



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 802 OF 2017

BETWEEN

MBWANA SAID MBAVU.....CLAIMANT

VERSUS

KWALE WATER AND SEWERAGE COMPANY LIMITED.....RESPONDENT

Rika J

Kituo Cha Sheria, Advocates for the Claimant

Lewa & Associates, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 10th October 2017. He states, he was employed by the Respondent as a Pipe Technician, between the year 2005 and 18th November 2016, when his contract was unlawfully terminated by the Respondent. He earned a monthly salary of Kshs. 16,802.

2. He worked throughout, without Annual Leave, and on Public Holidays. He was paid nothing in lieu of Annual Leave. He was not compensated for work done on Public Holidays. Termination was on account of his association with his Trade Union, Kenya Union of Commercial, Food, and Allied Workers. He attended a meeting called by the Union to discuss Employees' welfare, on 18th November 2016. The Respondent promptly terminated the Claimant's contract, without a hearing or notice. He was not paid anything by way of terminal dues.

3. His prayers against the Respondent are: -

- a. 1 month salary in lieu of notice at Kshs. 16,802.
- b. Annual leave over a period of 10 years at Kshs. 168,020.
- c. Public Holidays over a period of 11 years at Kshs. 110,880.
- d. Service pay at 15 days' salary for each of the 11 years at Kshs. 92,411.
- e. 12 months' salary in compensation for unfair termination at Kshs. 201,624.
- f. House allowance over a period of 11 years, at 15% of the monthly salary, at Kshs. 332,640.

Total Kshs. 927,377.

- g. Declaration that termination was unfair.

- h. Certificate of Service to issue.
- i. Costs.
- j. Interest.
- k. Any other relief.

4. The Respondent filed its Statement of Response on 22nd February 2018. Its position is that it employed the Claimant in 2015 as a Casual Employee. He was not employed in 2005. His last contract was to run from September 2016 to 30th November 2016. During his tenure, he had disciplinary issues which included: connecting water to Customers illegally; failure to remit cash collected from Respondent's Customers for supply of water; and issuing a receipt to a Customer from a receipt book which was reported to have been lost. He was involved in an illegal gathering called by his Trade Union at Baraza Park in Kwale. Workers marched to the County Governor's Office, singing and calling for the removal of Respondent's Managing Director. The Respondent's Board of Directors met on the same date, and determined that the Claimant's contract, which was to lapse on 30th November 2016, is terminated. The meeting was illegal because there was no notice issued upon the Respondent; the Claimant absented himself from his workstation throughout the day, without the leave of the Respondent; he did not explore the internal grievance procedure governing the workplace; and he incited other Workers to participate in an unlawful demonstration. The Respondent prays the Court to dismiss the Claim with costs.

5. The Claimant gave evidence, and rested his case, on 16th September 2019. Stephen Ngala Safari, Respondent's Internal Auditor, gave evidence for the Respondent on the same date, while Respondent's Transport Officer Ali Bakari Mwanzumari, closed the hearing on 2nd March 2020. Thereafter, the Parties filed their Closing Submissions and the file was forwarded to the Trial Judge under Ministry of Health and Judiciary Covid-19 Guidelines, on 18th August 2020, for preparation of Judgment.

6. The Claimant told the Court, he was employed in August 2006. He was not issued a written contract. He was paid Kshs. 1,500 weekly, in cash. He was later issued a written contract in 2015. He was asked to see the Director, alongside other Employees, on 18th November 2016. He was told it was about unionization. His contract was terminated. He was paid arrears of salary of 2 months. He never went on Annual Leave. He worked on Public Holidays. He did not know if N.S.S.F contributions were remitted. He was not given a pay slip. He was not heard and/or given reasons to justify termination.

