



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1835 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

STEPHEN NDUATI KAGOMBE.....CLAIMANT

VERSUS

NANCHANG FOREIGN ENGINEERING

COMPANY KENYA LIMITED.....RESPONDENT

JUDGMENT

Vide his statement of claim dated 12th October 2015 and filed in Court on 15th October 2015, the claimant herein avers that his employment was wrongfully and unfairly terminated by the Respondent, a registered limited liability company and failure by the Respondent to pay his terminal dues at the time of separation.

His case is that he was employed by the Respondent on or about 10th December, 2014 in the position of Driver, earning a monthly salary of Kshs.10,500. He maintained that he performed his duties diligently and to the Respondent's satisfaction until 31st August 2015 when it unlawfully and illegal terminated his employment.

The Claimant further averred that the reason advanced for his termination were unfounded, untrue and a witch hunt and that no notice of the intended dismissal was issued to him as required by law.

He contended that during the 9 months' period he was under the Respondent's employment his salary was underpaid as per the scale provided by law. He further contended that no notice to show cause for any offence was issued by the Respondent prior to his termination and that the reasons advanced by the Respondent for the termination were an afterthought and only intended to justify his unlawful and un-procedural termination.

The Claimant avers that he was not issued with any warning letter nor was he invited for any disciplinary hearing prior to his termination.

Aggrieved by the decision to terminate his employment the Claimant filed the instant Claim seeking the following reliefs:

- a) That the Court does examine the reasons and merit of the termination of his employment and find his termination unlawful.
- b) That this Court do find that the Respondent's action of continued withholding, failing, refusal and or neglecting to pay the Claimant's rightful terminal benefits and other unpaid dues unlawful.
- c) That the Respondent has been in breach of the Employment Act and other relevant Labour Laws.
- d) That the Respondent is under obligation to pay the Claimant his unpaid overtime earned but not paid, wages and salaries earned but not paid, leave days earned but not given and/or paid for.
- e) That the Respondent pay the Claimant his salaries earned but not paid, leave, travelling allowance, unpaid off days but not paid and leave days earned but not given and or paid for.
- f) That as a result, the Court do order that the Respondent to pay the Claimant all his terminal benefits and other unpaid dues as computed as hereunder:

1. 3 months' pay in lieu of notice $3 \times 14,785.70 = \text{Kshs.}44,357.10$
2. House Allowance $(15\% \times 14,785.70) \times 9 \text{ months} = \text{Kshs.}19,960$
3. Overtime worked 340 hours $\times \text{Kshs.}154 \text{ per hour} = \text{Kshs.}50,000$
4. Underpayment 9 months $\times \text{Kshs.}4,285.70 = \text{Kshs.}38,571.30$
5. Damages for unlawful termination $\text{Kshs.}14,785.70 \times 12 \text{ months} = \text{Kshs.}177,428.40$
6. Interest in 1, 2, 3, 4, 5 and 6 above at Court rates.
7. Any other relief as this Court may deem just and fit to give.

The Respondent in its Defence to Memorandum of Claim dated 23rd March, 2016 and filed in Court on 24th March, 2016 admits having engaged the Claimant from 11th December, 2015 until 29th August, 2015. It however denied having unlawfully terminated his employment as alleged.

The Respondent maintained that it had valid reasons to summarily dismiss the Claimant from employment on the grounds of absconding lawful duty and his alleged involvement in theft and/or loss of money in one of the vehicles under his care.

The Respondent further maintained that from the above reasons the Claimant failed to report back to duty only to return on 1st September 2015 and demand payment of his dues, which was done.

The Respondent contends that the Claim as filed herein is devoid of merit and that the Claimant is not entitled to the reliefs sought therein. It is on this basis that it urges this Court to dismiss the Claim in its entirety with costs to the Respondent.

Evidence

The matter was heard on 19th February 2020 with the Claimant testifying on his own behalf as CW1 and the Respondent calling one witness to testify on its behalf.

Claimant's Case

The claimant relied on his witness statement dated 11th October 2015 and filed in Court on 15th October 2015 as his evidence in chief. In his statement the Claimant reiterated the averments made in his memorandum of Claim.

The Claimant further testified that he was not issued with a letter of dismissal stating the reasons for his termination and that he was not paid any dues at the time of separation.

He further testified that he was not accorded any disciplinary hearing prior to his termination. He maintained that the letter issued to him on 31st August 2015 was a warning letter and not a letter of termination.

The Claimant urged this Court to allow his Claim in terms of the reliefs sought therein.

On cross examination the Claimant stated that he did not report for duty on 30th August 2015 for the reason that he was not asked to report. He further testified that he was not informed of any loss of money in the vehicle he drove and that he only signed the warning letter dated 31st August 2015 after he was promised that his payment would be processed and sent to him vide Mpesa but which was never sent.

