



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 368 OF 2017**

(Before Hon. Justice Mathews N. Nduma)

**ANTHONY GREGORY SHISANYA.....CLAIMANT**

**-VERSUS-**

**CAPDRIL KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit on 22<sup>nd</sup> August 2017, claiming damages for unlawful termination of employment and breach of contract and for payment of terminal benefits including: -

- i. Unpaid Leave allowance.
- ii. Unpaid overtime allowance.
- iii. Severance pay and
- iv. Gratuity.

2. The Claimant adopted a witness statement dated 18<sup>th</sup> February 2019 and filed on 21<sup>st</sup> February 2019 as his evidence in chief. CW1 testified that he was employed by the respondent as a driver/off side on 12<sup>th</sup> September 2016. The claimant was on a three months' contract renewable. The claimant served the first three months and the contract was renewed on 18<sup>th</sup> March 2017. The contract was supposed to run until 18<sup>th</sup> June 2017. The claimant testified that he was paid Kshs. 57,970 per month. That he worked diligently until the 4/6/2017, when he was served with a termination letter citing reasons for termination as below average work performance.

3. That the claimant was not evaluated or assessed on his work performance. He was not given a show cause letter and/or any opportunity to defend himself. That the written contract had a termination clause providing for one-month termination notice but the claimant was not given any notice. The termination was two weeks to the expiry of the contract.

4. The claimant produced the contract commencing 18<sup>th</sup> March 2017 and was to end on 18<sup>th</sup> June 2017 signed by both parties. The claimant also produced a letter of demand written by his advocate on 9<sup>th</sup> June 2017.

5. The claimant testified that he did not go on leave at all and that the reason for termination was not valid or proper and same was not explained to the claimant.

6. The claimant prays to be granted reliefs set out in the statement of claim.

7. The respondent filed a response in which it admitted the particulars of employment of the claimant. RW1 relied on a witness statement dated 16/10/2018 as his evidence in chief. RW1 testified that he was employed by the respondent as an administrator. That his work included employing workers and keeping employment records. That he also prepared the payroll. RW1 stated that the claimant was employed on contractual basis on 12<sup>th</sup> September 2016 for a period of three months' renewable at the discretion of the respondent.

8. That the contract was renewed on 12<sup>th</sup> December 2017 and again on 18<sup>th</sup> March 2017 respectively for a period of three months each. That the last contract was not renewed. The claimant was notified of the termination of his contract on 6<sup>th</sup> June 2017. The claimant was paid his

dues on the 7<sup>th</sup> September 2017. That the suit lacks merit and it be dismissed.

9. Under cross examination RW1 testified that the claimant was issued with a termination notice on 4<sup>th</sup> June 2017. That the reason for termination of contract was poor work performance rating. That the claimant's work was below average.

10. That this was determined by his supervisor Mr. Peter Sulton. RW1 admitted that the respondent did not have any work report done. RW1 admitted that no work appraisal was done in respect of the claimant.

11. RW1 stated that the comments in the notice of termination were from the project manager. RW1 stated that the claimant worked for the respondent for 9 months. That service gratuity was payable at the end of service at the rate of not less than 15 days' salary for each completed year of service.

12. RW1 confirmed that the claimant was not given a hearing. RW1 added that reduction in the work force was due to reduction in the work load. That the respondent off – loaded 7 employees across the board including security guards for operational reasons.

13. RW1 stated that they did not issue a notice of redundancy to the Ministry of Labour. That the respondent paid the claimant in lieu of notice and in lieu of leave days not taken. That the project is now closed.

#### **Determination**

14. The issues for determination are: -

- i. Whether the termination of employment of the claimant was for a valid reason and if it was effected following a fair procedure.
- ii. Whether the claimant is entitled to the reliefs sought.

15. The claimant was employed on a three months' contract as a driver/offside on 12<sup>th</sup> September 2016. The three-month contract was renewed on 18<sup>th</sup> March 2017 and was to end on 18<sup>th</sup> June 2017.

16. It is not in dispute that on 4<sup>th</sup> June 2017 the respondent served the claimant with a letter of termination with immediate effect. It is also not in dispute that the respondent gave a reason for the early termination of contract in the said letter, being that the claimant's work performance was below average. It is not in dispute that the claimant was not given notice to show cause, his work performance was not appraised and no appraisal report was produced before court. RW1 admitted that the claimant was not given any hearing before the termination.

17. RW1 under cross examination made an about turn and explained that the work load of the respondent declined and so the respondent declared 7 employees redundant including the claimant and security personnel.

18. That the respondent did not give the employees and the Ministry of Labour any notice of termination on grounds of redundancy. RW1 also testified that the claimant was paid in lieu of notice and in lieu of leave days not taken in the sum of Kshs. 83,053.

19. The claimant admitted having received a net amount of Ksh. 63,174. The claimant however stated that which was not denied by RW1 that payment of terminal benefits was done after the suit was filed.

20. It is the court's considered finding that the claimant's employment was terminated for reasons of poor work performance without any work appraisal, notice to show cause or any opportunity to defend himself on the matter. That this was just a smoke screen by the respondent when the real reason for the termination as was testified by RW1 was operational reasons due to reduction in the workload. That the claimant was engaged in a time bound project which has now come to an end.

21. The Court finds that the termination of the employment of the claimant was unlawful and unfair in that the respondent did not follow the mandatory procedure under section 40, 41,43, and 45 of the Employment Act 2007 in that the respondent gave no notice of redundancy to the claimant and his colleagues whose real reason for termination was redundancy.

22. The respondent admitted they did not allow any consultation between the claimant and the respondent on the matter but instead gave a false, and unsubstantiated reason to terminate the employment of the claimant.

23. Accordingly, the termination of the employment was unlawful and unfair and the claimant is entitled to compensation in terms of section 49 (1) (c) and (4) of the Employment Act, 2007.

24. In this regard the claimant had served the respondent for only 9 months and the termination of employment occurred two weeks to the expiry of the contract of employment. The claimant was paid terminal benefits after he had filed suit including payment in lieu of one-month notice and payment in lieu of leave days not taken.

25. The respondent gave fictitious reasons for offloading the claimant when the real reason for the action was that work load had reduced and the claimant was in fact declared redundant. This is an aggravating factor. The claimant was not paid severance pay to which he is entitled at the rate of 15 days' salary for the period served.

26. The respondent had closed its operations and so the claimant did not have further career prospects in the organization.

27. Considering all the circumstances of the case, the Court awards the claimant two (2) months' salary in compensation for the unlawful and unfair termination of his employment in the sum of Kshs. (57,970 X 2). = 115,940.

28. In the final analysis Judgment is entered in favor of the claimant against the respondent as follows: -

a. Kshs. 115,940 being two months' salary in compensation for unlawful termination of employment.

b. Severance pay at 15 days' salary for the months worked in sum of Kshs. 28,985.

29. The contract of service under clause 17 provided for payment of service pay and not gratuity as claimed in the suit. The claim for payment of gratuity is disallowed for want of proof.

30. Total sum kshs. 144,925.

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

d. Costs of the suit.

**Judgment Dated, Signed and Delivered at Nairobi this 25<sup>th</sup> day of June 2020.**

**Mathew N. Nduma**

**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 15<sup>th</sup> March 2020, this ruling 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 Audia for the Claimant

Mr. Pekee for Respondent.

Chrispo: Court Clerk