



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1940 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

NJERU EVANSON MWANIKI.....CLAIMANT

VERSUS

EURO PETROLEUM LIMITED.....RESPONDENT

JUDGMENT

The claim herein was instituted vide the claimant's memorandum of claim dated 27th October, 2015 and filed on 30th October, 2015. It is the claimant's averment in the memorandum of claim that he was employed by the Respondent herein, verbally on or about 1st January 2007 in the position of a turn boy earning a monthly salary of Kshs.12,750. He further averred that he performed his duties diligently and to the Respondents' satisfaction until 13th August 2014 when he was unlawfully terminated on account of alleged neglect of duties.

The Claimant further averred that his termination was unlawful and unfair and contrary to the provisions of Articles 27, 28, 35 and 47 of the Constitution of Kenya, 2010 and Sections 35, 36, 41, 45 and 49 of the Employment Act, 2007.

In the Memorandum of Claim he seeks the following reliefs: -

1. A declaration that the Claimant's dismissal from employment was unlawful and unfair.
2. A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
3. An Order for the Respondent to pay the Claimant his dues, terminal benefits and compensatory damages comprising of the following:

a).. One month's salary in lieu of notice.....Kshs.12,750

b).. Untaken leave days @ 26 days

x 12,750.....Kshs.89,250

c).. Leave pay for 7 years

12,750 x 7 years..... Kshs.89,250

d).. Unfair termination @ 12 months

Gross salary 12,750 x 12..... Kshs.153,000

e).. Overtime 3 hrs per day for 7 years

3 hrs x 314 days x 7 years x 12,750..... Kshs.525,459.38

f).. House allowance @

x 12,750 x 7 years x 12.....Kshs.160,650

g).. Untaken Public Holiday (worked)

11 (days in a year) x x 7 years..... Kshs.37,760

h).. Severance pay 15 days for every completed

year of service x 7 x 12,750.....Kshs.44,625

Total Claim Kshs.939,745

4. Certificate of Service

5. Costs of this suit and interest therein.

The Respondent in its Memorandum of Response dated 10th February, 2016 and filed in Court on 17th February, 2016 admitted having employed the Claimant as a turn boy as alleged. It however denied that the Claimant worked with diligence during the subsistence of his employment contract.

The Respondent averred that the Claimant's salary at the time of his dismissal was Kshs.10,200 and not Kshs.12,750 as contended by the Claimant in his Memorandum of Claim. Further, that he was entitled to 21 leave days and not 26 days as pleaded in his Memorandum of Claim. The Respondent further averred that the Claimant took all his leave days for each completed year of service and is therefore not entitled to any compensation under this head.

The Respondent maintained that the Claimant's dismissal was within the terms of his employment and was occasioned by his absconding lawful duties on 13th August, 2014. The Respondent further maintained that the Claimant's dismissal was in accordance with the applicable employment laws as well as the Respondent's policy and procedures.

The Respondent averred that at the time of separation the Claimant's terminal dues were computed and totalled Kshs.9,780. A cheque was prepared in his favour but he declined to accept it.

In conclusion the Respondent urged the Court to dismiss the Claim in its entirety as the same is devoid of merit and otherwise an abuse to the Court process.

Evidence

At the hearing the Claimant testified on his own behalf. The Respondent called one witness who testified on its behalf. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The claimant testified that he was employed by the Respondent from January, 2007 in the position of a turn boy. He worked for the Respondent continuously until the year 2014 when his employment was unfairly terminated.

He testified that he was never issued with a payslip during the subsistence of his employment. He further testified that on the day of his termination on 13th August, 2014 he was assigned to work on a fuel tank. That he was summoned by the Respondent's Director one Mr. Raju who told him to leave and never return. He testified that the said manager did not consider his explanation prior to terminating his services and that the supervisor who assigned him the said duties, one Mr. Mohammed, declined to explain to Mr. Raju about his assignment.

The claimant confirmed having been offered settlement by the Respondent but declined because the amount offered was less than the dues owed to him by the Respondent.

He stated that he is entitled to the reliefs sought in the Claim as due process was not followed by the Respondent prior to the termination. He urged this Court to allow his Claim as prayed.

On cross examination the claimant stated that on the date of his dismissal he was assigned to load rice that was to be delivered to the cereals board. That in the process of loading his supervisor assigned him to wash a different vehicle. He confirmed he was offered a cheque as payment of his terminal dues which he rejected.

He stated that he was not accorded a hearing prior to his termination.

On re-examination the claimant stated that he commenced working for the Respondent on 1st January 2007 but payment through his bank account started later. He further confirmed that deductions for NSSF were remitted by the Respondent from the year 2013.