7. Cross-examined, he denied that he lied in his Pleadings, that he was employed in 2005. In his letter of demand, he stated he was employed in 2002. He affirmed that the correct date is 2006. He was in casual employment. It is not true that he was called by the Respondent on need basis. He worked in continuity. He fixed burst pipes. He did not collect revenue. He was not aware that there was any complaint against him from Respondent's Customer that he collected revenue from the Customer. He attended the union meeting at Baraza Park, from 1.30 p.m. to 2.15 p.m. It was authorized by the Respondent. Many Employees attended. The Director called the Claimant later. The Claimant's contract was terminated. The Claimant never went on Annual Leave. He worked in Ukunda, Kinango, Mariakani and Tiwi, among other areas.

8. Internal Auditor Safari, told the Court he has worked for the Respondent from 2004. He oversaw implementation of Respondent's policies. He was familiar with the Claimant's case. The Claimant was initially employed as a Casual Employee. He was paid his salary in arrears in 2014, and left employment. He came back in 2015 under a new Managing Director. He was placed on 3 months' contract. He was not in employment in 2014. The Respondent came into being in 2005. There were complaints by Customers from Kombani area, that the Claimant was collecting revenue from them. Respondent's Accounts Office found out there were lost receipt books. One of them had been used to issue receipts to Customers illegally. The Customers confirmed that the Claimant issued these receipts. The Managing Director advised Customers to seek refund from the Claimant. There was no meeting on 18th November 2016, involving all Employees. Most participants were Employees who had been sacked. The Respondent does not open on Public Holidays. The Claimant did not work on Public Holidays. If one worked on Public Holidays, he was paid overtime. There was a Schedule of overtime paid. No Employee worked for 7 days a week. Field Employees worked from Monday, to Saturday 12.00 o'clock.

9. Cross-examined, the Internal Auditor told the Court that Customers who allegedly paid Claimant some money for supply of water, were not named. Their names were not stated before the Court. The receipts issued to them were not exhibited. Receipt books disappeared. The Respondent did not issue a public notice on their disappearance. The Internal Auditor did not witness any receipts being issued. He was not able to say when the Claimant started working. He was not able to say if the Claimant initially worked without a written contract. The Respondent did not have written contracts initially. It is documented that the Claimant was an Employee of the Respondent. His contract was terminated. It is correct he did not appear before any disciplinary forum. There is no resolution of the Board, terminating the Claimant's contract. The Claimant was never heard, on allegations about participation in an illegal meeting. Redirected, the Internal Auditor told the Court he did not know where the Customers upon whom the Claimant issued receipts, are.

10. Transport Officer Mwanzumari, was previously Human Resource Assistant and also, Senior Human Resource Clerk. The Claimant was a Pipe Fitter. He was based at Tiwi, Kombani Station. He was a Casual Employee. He was paid after every 15 days worked in a month. He rested on Sundays. He rested on Public Holidays. He would only be required, if and when, there was an emergency on Sundays and/or Public Holidays. There was a meeting at Baraza Park. The Managing Director sent Mwanzumari to Baraza Park, to enquire about the nature of the meeting. Mwanzumari met the Union Leaders, who told him the meeting was called to elect Officials. He asked whether the Respondent had authorized the meeting. The participants shouted at Mwanzumari, threatening to beat him up. The Claimant was among the participants.

11. Mwanzumari told the Court on cross-examination that he did not know when the Claimant joined the Respondent. He found the Claimant in employment. The Claimant had disciplinary issues prior to the incident at Baraza Park. He forged documents. Mwanzumari did not have evidence of forgery. The Claimant was dismissed. The main reason for this is that he participated in an illegal meeting. He did not have a contract at the time of termination. Paragraph 3 of the Statement of Response indicates the Claimant was placed on contract. Paragraph 7 reiterates this fact. The Respondent did not issue the Claimant with a letter to show cause. He was not called to a disciplinary hearing. The

meeting at Baraza Park was attended by more than 30 participants. Some are still employment.

The Court Finds: -

12. Whereas it is not controverted that the Claimant was an Employee of the Respondent Water Company, the date when he joined the Respondent is highly contested. He states in his Statement of Claim that he was employed as a Pipe Technician, in 2005. In his demand letter dated 20th February 2017, the date of employment is in the year 2002. The year 2005 is repeated in Claimant's Witness Statement filed on 10th October 2017. In his oral evidence the date of employment changed to the year 2006.

