



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 1491 OF 2012 CONSOLIDATED

WITH

CAUSE NO. 1339 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

JACKSON MAUNDU MUNYAO.....CLAIMANT

VERSUS

ROLMILL KENYA LIMITED.....RESPONDENT

JUDGMENT (NO. 2)

By an order made on 22nd September 2014, the court directed that **Cause No. 1339 of 2012; Jackson Musyoka Kithimba v Rolmill Kenya Limited** be heard together with **Cause No. 1491 of 2012; Jackson Maundu Munyao v Rolmill Kenya Limited**. The case of JACKSON MUSYOKA KITHIMBA was heard by Nduma J. on 9th November 2015. When I took over the file from Nduma J., I heard the evidence of JACKSON MAUNDU MUNYAO. The record does not reflect that he was the second claimant's witness. In the written submissions, parties made reference only to the case of JACKSON MAUNDU MUNYAO and the judgment delivered on 18th January 2019 was thus in respect of only the said JACKSON MAUNDU MUNYAO. Even though the file and judgment are in file for Cause No. 1339 of 2012 which is the cause filed by JACKSON MUSYOKA KITHIMBA. It is only after judgment that Counsel for the claimant realised the error and filed the application dated 31st January 2019 in which the applicant sought the following orders –

1. Spent
2. The Court be pleased to review and rectify its judgment delivered herein on the 18th of January 2019.
3. Costs be in the cause.

Counsel for the respondent did not oppose the application hence this second judgment.

In the claim dated 6th August 2012 by Jackson Kithimba filed on 7th August 2012, he seeks the following orders –

- (a) A declaration that the Respondent's dismissal of the Claimant from employment was illegal and unlawful and that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- (b) An order for payment of the Claimant's terminal dues and compensatory damages totaling to Kshs.101,250.
- (c) An order for the Respondent to pay cost of this suit plus interest thereon.

The particulars of the claim are as set out at paragraph 9 of the claim as follows –

- (i)..... One month's salary in lieu of notice Kshs.16,875
- (ii)..... Untaken leave for the entire duration of service

being Kshs.16,875 x 2 years..... Kshs.33,750

(iii)..... Salary for the remaining term of the contract being

Kshs.16,875 x 3 months..... Kshs.50,625

Total Claim Kshs.101,250

The respondent filed a reply to memorandum of claim dated and filed on 18th December 2012 in which the respondent denies all the averments in the memorandum of claim except paragraphs 1 and 2 of the claim which the respondent admits. Paragraphs 1 and 2 of the claim are descriptive of the parties.

At the hearing on 9th November 2015, Jackson Musyoka Kithimba testified that he was employed as a driver by the respondent in 2009 and that his letter of appointment was for 6 months' contract which was renewed. He was paid salary of Kshs.11,850 and worked from 8 am to 5 pm. He worked on Saturdays up to 2 pm. Whenever he worked extra hours he was paid overtime.

The claimant testified that he did not take annual leave and was not paid in lieu thereof. His last contract was for the period starting July 2011.

He testified that he was sacked on 25th October 2016. That he was not given any reason for the termination. That the guard at the gate told him that he was instructed by the Human Resource Officer, one Dennis Mwangera, not to let the claimant in.

The claimant testified that he waited to see the Human Resource Officer who told him that the company had too many drivers and needed to reduce them. He testified that other drivers were also dismissed.

The claimant testified that he was told to wait to be called for salary. He testified that although his contract had not ended he was not given written notice before termination.

He testified that he was claiming notice pay Kshs.16,875, leave for 2 years Kshs.33,750 and balance of contract of 3 months Kshs.50,625.

He testified that he had an accident when accompanying a sick driver Jackson Munyao while taking the foreman Joseph Kamau home to Ruai on Kangundo Road. The accident was a head on collision with a pick up. The driver was taken to hospital.

Under cross examination he stated that he had back on back contracts of 6 months from 2009. That his last contract was from August 2011 to January 2012.

He testified that he was not aware that Munyao who was driving was charged with careless driving. He denied recording a statement with the police and testified that he did not attend court as witness in any traffic case. He denied preparing two contradictory statements.

The respondent closed its case without calling any witness.

Submissions by Claimant

In the written submissions filed on behalf of the claimant, it is submitted that the respondent did not comply with the provisions of Section 41 of the Employment Act. That the respondent did not give the claimant any plausible reason for termination and did not call any witness to controvert the evidence of the claimant.

The claimant relied on the decision in **Jared Dimba v Fina Bank Limited** where the court stated that termination for valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification to the employee of the grounds and affording the employee an opportunity to be heard prior to termination.

The claimant further submitted that there was no compliance with Section 43 and that the termination was unfair under Section 45 of the Act.

The claimant further relied on the case of **Walter Ogal Anuro v Teachers Service Commission, Kenya Union of Commercial Food and Allied Workers v Meru North Farmers SACCO Limited** and **Donald Odeke v Fidelity Security Limited**.

Submissions by Respondent

It is submitted for the respondent that the claimant's salary according to payslip was Kshs.13,163 being basic plus house allowance and not Kshs.16,875 as prayed. That for the prayer of leave, the claimant is entitled to only one year by virtue of Section 28 of the Employment Act.

It is further submitted that the claimant has not given justification for award of salary for remainder of the contract and is not entitled to the same under Section 49 of the Act or to 12 months' salary as compensation. The respondent relied on the case of **Mary Mutanu Mwendwa v Ayuda Ninos De Africa-Kenya (Anidan) K.**

Determination

The claim herein was not defended as the respondent did not call any witness to controvert the testimony of the claimant. The claimant's averments that he was stopped from accessing the workplace by a security guard and later informed that the company did not require his services as it had too many drivers, disclose an unfair termination as the claimant was neither given a hearing nor informed of the intention to terminate his employment before the same was done. He was further never given an opportunity to defend himself.

I thus make a determination that the termination of the claimant's employment was unfair for want of both valid reason and fair procedure.

On remedies the claimant is entitled to pay in lieu of notice, his employment having been terminated without notice. He is further entitled to annual leave for the period August 2009 to October 2011, a period of 26 months. At 1.75 days per month provided for in Section 28 of the Act, the claimant is entitled to 45.5 days.

Having been unfairly terminated, the claimant is entitled to compensation. Taking into account the length of service, the circumstances in which his salary was terminated and all relevant factors under Section 49(4) of the Act, I award the claimant 5 months' salary as compensation. He is not entitled to the remainder of his contract term as prayed in view of the compensation for unfair termination.

There is disagreement over the claimant's salary. The claimant avers his salary was Kshs.16,875 while the respondent avers it was Kshs.13,163.

According to the claimant's payslip his salary was Kshs.11,446 basic with house allowance of Kshs.1,717. His gross salary was thus Kshs.13,163.

I therefore award him the following –

- (i)... Pay in lieu of notice..... Kshs.13,163.00
- (ii)... Leave (45.5 days)..... Kshs.20,030.50
- (iii) Compensation..... Kshs.65,820.00

Total Award Kshs.99,013.50

The respondent shall pay claimant's costs and interest shall accrue at court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF MAY 2020

MAUREEN ONYANGO

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 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