



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 108 OF 2018

MOHAMMED BOCHA GOBU.....CLAIMANT

VS

BGP KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Mohammed Bocha Gobu against his former employer, BGP Kenya Limited.
2. The claim is by way of a Memorandum of Claim dated 22nd February 2018 and filed in court on 2nd March 2018.
3. The Respondent filed a Memorandum of Response on 13th April 2018 but did not attend the trial, in spite of due notice.
4. In a ruling delivered on 9th April 2020, the Court rejected the Respondent's application to have the matter reopened, and directed the Respondent to file final submissions on the main claim.
5. In arriving at its judgment, the Court has taken into account the Respondent's Response and submissions on record.

The Claimant's Case

6. The Claimant states that he was employed by the Respondent on 20th June 2012, in the position of Chief Mechanic. He worked as such until 29th June 2016, when his employment was terminated. At the time of termination, the Claimant earned a monthly salary of Kshs. 25,745.
7. The Claimant pleads that the termination of his employment was unjustifiable and unfair. He points out that prior to the termination, he was not allowed an opportunity to defend himself.
8. The Claimant now claims the following from the Respondent:

- a. One month's salary in lieu of notice
- b. Damages for unlawful termination of employment
- c. Gratuity for the period worked at the rate of 15% of annual salary
- d. Certificate of service
- e. Costs plus interest

The Respondent's Case

9. In its Memorandum of Response dated 5th April 2018 and filed in court on 13th April 2018, the Respondent states that the Claimant was

engaged as a Mechanic, on the basis of fixed term contract from time to time.

10. The Respondent further states that the Claimant was employed when there was work and his contract would normally be fixed to the period of the said work.

11. The Respondent goes on to state that following expiry of the Claimant's contract, he was paid all his dues, upon which his relationship with the Respondent was lawfully severed.

12. The Respondent adds that after some months of separation with the Claimant, the Respondent secured some new works and therefore called the Claimant who accepted to be re-engaged on a fixed term contract from 19th October 2016 to 19th January 2017.

13. The Respondent denies that the Claimant's employment was terminated and states that his fixed term contract expired.

14. The Respondent avers that at the time of expiry of the Claimant's fixed term contract on 19th January 2017, his gross monthly salary was Kshs. 24,400.

15. The Respondent further avers that the Claimant was paid all his terminal dues and that he had no legitimate claim against the Respondent.

Findings and Determination

16. There are two (2) issues for determination in this case:

a. Whether the Claimant has made out a case of unlawful termination of employment;

b. Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

17. At paragraph 5 of his Memorandum of Claim, the Claimant pleads the following:

“On 29th June 2016, the Respondent terminated the Claimant's employment unilaterally, without any prior warning, without any justifiable cause and in complete disregard to the procedure expressly set out in the Employment Act, 2007.”

18. On the other hand, in his witness statement dated 22nd February 2018, which he adopted as his testimony before the Court, the Claimant states that on 16th December 2016, he escorted motor vehicles from Athi River to the Port of Mombasa. He adds that after finishing his work on 22nd December 2016, he went back to his home in Witu.

19. The Claimant further testified that he was to resume duty on 11th January 2017 but before then, he was called by the Respondent's Manager who told him to wait to be called. He was not called as promised.

20. Which then was the actual date of the termination of the Claimant's employment; was it 29th June 2016 as pleaded or 22nd December 2016 as stated in *viva voce* evidence?

21. As held in *Joseph Mbuta Nziu v Kenya Orient Insurance Company Ltd [2015] eKLR* parties are bound by their pleadings and any evidence that contradicts the averments in the pleadings goes to no issue and must be disregarded.

22. In its Response to the Claimant's claim, the Respondent states that at the time material to the claim, the Claimant served on a fixed term contract running from 19th October 2016 to 19th January 2017.

23. The Claimant's defence therefore is that the Claimant's employment came to an end by effluxion of time.

24. Section 47(5) of the Employment Act states as follows:

5. 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.

25. In its final submissions, the Respondent made reference to the decision in *Kennedy Maina Mirera v Barclays Bank of Kenya Limited [2018] eKLR* where my brother **Nduma J** held that Section 47(5) of the Employment Act must be construed in accord with the conventional law on the burden of proof.

26. An employee who alleges unlawful termination of employment must therefore discharge their evidential burden, which burden does not shift merely because the employer does not call witnesses.

27. In the present case, the Claimant pleads one date of termination and goes ahead to testify on a different date. An employee who dithers on

the date of termination cannot be said to have discharged the burden of proof.

28. In the circumstances of this case, I find and hold that the Claimant failed to prove his allegations of unlawful termination of employment. The claims for compensation and notice pay are therefore without basis and are dismissed.

29. No basis was established for the claim for gratuity which is also dismissed.

30. In the end, the Claimant's entire claim fails and is dismissed.

31. Each party will bear their own costs.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF SEPTEMBER 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Njoroge h/b for Mr. Mwakio for the Claimant

No appearance for the Respondent