Respondent's Case

FENG LEILIN, the Respondents' Accountant testified on its behalf. He relied on his witness statement dated and filed in Court on 28th June 2019 as his evidence in chief. He further relied on the documents attached to the Defence

RW1 testified that the Claimant was engaged as a driver by the Respondent from December 2014 to August 2015 when he was issued with the letter dated 31st August 2015 following an incident where money was lost in the vehicle he was driving on 29th August 2015.

RW1 further testified that the Claimant subsequently absconded duty only to return on 31st August 2015 demanding payment of his salary. He confirmed that the Claimant was indeed paid on 1st September 2015 the sum of Kshs.12,910 which was inclusive of overtime payment as evidenced by Page 14 of the Respondent's documents attached to the Response.

RW1 further testified that the Claimant was paid for overtime worked and that his Claim for the same lacked basis. He urged this Court to dismiss the Claim filed against the Respondent.

Submissions by the Parties

The Claimant submitted that his termination was unlawful and unfair as the Respondent failed to comply with the mandatory provisions of Section 41, 43 and 45 of the Employment Act, 2007. The Claimant relied on the case of **Anthony Makala Chitavi v Malindi Water & Sewerage Company Limited (2013) eKLR**, **Julia Cooper Rust v Academy Dance & Arts (2019) eKLR** and **Jared Aimba v Fina Bank Limited (2016) eKLR** where the Courts held that for a termination to be fair an employer must comply to the provisions of Sections 41 and 45 of the Employment Act, 2007.

He further submitted that the allegations levelled against him by the Respondent on the alleged loss of money had no basis as the vehicle in question was used by him as well as other drivers employed by the Respondent.

He further submitted that his absence from lawful duty was due to the fact that he was informed by the security guard at the Respondent's compound not to report to work and that he was further not informed of the need to report to work as it was a Sunday.

The Claimant further submitted that in absence of being accorded a hearing rendered his summary dismissal unlawful and unfair. He urged this Court to be guided by the decisions in the cases of **Shankar Saklani v DHL Global Forwarding (K) Limited (2012) eKLR**, **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited (2014) eKLR**, **Gilbert Mariera Makori v Equity Bank Limited (2016) eKLR** and **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** where Courts held that termination is bound to be unfair where an affected employee is not accorded a hearing in the presence of a union representative or in the presence of a fellow employee of their choice in compliance with the provisions of Section 41 of the Employment Act, 2007.

Based on the above reasons, the Claimant urged this Court to find his termination unlawful, unfair and un-procedural, to find merit in his Claim and allow the same in terms of the reliefs sought therein.

Respondent's Submissions

The Respondent on the other hand submitted that it did not unlawfully terminate the Claimant's employment but rather the Claimant absconded lawful duties for no just cause and out of his own accord.

It is on this basis that the Respondent maintained that it was entitled to summarily dismiss the Claimant by dint of Section 44 of the Employment Act, 2007.

It further submitted that the Claimant has failed to discharge his burden of proof of unfair termination as required under the provisions of Section 47 of the Employment Act, 2007. For emphasis the Respondent relied on the case of **Jane Muthoni Muya v John & T. Kempro Company Limited (2019) eKLR**.

The Respondent maintained that the Claimant had no claim as against it having paid him his salary for the month of August 2015, which amount he duly acknowledged receipt of.

In conclusion the Respondent urged this Court to find the Claim as filed devoid of merit and dismiss the same with costs to the Respondent.

Determination

I have considered the pleadings, the evidence adduced by the parties, the written Submissions and authorities cited therein and find that the issues arising for determination are:

1. Whether the Claimant wilfully absconded work or was summarily dismissed by the Respondent.
2. Whether the Claimant was wrongfully and unfairly dismissed from employment by the Respondent.
3. Whether the Claimant is entitled to the reliefs sought in his Memorandum of Claim.

Whether the Claimant wilfully absconded work or was summarily dismissed by the Respondent.

The Claimant contended that his employment was terminated without prior notice or hearing and that the letter dated 31st August 2015 was not a termination letter but a warning letter.

The Respondent on the other hand submitted that it did not dismiss the Claimant as alleged by the Claimant and that he was guilty of absconding lawful duties after enquiries were made on some money that went missing in a vehicle under his care.

The Respondent in compliance with the provisions of Section 74 of the Employment Act produced attendance cards for the Claimant and it clearly indicates that in the month of August 2015 the Claimant failed to attend lawful duties on the 30th August 2015.

Further, on his return on 31st August 2015 the Claimant was issued with a warning letter dated 31st August 2015 wherein he was warned on his behaviour in relation to:

- a) *Falsifying the working time on his job card*
- b) *Failure to attend to work without notifying his employer*

c) the alleged loss of money that was in the vehicle under his care.

d) Bad attitude when communicating with his employer.

The Claimant explained his absence by indicating that he was not notified of the need to attend to work as it was a Sunday and that he was informed by the security guard at the Respondent's premises that the boss had asked the security guard to inform the claimant that he should not report back to work again. The Respondent did not deny the averments of the claimant.

