



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO. 32 OF 2017

[Formerly Kisumu Cause NO. 380/2016]

(Before Hon. Justice Mathews N. Nduma)

DICKSON ALUVIZIA LIVASIA.....CLAIMANT

VERSUS

MUFATE GROWERS SACCO LTD.....RESPONDENT

JUDGMENT

1. The suit was filed on 23rd December 2016 in which the claimant prays for the following reliefs:
 - (i) Payment in lieu of leave days not taken for five (5) years.
 - (ii) Payment of terminal benefits including notice pay and arrear salary pursuant to the minimum wage regulations applicable.
 - (iii) Costs and interest.
2. The claimant testified under oath and adopted a witness statement dated 22nd December 2016 as part of his evidence in chief.
3. The claimant testified that he was employed by the respondent on 10th February 2010 as a messenger which job included general office cleaning and preparing tea. The claimant was initially paid Kshs. 3,000 until the year 2013 when the salary was increased to Kshs. 4,500 and to Kshs. 8,000 in the year 2016. The claimant produced exhibits '1' to '5' attached to the statement of claim.
4. On 30th April 2016, the claimant was granted leave. When the claimant came back after one month leave, he was told by the respondent to go home again on leave because he had not taken leave for five (5) years. The claimant complained that the leave was too long but was told to go back and was given Kshs. 3,500.
5. The claimant was not recalled until he filed suit. The claimant testified that he had a clean record. He was not given notice, notice to show cause or hearing before the termination under the guise of indefinite leave.
6. The claimant prays the court to find that the termination was unlawful and unfair. That he had served the respondent for six (6) and 6 months. That he was not given certificate of service. That he sent a demand letter to the respondent. The respondent responded to the same and stated that the claimant would be given a salary raise when he came back.
7. The claimant amended the statement of claim on 20th May 2018 and included a further remedy of 12 months compensation for unlawful dismissal in addition to payment of gratuity in the sum of Kshs. 24,000; leave days for six (6) years; Three month notice and arrear salary as the reliefs sought.
8. Under cross examination the claimant stated that he had never gone on leave until he was sent home. That he was employed initially as a casual labourer. The claimant denied he was employed on 3 months contract renewable. The claimant stated that he worked continuously for two years and then he was given a new contract. The contracts were for three months each. That his employment was continuous for the entire six (6) years and six (6) months until he was sent on leave on 31st April 2016 and was not recalled back.

9. The claimant denied that the contract of employment expired in March 2016. The claimant also denied that he was arrested and imprisoned. The claimant stated that he did not apply for leave.

10. RW1 Antony Bitinyu, the CEO of Mudele Factory, Tea Growers adopted a witness statement dated 22nd March 2019 as his evidence in chief. RW1 stated that the claimant was employed by the respondent as a casual employee for a period of three months. RW1 added that the respondent hired casuals on a needs basis. That casuals were given three (3) months contracts and were then re-hired if required. That the claimant was paid for the period worked and was not owed any arrear salary. That the claimant is not entitled to leave allowance for five (5) years and is also not entitled to notice pay. That the suit lacks merit and it be dismissed with costs.

11. Under cross examination RW1 stated that he could not recall when the last casual engagement of the claimant ended. RW1 confirmed that the work of the claimant was to clean the offices, washrooms and the compound. The claimant also prepared tea for the office staff. RW1 stated that the respondent did not hire seasonal employees. That the claimant was first employed in the year 2012 and was placed on three (3) months contract.

12. The claimant was given three months contracts three times only. That the claimant was a member of the staff SACCO. That the claimant was paid a monthly salary. RW1 stated that the respondent did not terminate the employment of the claimant. That the claimant was paid Kshs. 8,000 salary a month by the time he left. That the claimant was not given leave and the respondent did not give the claimant termination notice. That the respondent has replaced the claimant with some other employee on permanent basis. RW1 prays that the suit be dismissed with costs.

Determination

13. The issues for determination are:

(i) Whether the claimant's employment was terminated by the respondent and if so, whether termination was lawful and in terms of a fair procedure.

(ii) Whether the claimant is entitled to the reliefs sought.

Issue (i)

14. Both parties filed written submissions in support of their respective positions in this matter. Upon a careful analysis of the evidence adduced by the claimant vis a vis that adduced by RW1, it is manifestly clear that the claimant worked for the respondent for a continuous period of six (6) years and six (6) months. It has also been established that the claimant worked as a messenger for the respondent and was also engaged in cleaning the offices, washrooms and the compound. The claimant also made tea for the office staff.

15. The claimant may aptly be categorized as a general worker in the category commonly referred to as support staff. The claimant was paid Kshs. 3,000 monthly salary between the years 2010 to 2013. The salary was then raised to Kshs. 4,500 until the year 2016 when it was raised to Kshs. 8,000.