He stated that he worked overtime but was not paid for the same. He therefore urged the Court to allow his Claim in terms of the reliefs sought therein.

Respondent's Case.

RW1, GIBSON KABUE, the Legal Officer of the Respondent adopted his witness statement dated 21st January 2019 and filed in Court on 22nd January 2019 as his evidence in chief.

In his statement RW1 avers that the Claimant was employed by the Respondent on 1st January, 2007 and was lawfully terminated following due process on 13th August, 2014 for absencing himself from lawful duty at the station assigned to him. He further avers that the Claimant had prior to this absented himself without lawful permission on several occasions and was issued with several warning letters.

RW1 further avers in the witness statement that the Claimant was summoned to the Respondent's director's office to explain the reason behind the abdication of his duties. RW1 maintained that the Claimant casually responded to the issues and that the Respondent decided to terminate his services on grounds of gross misconduct and duly notified the Claimant of its decision.

He testified that the Claimant received a consolidated salary and therefore his Claim for house allowance is unwarranted. RW1 further testified that the Claimant was duly paid for all work done in overtime and that he did not work on public holidays as alleged.

On cross examination RW1 testified that despite the fact that in his statement he avers that the Claimant was employed on 1st January 2007, the Claimant was employed in 2013. He however admitted not availing any evidence to support this assertion.

RW1 further testified that the warnings issued to the Claimant were all oral and therefore no record of the same was adduced. RW1 further testified that the Claimant received a consolidated salary of Kshs.10,200. He similarly stated that he had no records to confirm this position.

RW1 further testified that the Claimant was assigned to a specific motor vehicle and could therefore not be asked to work on something else. RW1 agreed that there was no invitation issued to the Claimant for a disciplinary hearing but insisted that the invite was orally made by the Respondent's Director.

On re-examination RW1 testified that the Claimant was employed in the year 2013 as evidenced by the NSSF and NHIF statements.

RW1 further testified that the reason for the Claimant's termination was absconding lawful duties. He testified that the Claimant was absent from duty around 13th August 2014.

Submissions by the Parties

The Claimant submitted that his employment with the Respondent 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 Respondent failed to establish that it accorded him a disciplinary hearing prior to the termination. The Claimant relied on the case of **Liz Ayany v Leisure Lodges Limited (2018) eKLR** where the Court held that Section 41 of the Employment Act, 2007 provides that in the event of a dismissal on account of poor performance or misconduct, the employee shall be given a notice and a hearing.

The Claimant urged this Court to find in his favour and allow his Claim in terms of the reliefs sought therein relying on the case of **Musee Nguthi v Shabiby Transport Services Limited (2018) eKLR**

Respondent's Submissions

The Respondent submitted that the allegation of unfair and unlawful termination is baseless as the Claimant has failed to demonstrate or show how his termination was unlawful or unfair. For emphasis the Respondent cited the case of **Iyego Farmers Co-operative Sacco v Kenya Union of Commercial Food & Allied Workers (2015) eKLR** where the Court held that whenever an issue of wrongful or unfair dismissal arises, the Court looks at the validity and justifiability of the reasons for the termination and also interrogates procedural fairness.

The Respondent further submitted that the Claimant's termination

was procedurally fair and that it followed due process as required under the provisions of Section 44(4)(a) of the Employment Act, 2007.

The Respondent further submitted that the Claimant was duly invited for a disciplinary meeting on 13th August, 2014 and given an opportunity to make his presentation thus fulfilling the Respondent's obligations under Section 41 of the Employment Act, 2007. The Respondent relied on the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Limited (2013) eKLR**.

The Respondent further submitted that the Claimant having been lawfully and fairly dismissed in accordance with the Employment Act and the Respondent's policies and procedures is not entitled to the reliefs sought in his Memorandum of Claim.

In conclusion the Respondent urged the Court to dismiss the instant Claim in its entirety as the same is baseless, unmerited and an abuse to the Court process.

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 respectively, the following are the issues for determination:

1. Date of employment of the claimant.
2. Whether the termination of the Claimant's employment was valid both procedurally and substantively.
3. Whether the Claimant is entitled to the reliefs sought.

Date of Employment

In both the claim and witness statement, the claimant states he was employed on 1st January 2007. The respondent confirmed this in the defence and in the witness statement of RW1. I find the testimony of RW1 to the effect that the claimant was employed in 2013, a contradiction of the respondent's averments in the defence and the witness statement. I thus find that the claimant was employed on 1st January 2007.

Unfair termination

Under Section 45(2) of the Employment Act termination 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.

