



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 861 OF 2015

BETWEEN

JOHN KAMAU GACHINA.....CLAIMANT

VERSUS

ZAKHEM INTERNATIONAL

CONSTRUCTION [KENYA] LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Lumatete Muchai & Company Advocates for the Claimant

Issa & Company, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 13th November 2015. He avers, he was employed by the Respondent as a Side Boom Operator, on 27th March 2015. His contract would last for the duration of a project the Respondent was undertaking in Mombasa. He received Internal Memo dated 25th September 2015 from the Respondent, indicating that his contract had been terminated. He was alleged to have conspired to steal Respondent's fuel. He was not heard. He was not availed any report on investigations carried out with regard to allegation of fuel theft. He prays for Judgment against the Respondent as follows: -

- a. Declaration that termination was unfair.
- b. Compensation for unfair termination.
- c. Unpaid leave allowance for 6 months.
- d. Certificate of Service.
- e. Costs.
- f. Interest.
- g. Any other suitable relief.

2. The Respondent filed an Amended Statement of Response on 9th March 2018. Its position is that it is correct the Claimant was employed by the Respondent. His contract was to subsist until completion of Mombasa- Nairobi Pipeline Project, which was being undertaken by the Respondent. The Claimant's contract was subject to completion of 3 months' probation and satisfactory performance. His contract was terminated by notice, under Section 36 of the Employment Act. His terminal dues were ready for collection, from the Head Office. The Claimant however, did not travel to Nairobi Head Office as advised, to collect his dues. Termination was lawful. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant gave evidence, and rested his case on 3rd December 2019. Human Resource Manager Lilian Ndunge, gave evidence for the Respondent on 11th March 2020, closing the hearing.

4. The Claimant told the Court that he was employed by the Respondent in 1979. He was retired and then re-engaged in March, 2015. His contract was terminated by the Respondent on 25th September 2015. It was alleged he planned to steal fuel from the Respondent. He was not heard. There was no notice. He was not given valid reason justifying termination. He was unable to get alternative employment. He never went on annual leave.

5. Cross-examined, the Claimant told the Court that the Respondent was involved in a particular project. He signed a document on employment. It had probation period of 3 months. The Claimant was to receive a monthly salary of Kshs. 90,000. He was a Side Boom Operator. He worked for about 6 months. The 1st 3 months were probationary. He took leave during this period, of 2 days. Termination was unfair. He was instructed not to go to the site. He was given fare to travel to the Head Office in Nairobi. At Nairobi, he was told to leave, because he was a thief. He learnt that some Employees had siphoned fuel. He did not know if they were sacked. Redirected, the Claimant told the Court he was given 2 days of annual leave to attend a burial. He was called while on leave, and dismissed. He was not paid terminal dues, as tabulated by the Respondent.

6. Lilian Ndunge told the Court that the Claimant was employed as a Side Boom Operator on temporary terms, on 27th April 2015. He was to work for the duration of a project the Respondent was undertaking. He was on probation for 3 months. He was advised on 25th September 2015, that his contract had been terminated. He was advised to collect his dues at the Head Office, Nairobi. Termination was carried out under Section 36 of the Employment Act 2007. Cross-examined, Ndunge told the Court that the Respondent tabulated the Claimant's terminal dues. The Claimant did not accept tabulation. The Respondent complied with the terms of the contract.

The Court Finds: -

7. The Claimant was 65 years old, when he was engaged by the Respondent, as a Side Boom Operator, on 27th April 2015. He seems to have worked for the Respondent in the past, from as early as 1979, retired and was recalled. The dispute relates to the contract of 27th April 2015. The contract document does not indicate the duration of the contract. Parties in their evidence agree the Respondent was undertaking a pipeline project, and the Claimant's contract was pegged to the completion of the project. He was subject to probation of 3 months. After the end of his probation, he worked for another 3 months. His contract was terminated through an Internal Memo, issued by Plant Manager Raff Rizkallah, dated 25th September 2015.

8. No reason is given in the Internal Memo, in justifying termination. Parties alluded to allegations of fuel theft, but this is not an accusation captured anywhere in the Internal Memo. The Respondent instead, explained in its Pleadings and Evidence, that termination was based on Section 36 of the Employment Act, which allows for termination through a notice, or payment in lieu of notice.

9. Section 36 is not a standalone provision. It is to be read with Section 41, 43, 45 and 47 of the Employment Act. If it was a standalone provision, it would result in a throwback to the era of termination at the will of Employers. Contracts of employment would be terminated for good cause, bad cause or no cause. It would defeat the purpose for enactment of the progressive Employment Act of 2007. The Employment Act demands that all termination is fair and justified.

10. The Internal Memo on record does not even amount to a notice of termination. It merely informs the Claimant that a decision had been made to terminate. He was not paid notice at the time of termination- 25th September 2015. He was offered fare travel to Nairobi, where he was expected to report by the following week. It is difficult in the circumstances, to even say when termination became effective.

11. The Court is satisfied that termination was not preceded by notice, pay in lieu of notice, valid reasons, and was lacking in fairness of procedure. It did not meet the requirements of the law, under Section 36, 41, 43, 45 and 47 of the Employment Act.

12. The Claimant had worked for a total of 6 months. 3 of them were probationary. He states he had worked for the Respondent previously, from as early as 1979. The Respondent engaged in project work, and it is understandable why the Claimant was not engaged in continuity. Relevant to this dispute, he was engaged for the duration of the pipeline project, which entailed operation of Side Boom [or Sideboom], which is a type of construction vehicle, used to lay pipes.

13. As of the date his contract was terminated, the project does not seem to have terminated. He expected to go on working to the end of the project. He had worked for the Respondent in the past, and was recalled, at the age of 65 years. He is not shown to have had disciplinary issues. He was offered terminal dues of Kshs. 100,962, comprising salary for days worked to 30th July 2015; earned leave of 9 days; and notice of 1 month. He did not collect this amount.

14. The Court agrees with him, that termination was unfair. ***He is granted equivalent of 2 months' salary in compensation for unfair termination at Kshs. 180,000.***

15. ***He is allowed the prayer for notice pay at Kshs. 90,000 as offered by the Respondent.***

16. ***He is granted annual leave of 9 days as offered, at Kshs. 31,153.***

17. ***Certificate of Service to issue.***

18. ***No order of the costs and interest.***

IN SUM, IT IS ORDERED: -

a. Termination was unfair.

b. The Respondent shall pay to the Claimant: compensation at Kshs. 180,000; notice at Kshs. 90,000; and annual leave at Kshs. 31,153 – total Kshs. 301,153.

c. Certificate of Service to issue.

Dated and delivered at Mombasa, this 29th day of September 2020

James Rika

Judge