16. It is clear that the claimant was engaged in work that could not be completed in a period of three months and the claimant had worked continuously for periods longer than one month. The court finds that the claimant may have been engaged as a casual in the first place but the claimant converted to a protected employee in terms of Section 37 of the Employment Act, 2007 upon completion of the first month of service while engaged in work that did not get finished within a period of three months.

17. The claimant was therefore entitled to annual leave for a minimum of 21 days in each completed year of service. The claimant was also entitled to all the minimum terms and conditions of service guaranteed under parts III, IV, V and VI of the Employment Act.

18. Therefore the claimant's employment could not be terminated without adhering to the provisions of *Sections 36, 41, 43 and 45 of the Employment Act*. The claimant was entitled to a termination notice of not less than 28 days or payment in lieu of 28 days notice. The claimant was also entitled to a hearing before termination of his employment. Therefore the respondent was obliged to give the claimant a notice to show cause and opportunity to explain himself in writing and if not satisfied with the written response, call the claimant to an oral hearing on reasonable notice. The respondent was also obliged to allow the claimant to bring to the hearing a colleague or union official to assist him at the hearing.

19. It has been proved by the claimant that on 30th April 2016, the respondent sent the claimant on an indefinite leave and only paid him Kshs. 3,500 whilst he was on leave. It has also been established that the claimant returned to work after about a month and was again told to go back on leave until he would be called back. The claimant has established that the respondent never recalled him until he filed the suit on 23rd December 2016, a period of over seven (7) months from the date he was first sent on leave on 30th April 2016.

20. The conduct by the respondent amounted to an unlawful repudiation of the employment contract, and amounted to a constructive dismissal of the claimant. The claimant was not paid salary during this period nor was he paid any terminal benefits. The claimant wrote a demand letter to the respondent to recall him and pay arrear salaries on 7th October 2016, and a reminder on 27th October 2016 to no avail.

21. It is the court's finding that the employment of the claimant was unlawfully and unfairly terminated by the respondent on 30th April 2016 when the respondent sent him away without any intention of recalling him back.

22. The termination violated *Sections 36, 41, 43 and 45 of the Employment Act*. The claimant is entitled to compensation in terms of *Section*

49(1) (c) and (4) of the Act.

23. In this regard, the claimant had worked for a period of 6¹/₂ years with a good record. The claimant was not well paid most of the period. The claimant was not given any rest day or leave during the period. The claimant did not contribute to the dismissal. The claimant was not paid any terminal benefits. The claimant was not compensated for the job loss. The claimant was not given a certificate of service to help him get a new job. The claimant suffered loss and damage as a result of being kept in limbo for a prolonged time.

24. The claimant relied on the case of *Mary Chemweno Kiptui vs Kenya Pipeline Company Limited (2014) eKLR* in which Mbaru J. reinstated the claimant dismissed in similar circumstances without loss of any remuneration from date of dismissal. It is not practicable to reinstate the claimant in the present case nor was the remedy of reinstatement sought.

25. The claimant further relied on the case of *Moses Ochieng vs Unilever Kenya Limited (2018) eKLR* in which Marete J. awarded the claimant the maximum compensation of 12 months salary for the unlawful summary dismissal of the claimant.

26. Upon considering all the above factors the court awards the claimant ten (10) month salary in compensation for the unlawful and unfair dismissal in the sum of Kshs. 80,000.

Terminal benefits:

Notice.

27. The claimant has proved on a balance of probabilities that he was summarily dismissed without notice or payment in lieu of notice without justification. The court awards the claimant one month salary in lieu of notice in the sum of Kshs. 8,000.

Gratuity

28. The claimant was not registered with NSSF and the respondent did not make statutory payments in favour of the claimant. The claimant is entitled to terminal gratuity at the rate of 15 days salary for each completed year of service in the sum of Kshs. (4,000x6) 24,000.

Leave pay

29. The claimant did not go on leave for a period of six and a half (6¹/₂) years. The claimant did not apply for the same. However, the claimant is entitled to payment of leave days in respect of the last three years of service in the sum of Kshs. 24,000.

Underpayments

30. The claimant did not prove that he was contracted for more salary than he was paid as a general labourer. The claimant has not proved this claim satisfactorily to the required standard and same is dismissed.

31. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

(a) Compensation	Kshs. 80,000
(b) Notice pay	Kshs. 8,000
(c) Gratuity	Kshs. 24,000
(d) Annual leave	Kshs. 24,000
Total sum	Kshs. 136,000

(e) Interest at court rates from date of filing suit in respect of (b) (c) and (d) above and from date of judgment in respect of (a) above till payment in full.

(f) Respondent to provide the claimant with a certificate of service within 30 days of this judgment.

(g) Costs of the suit.

Judgment Dated, Signed and delivered at Nairobi this 13th day of May, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment 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 18 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.

Mathews N. Nduma

Judge

Appearances

M/S Mumalasi for the Claimant.

Mr. Indimuli for Respondent

Chrispo – Court Clerk