13. The Respondent's position is that the Claimant was employed as a Casual Employee, in 2015. The date of employment stated by the Respondent, in the Statement of Response in June 2015.

14. There are no definitive documents availed by either Party, in support of their respective positions on the date of employment. However, the Claimant exhibited a letter of appointment dated 27th August 2015, whereof the Respondent offered to employ the Claimant, as a Casual Artisan for a renewable period of 3 months effective 1st September 2015.

15. The Witnesses for the Respondent suggested the Claimant was engaged prior to the contract of 2015. Safari stated the Claimant was initially employed as a Casual Employee. He was paid salary arrears in 2014, and left. He returned in 2015 when there was a new Managing Director, and offered a 3 –month renewable contract. Cross-examined, Safari told the Court he could not definitively say when the Claimant was employed. He could not say if the Claimant was initially employed without a written contract. It was Safari's evidence, that indeed, the Respondent did not issue written contracts to Employees initially. Mwanzumari found the Claimant already in employment when he joined the Respondent. He told the Court he was in his 5th year at the Respondent, at the time of giving his evidence, on 2nd March 2020. This would suggest that Mwanzumari himself joined the Respondent in the year 2015. He too was categorical, that he did not know, when the Claimant actually joined the Respondent.

16. In the absence of conclusive documentary evidence from the Respondent on the date it employed the Claimant, the Court must go by the oral evidence of the Claimant, relying on Section 10 [7] of the Employment Act 2007, and accept that the Claimant was employed in the year 2006, as categorically corrected, and reaffirmed in his evidence before this Court.

17. Was termination on 18th November 2016 carried out fairly under Section 41, 43 and 45 of the Employment Act 2007?

18. There is an easy answer, to the question of procedural fairness. This easy answer is provided to the Court, by the evidence of Safari and Mwanzumari. Safari confirmed that the Claimant's contract was terminated by the Respondent. He confirmed that the Claimant was never called to any disciplinary forum of any hue or colour. The Board resolved to terminate, Safari told the Court. He did not have the relevant resolution of the Board in Court. He emphasized that the Claimant, was never heard on the allegations of involvement in unlawful trade union activities. Mwanzumari told the Court that the Claimant was not asked to show cause why, he should not face disciplinary proceedings. He was not called to any disciplinary hearing. From the evidence of the 2 Witnesses called by the Respondent, it is clear that the procedure adopted by the Respondent in terminating Claimant's contract was a complete failure, defying every principle of fair procedure contemplated under Section 41 and 45 of the Employment Act.

19. Was there valid reason or reasons justifying the decision, in accordance with Sections 43 and 45 of the Employment Act? Various reasons are suggested in the evidence of the Respondent, to comprise substantive justification. It is said the Claimant collected revenue from Respondent's Customers, for water supply, using receipt books stolen from the Respondent. Safari was not able to supply names of the Customers from whom the Claimant illegally obtained water supply money. He did not have the receipts or receipt books. The Respondent did not alert the public, through a public notice, about the disappearance of its receipt books. Strangely, the Managing Director, rather than forward the Claimant to the criminal justice system for engaging in corruption, advised the defrauded Customers to get refunds from the Claimant. This is the evidence of Internal Auditor Safari. What kind of a Managing Director, would advise Customers who have been swindled by his Company Employees, to recover their money from such Employees?

