



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 74 OF 2019

IN THE MATTER OF PROVISIONS OF ARTICLES 41 AND 47 OF THE CONSTITUTION, 2010

IN THE MATTER OF PROVISIONS OF SECTIONS 10, 11, 12, 13, 14,15, 20, 41, 45, 47 AND 49 AND 51 OF THE EMPLOYMENT ACT

IN THE MATTER OF THE UNFAIR TERMINATION OF THE PETITIONER'S CONTRACT OF SERVICE BY THE RESPONDENT

-BETWEEN-

PETER ODUNYA ONYANGO.....PETITIONER

-VERSUS-

ALMAS ELECTRONICS E.A LTD.....1ST RESPONDENT

ALMAS ENTERPRISES E.A LTD.....2ND RESPONDENT

SALIM ANWARALI.....3RD RESPONDENT

SHEZ SHEZAD ANWARALI.....4TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 9th October, 2020)

JUDGMENT

The petitioner Peter Odunya Onyango filed the petition on 12.05.2019 through F.N. Wamalawa & Company Advocates. At paragraph 41 of the petition the petitioner prayed thus, **“41. The petitioner accordingly claims for violation of his fundamental constitutional rights to fair remuneration and reasonable working conditions and protection against dismissal without due process guaranteed by Article 41(1) and (2) of the Constitution and to equality before the law and equal protection and equal benefits of the law guaranteed by Article 27(1) and (2) of the Constitution and in addition I claim Kshs. 1,162,800.00.”**

The petitioner computed his claims as follows:

- a) Overtime for the period 03.10.2012 to 28.03.2019 being a sum of Kshs.822, 800.00.
- b) One-month salary for each completed year from 03.10.2012 to 02.10.2018 x Kshs.20, 000.00 making Kshs.120, 000.00.
- c) Salary in lieu of leave not taken for 6 years at Kshs.20, 000.00 x 6 making Kshs.120, 000.00.
- d) House allowance at 20% basic salary for the six years at the sum of Kshs. 277, 600.00.
- e) Travelling allowance for 03.10.2012 to 28.03.2019 Kshs.800.00 per month x 78 months making Kshs. 62, 400.00.
- f) Subtotal on b-e above Kshs. 340,000.00
- g) Grant total Kshs.822, 800.00 plus Kshs. 340,000.00 making Kshs. 1, 162, 800.00.

The petition was based on the attached petitioner's affidavit.

The petitioner's case is as follows. The 1st and 2nd respondents are companies registered under the Companies Act. The 3rd and 4th respondents are directors of the 1st and 2nd respondent. The 1st respondent employed the petitioner as a cleaner effective 03.10.2012. The 1st respondent accorded the petitioner in-house training as an Electronic Technician and upon becoming proficient and skilled he was engaged in repair of mobile phones, Ipads, computers and accessories thereof. The terms of employment were not reduced into a written contract. The petitioner's case is that his contract of service would run until lawfully terminated in accordance with the provisions of the Employment Act, 2007. His work station was in Nairobi and he worked from 9.00am to 1900 hours, Tuesday to Sunday without lunch breaks being 10 hours per day, 60 hours per week (Tuesday to Sunday) and for 52 weeks per year. The petitioner says he was entitled to minimum terms under law for health and sick benefits, sick leave, annual leave, house allowance, days of rest, overtime, terminal benefits, pension and other benefits.

The petitioner's further case is as follows. The 1st respondent failed to keep records of his employment and he served upon disadvantageous terms and conditions. No written contract was provided for per section 10(2) of the Employment Act, 2007 and sections 10, 12, and 13 of the Employment Act were breached.

The claimant further states as follows. He was not at all material times employed by the 2nd, 3rd, and 4th respondents. The 3rd and 4th respondents without any just cause or reasonable excuse orally dismissed the petitioner effective 28.03.2019 and refused to pay the petitioner's terminal dues and that the same would be payable on 04.04.2019. On 04.04.2019 the 2nd, 3rd and 4th respondents gave the petitioner a letter of summary dismissal backdated to 28.03.2019 signed by the 3rd and 4th respondents with a paltry Kshs. 6, 259.07 as the claimant's terminal dues. The petitioner declined to sign for the terminal dues as the 2nd, 3rd, and 4th respondents were strangers to his contract of service with the 1st respondent. The petitioner claimed against the 1st respondent a statement showing his terms of service per sections 10, 12 and 13 of the Employment Act, 2007. Throughout the service the petitioner says he was not given annual leave and the termination was fabricated to wipe out his legitimate terminal dues. He was not given a termination notice or an opportunity to defend his case per sections 43, 44 and 45 of the Act. He worked overtime and made claims as particularised. As a cleaner he was paid Kshs. 8,000.00 per month from 03.10.2012 to September, 2013 and thereafter from October 2013 to dismissal 29.03.2019 Kshs. 20, 000.00 per month. He received no sick benefits and no annual leave.