The reason cited for the termination of the Claimant's employment was gross misconduct for absconding lawful duty. The Respondent further contends that the Claimant was accorded a hearing having been invited orally for a meeting on 13th August, 2014.

The Claimant on the other hand contended that he was on duty on the 13th August, 2014 and was assigned to load rice that was to be delivered to the Cereals Board. That in the process he was reassigned by his supervisor one Mr. Mohammed to work on another truck in the fuelling section.

The Claimant maintained that he did explain this position to the Respondent's manager who did not understand. That he requested his supervisor to explain his reassignment to the Director but his request was declined due to fear on the part of the supervisor.

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

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 reference is made to the case of **Nicholus Muasya Kyula v FarmChem Limited (2012) eKLR** where the court held that;

“It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.”

Section 45(2) of the Employment Act, 2007 provides that where the employer fails to prove either procedural fairness or validity of reason the termination of employment is unfair.

The Respondent despite maintaining that the Claimant was accorded a fair hearing failed to avail to this Court any proof of a disciplinary hearing to support the said assertion. In the absence of any evidence I find that the termination of the Claimant's employment was unlawful and unfair as it failed to comply with the mandatory provisions of Section 41 of the Employment Act, 2007. Further the Respondent failed to prove that the Claimant absconded lawful duty as he was clearly present at work on the day he was dismissed allegedly for absconding duty.

Whether the Claimant is entitled to the reliefs sought

The Claimant is entitled to the following:

(i) Salary in lieu of notice Kshs.12,750

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

The Claimant in his pleadings, evidence and submissions maintained that his last salary was Kshs.12,750. He further averred that the Respondent did not issue him with any pay slip but annexed to the claim bank statements from Equity Bank to confirm that the Respondent paid his salary.

The Respondent on the other hand maintained that the Claimant's last salary was Kshs.10,200 and not Kshs.12,750. It however failed to attach any evidence to support this assertion being the custodian of such records.

Section 10(7) of the Employment Act 2007 which states that: -

If in any legal proceedings an employer fails to produce written contract or written particulars prescribed in Sub-section (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

I therefore find that the Respondent has failed to prove that the Claimant's last salary was Kshs.10,200 and award the claimant **Kshs.12,750** as one month's salary in lieu of notice.

(ii) Accrued leave days Kshs.89,250

The Claimant maintained that he is entitled to the above relief while the Respondent on the other hand averred that he was not entitled to the same as he did proceed on leave when required to and therefore has no claim under this head.

The Respondent did not avail any evidence to controvert the claimant's evidence or prove that the claimant took annual leave or was paid in lieu thereof. I therefore find that the Claimant is entitled to this relief as prayed and accordingly award him **Kshs.72,086** as payment in lieu of leave days not taken.

(iii) Compensation for unfair termination Kshs.153,000

Having found that the Claimant's termination was unlawful and unfair, he is entitled to compensation by dint of Section 49 of the Employment Act, 2007.

I have considered the length of the Claimant's employment and the circumstances behind his termination and award him 10 months' salary as compensation in the sum of **Kshs.127,500**.

(iv) Overtime for 3 hours for 7 years of employment Kshs.525,459.38

The Claimant maintained that he worked overtime and was not paid. The Respondent on the other hand submitted that there no overtime work done and that the Claimant failed to produce any documentary evidence to prove this Claim.

No evidence was adduced in support of his prayer. The same is accordingly dismissed.

(v) House Allowance

The claimant avers that he was not paid house allowance. The respondent's averment is that the salary was consolidated. The minimum wage for a turn boy in 2014 was Kshs.10,563.60. Inclusive of 15% house allowance this would be Kshs.12,148.20. I thus find that the claimant's salary of Kshs.12,750 was consolidated. The claim for house allowance thus fails and is dismissed.

(vi) Untaken public holidays worked Kshs.37,760

The claimant did not adduce any evidence to prove the days he worked on public holidays or that he worked on any public holiday at all. The respondent denies that the claimant worked on any public holiday.

I find no proof of the claimant working on a public holiday and dismiss the prayer.

(vii) Severance pay

This not being a case of redundancy the Claimant is not entitled to this relief.

In summary I award the claimant the following –

1. One month's salary in lieu of notice..... Kshs.12,750
2. Pay in lieu of annual leave days not taken.....Kshs.72,086

3. 10 months' salary compensation.....Kshs.127,500

Total Award **Kshs.212,336**

4. Certificate of Service

The Claimant is entitled to a Certificate of Service by dint of Section 51 of the Employment Act, 2007.

The Claimant is awarded costs of this Suit. Interest shall accrue at Court rates from the date of Judgment until payment in full.

The above amounts shall be subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY 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 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