What then is the law on desertion and/or absconding lawful duties?

Black's Law Dictionary (Ninth Edition) defines desertion as:

“The willful and unjustified abandonment of a person's duties or obligations.”

In the South African case of **Seabolo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)** the Court sought to distinguish desertion from unauthorized absence from duty as follows:

“...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post, subsequently formulates the intention not to return.”

Is the Claimant therefore guilty of desertion and/or absconding lawful duties as contended by the Respondent?

From the evidence adduced in this matter I do not find any proof of desertion or absconding duty by the claimant as the absence is well explained.

However, even assuming the Claimant had absconded lawful duties, he was still by law entitled to a fair disciplinary process as set out in Section 41 of the Employment Act, 2007. No evidence was availed to the Court to support the claimant having been taken through a disciplinary process or any notice of a disciplinary hearing having been issued prior to the termination. It is the duty of the Respondent to show this Court that it accorded the Claimant a fair hearing prior to his termination. As was decided in the case of **Felistas Acheha Ikatwa v Charles Peter Otieno (2018) eKLR**

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”

The statutory burden for a complaint of unfair termination of employment or wrongful dismissal is contained in section 47(5) of the Employment Act. The section provides that –

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.

An employee therefore has the burden of proving that an unfair termination of employment has occurred while the employer's burden is to justify the reasons for such termination. The claimant has on the evidence on record, discharged his burden under Section 47(5) of the Act.

In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

In view of the foregoing I find that the Claimants' termination was indeed unlawful, unfair and wrongful both substantively and procedurally in terms of Section 45 (1) and (2) of the Employment Act, 2007.

Whether the Claimant is entitled to the reliefs sought in his Memorandum of Claim

The Claimant sought payment of 3 months' pay in lieu of notice, house allowance, overtime, salary underpayment, compensation for unlawful termination and costs to the Claim.

House Allowance and Underpayments

On the issue of house allowance as pleaded by the Claimant the Respondent maintained that the Claimant earned a daily salary of Kshs.1,000 that was inclusive of house allowance and therefore contended that he was not entitled to the same.

The Claim for underpayment is similarly denied by the Respondent who maintains that the salary earned by the Claimant is what is recommended by law and therefore urged this Court to dismiss the Claim.

Under Section 3(6) and 26 of the Employment Act, any contract to employ on terms inferior to those provided for in the Act is illegal, null and void. Further, under Section 48(1) of the Labour Institutions Act the court is required to read into a contract the statutory minimum terms of employment. The statutory minimum wages in 2014 were those under the Regulation of Wages (General) Order 2013, the same having not been amended until 2015. The basic minimum wage for a driver in 2014 was Kshs.13,201.55 with house allowance of 15% per month being Kshs.1,980.23. For the year 2015 the Regulation of Wages (General) Order 2015 applies where the Claimant was to earn a minimum of Kshs.14,785.70 with house allowance of 15% per month being Kshs.2,217.80.

The Claimant's salary was Kshs.10,500. He is therefore entitled to underpayments and house allowance was tabulated below:

i. December 2014 to April 2015 Salary (Kshs.13,201.55 – Kshs.10,500) = Kshs.2,701.55 for 5 months being Kshs.13,507.70.

ii. Salary between May 2015 to August. 2015

(Kshs.17,003.50 – Kshs.10,500) = Kshs.6,503.50 x 4 months being Kshs.26,014.00.

Total amount payable to the Claimant in underpayments of basic wage is Kshs.39,521.90 and house allowance of (7,920.90 + 11,089.00) Kshs.19,009.90 bringing the total to **Kshs.58,531.80**.

Overtime Payment

The Claimant further claimed overtime payment which payment was vehemently denied by the Respondent who maintained that the Claimant was paid for any overtime work done.

I have perused the annexure to the Response filed by the Respondent at page 17 to 32 being copies of the Claimant's payslips and note that an entry is made for overtime payment. I therefore find that he is not entitled to the same.

Payment in lieu of notice

The Claimant is entitled to one (1) month's salary in lieu of notice by dint of Section 35 of the Employment Act, 2007 being **Kshs.17,003.50**

Compensation for unfair and unlawful termination

Having found the Claimant's termination unlawful, he is entitled to compensation under this head. The Claimant is awarded 3 months' salary as compensation for unfair termination. In arriving at the same I have considered the provisions of Section 49 of the Employment Act, especially the length of service and the manner in which the claimant's employment was terminated. I award him the same at 17,003.50 x 3 months = **Kshs.51,010.50**.

In conclusion Judgment is entered in favour of the Claimant against the Respondent in the **total sum of Kshs.126,545.80**.

The Claimant is awarded costs of this suit and interest at Court rates from the date of the judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2020

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

MAUREEN ONYANGO

JUDGE