is no dispute that the respondent terminated the contract of service. However the circumstances of the termination are in dispute. The claimant has pleaded that on 16.03.2014 the respondent unlawfully terminated the claimant's employment without prior notice or justifiable cause. The claimant further pleads that the respondent delivered to the claimant the letter dated 17.02.2014 purporting to issue a one month notice for termination of the claimant's employment contract. The letter stated in part as follows, "**Reference is hereby made to clause 8(a) of your appointment letter, about termination of employment. Your employment is being terminated with effect from close of business hours on 17th March 2014. Kindly treat this letter as one month notice for termination of your employment. During this period you are expected to dispense your duties as per norm and adhere to the company's etiquettes rules.**"

The respondent has pleaded that it duly issued the letter on notice to terminate the contract and the letter was lawful. Further the claimant absconded duty without handing over company property in his possession including 5 pieces of water heaters valued at Kshs.14, 000.00

each and drums and paints. Further the claimant absconded duty to avoid involvement in a case in which the claimant's cousin was alleged to have stolen USD 6,000.00 from the respondent.

The claimant testified that he was given the letter dated 16.02.2014 on 17.03.2014 and it was in an envelope. He did not sign anywhere to acknowledge receipt. He testified that it was misleading for the respondent to say that he was given the letter on 16.02.2014. The claimant testified that on 16.03.2014 his boss called him and told him that effective 17.03.2014 he was not needed as an employee. On 16.03.2014 he was asked to clear with the workshop and he complied by clearing on 17.03.2014. He signed the clearance forms and on 16.02.2014 he was given the letter dated 16.02.2014. He reported at work on 17.03.2014 to clear. So he cleared on 17.03.2014. The Workshop Manager summoned him to go and clear and he complied.

The respondent's witness (RW) was James Mwangi Munene, the respondent's accountant. He testified that the claimant absconded duty from 16.02.2014 to 17.03.2014 and for that period he was not paid at all because he did not work for the respondent. The last payment was for 16 days worked in February 2014. The cash payment was on 16.02.2014. He failed to clear but filed a complaint with the labour officer. RW had joined the respondent's employment on 28.08.2017. RW further testified that the respondent's workshop manager and managing director who were present as at the time of termination were very busy at work and they were not witnesses in the case.

The Court has considered the pleadings and the evidence and returns that there is no evidence that the letter dated 16.02.2014 was delivered to the claimant on 16.02.2014. The Court therefore returns that the alleged termination on account of notice per termination clause was not a genuine reason for termination as per section 43 of the Employment Act, 2007 and the procedure as invoked was not fair under section 45 of the Act. The Court finds that the termination was unfair. The claimant's evidence on the circumstances of the termination is upheld by the Court as it has not been rebutted in any material respects. Further the respondent's evidence is found to have gaps such as failure to file relevant documents such as on the alleged final cash payment and it cannot therefore be trusted.

The Court has considered the long term of service of over 8 years. The Court has considered that the claimant was willing to continue in employment and he had a clean record of service. The Court has considered that no terminal dues were paid. The Court awards the claimant 8 months' pay in compensation under section 49 of the Act at Kshs.15, 000.00 per month making **Kshs.120, 000.00**. Further he is awarded **Kshs.15, 000.00** contractual pay in lieu of the one month termination notice. He is also awarded 17 days worked in March 2014 **Kshs.8, 500.00**. The certificate of service is due per section 51 of the Employment Act, 2007.

The **3rd issue** for determination is whether the claimant is entitled to the other prayers in the memorandum of claim. The court has considered leave pay, pay for public holidays, 167 leave days, pay for work on Sundays and returns that they were continuing injuries which ceased on 17.03.2014 whereas the suit was filed on 04.09.2015 after the lapsing of 12 months of time of limitation under section 90 of the Employment Act, 2007. The claims and prayers will fail as time barred. In any event there was no evidence of a grievance in that regard while the contract of service persisted and the claims will fail. Further leave forms filed showed times when the claimant applied for leave and it was approved and on a balance of probability, the claimant was accorded due annual leave.

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

- a) The declaration that the termination of the contract of service by the respondent was unfair.
- b) The respondent to pay the claimant **Kshs.143, 500.00** by 01.07.2020 failing interest to be payable thereon from the date of this judgment till the date of full payment.
- c) The respondent to deliver the certificate of service in 30 days from the date of this judgment.
- d) The respondent to pay the claimant's costs of the suit.
- e) In view of the prevailing COVID 19 pandemic there be stay of execution of the decree herein until 01.07.2020.

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

BYRAM ONGAYA

JUDGE