20. There were 2 other reasons suggested by the Respondent in justifying termination decision. It was said that the Claimant joined an illegal meeting at Baraza Park, which was called by the Claimant's Trade Union. It is not clear from the evidence of the Respondent what was illegal in the meeting. Mwanzumari told the Court the meeting was attended by more than 30 Employees some who are still employed by the Respondent. It would have served the Respondent well, if there was evidence that the Claimant left his workstation during working hours. He told the Court the meeting was between 1.30 p.m. and 2.15 p.m. This would suggest the Employees met during their lunch break. The Respondent did not offer persuasive evidence to discount the Claimant's evidence, that he did not abandon his workstation and engage in an illegal meeting during working hours. The Court does not think that the meeting would be deemed illegal only on account of there being no notice to the Respondent, and on account of the Employees shouting and dancing, and seeking audience with their County Governor. Employees are allowed under our Constitution to demonstrate, picket and draw attention to their grievances. The Respondent needed to show that in exercising these fundamental rights and freedoms, the Claimant and his Colleagues crossed the line of what is legally permissible.

21. The last reason suggested by Mwanzumari in justification, is that the Claimant had been involved in forgery. This reason was not in the Pleadings filed by the Respondent. It was not supported by the evidence given by Mwanzumari. It was not stated to have formed part of the reasons considered by the Board, in resolving to terminate.

22. It can be concluded that termination was unfair, both on account of procedure and validity of reasons.

23. The Claimant had worked for 10 years from 2006 to 2016. The Respondent did not supply the Court with any evidence, showing that the Claimant's disciplinary record was tainted. He worked on short term contracts, which were renewed without fail. Some of his Colleagues who were in the Trade Union meeting, in the evidence of the Respondent, are still serving the Respondent. The Claimant did not prove that he earned Kshs. 16,802 monthly. The Casual Payroll for October 2016, shows a daily rate of Kshs. 542, which would support the figure of

Kshs. 14,092 monthly, contained in the Closing Submissions of the Respondent. The Court adopts a monthly salary of Kshs. 14,092. He was paid nothing after 10 years of service, in terminal benefits. **He is allowed compensation for unfair termination, equivalent of 8 months' salary at Kshs. 112, 736.**

24. He is granted 1 month salary in lieu of notice at Kshs. 14,092.

25. The Court is not able to agree with the Claimant that he is entitled to Annual Leave and Public Holiday Pays, over a period of 10 years. He concedes he was initially taken in on casual basis. It was not until August 2015, that he was offered a renewable, written contract of 3 months, although still irregularly characterized as a 'Casual Artisan.' He had flexibility in his hours of work while still engaged casually. He has not convinced the Court that even in his casual years, he worked on Public Holidays.

26. The Casual Payrolls exhibited by the Respondent suggest the Respondent deducted a sum of Kshs. 200 monthly, from the Claimant's salary as N.S.S.F contributions. The Casual Payrolls however relate to the year 2016. The Court has been persuaded that the Claimant worked for the Respondent from 2006. He would be entitled to service pay, from the year 2007 when Section 35 of the Employment Act became law, to 2015 when he was issued a 3 months' contract, and probably when contributions to N.S.S.F commenced. It is not unreasonable to accede to the prayer for service pay, based on 8 years of service, at the rate of 15 days' salary for each of the 8 years. **He is allowed service pay at Kshs. 65,040.** The salary received by the Claimant was daily dated at Kshs. 542. Daily rates include the housing element. There is no legal basis for the claim for house allowance in arrears.

27. It is declared that termination was unfair.

28. Certificate of Service to issue.

29. Costs to the Claimant.

30. Considering the prevailing public health situation and business environment, execution of this Judgment is stayed for a period of 45 days, from the date hereof.

31. Interest to accrue at the rate of 16% from the end of the 45 days.

IN SUM, IT IS ORDERED: -

a. It is declared that termination was unfair.

b. The Respondent shall pay to the Claimant: compensation at Kshs. 112,736; notice at Kshs. 14,092; and service at Kshs. 65,040 – total Kshs. 191,868.

c. Certificate of Service to issue.

d. Costs to the Claimant.

e. Stay of execution of 45 days allowed.

f. Interest at the rate of 16% per annum from the end of 45 days allowed.

Dated, signed and released to the Parties, under Ministry of Health and Judiciary Covid-19 Guidelines, at Chaka, Nyeri County, this 28th day of August 2020.

James Rika

Judge