The petitioner has exhibited the letter of summary dismissal dated 01.04.2019. It is on 2nd respondent's letterhead. The letter states the company (2nd respondent) employed the petitioner beginning October 2015 under contract of service agreement as specified under the Employment Act, 2007. The letter states that during the employment he was engaged on piece work at a gross basic wage of Kshs. 20,000.00 per month as at time of summary dismissal. The letter further states that the petitioner was summarily dismissed on 28.03.2019 before noon when by his conduct on the day of dismissal indicated that the petitioner had fundamentally breached his obligations under the contract of service by using abusive or insulting language and behaving in a manner insulting to his employer and a customer to the company. Further records showed that despite previous warning against such behaviour on 16.08.2017 and on 09.12.2017, the petitioner had persisted in acts of indiscipline resulting in his dismissal. His gross monthly pay as at dismissal was Kshs. 20, 000.00 and he had been paid for days worked since he had already taken his annual leave for 2018. His terminal dues were computed at Kshs. 6, 259.07 and the petitioner never signed the exhibited letter. The petitioner also exhibited the payslip for August 2018 showing the NSSF and NHIF remitted with a gross pay of Kshs.20, 000.00.

The 2nd, 3rd, and 4th respondents filed a response to the petition on 03.07.2019 through A.I. Onyango & Company Advocates. The 2nd, 3rd, and 4th respondents' case was as follows:

- a) The 1st respondent is not part of the 2nd respondent company or part of the 2nd, 3rd and 4th respondents.
- b) The petitioner's case is not a true reflection of his employment circumstances. He never served the 2nd respondent as an Electrical Technician but he was employed as a cleaner.
- c) From 03.10.2012 the 2nd respondent employed the claimant as a cleaner on piece work terms and from October 2015 the terms of service converted to contract of service agreement which was an oral contract. Per section 27(2) of the Employment Act, the petitioner was given one rest day per week. He was a contributor to both NHIF and NSSF and his health and social protection benefits were provided for and section 35(6) of the Employment Act applied; as he was not entitled to any further service pay. The petitioner was paid all agreed wages. Under section 10 of the Act parties were entitled to conclude an oral contract of service.
- d) The petitioner was granted the annual leave per section 28 of the Act.
- e) The petitioner was warned by the letter dated 16.08.2017 and a notice to terminate services was by letter dated 09.12.2017 and summary dismissal was by letter dated 28.03.2019. the warning was about absence from duty for 6 days from 09.08.2017 to 16.08.2017. On 28.03.2019 the petitioner used abusive and insulting language against customers and behaved violently against the customers and the respondents herein. He then walked away leaving no avenue for further engagement with the respondent. The 3rd and 4th respondents are directors of the 2nd respondent and therefore not strangers in the matter.
- f) The petitioner's dismissal was in accordance with section 45(2) (b) (i) & (ii) as it was based on the respondent's operational requirements.
- g) The 2nd respondent never trained the petitioner as an Electrical Technician.
- h) Almas Electronics E.A Ltd is not known to the 2nd, 3rd and 4th respondents.

i) The petitioner has exhibited the relevant pay slip duly issued to him.

The 2nd, 3rd and 4th respondents further filed on 07.10.2019 the further replying affidavit of Salim Anwarali, the 3rd respondent.

Submissions were filed for the petitioner and the 2nd, 3rd and 4th respondents respectively. The Court has considered all the material on record and the parties' respective cases. The Court makes findings as follows.

To answer the 1st issue for determination, the Court returns that the petitioner has failed to show that he was employed by the 1st respondent as a cleaner and then trained by the 1st respondent and employed as an Electrical Technician as alleged in the petition. In particular, the petitioner has failed to show that the 1st respondent indeed existed at all material times. The Court therefore finds that as urged for the 2nd, 3rd and 4th respondents, the petitioner's case should fail in so far as he has sued the 1st respondent as an employer but not shown that the 1st respondent indeed existed. In so far as the claims are based on the contract of employment and made against the 1st respondent, the petitioner's case must fail especially that the petitioner is bound by his pleading that the 2nd, 3rd and 4th respondents were strangers to his contract of employment.

The 2nd issue for determination is whether the 2nd, 3rd and 4th respondents can be held liable for the claims and prayers made for the petitioner. The Court has already found that they cannot be so held liable to the extent that the claimant has denied them as his employers and the claims arising out of the contract of employment were made against the 1st respondent as the employer but which the claimant has failed to establish. In any event there is no reason to doubt the circumstances of the employment and its termination as per the account by the 2nd, 3rd, and 4th respondent. The Court finds that the 2nd respondent employed the petitioner as a cleaner initially on piece work basis and later on a contract of service. The initial monthly pay was Kshs.8, 000.00 and later Kshs. 20, 000.00. The petitioner enjoyed a weekly off duty or rest day. He was a member of NSSF and NHIF. All the agreed wages or salary were paid and the alleged underpayment, pay in lieu of annual leave and other liquidated claims will collapse. The petitioner received the warning letter and the notice of intention to terminate and his behaviour on the date of the dismissal has not been denied at all as given in the account by the 2nd, 3rd and 4th respondents. Taking into account that material evidence, the Court finds that on a balance of probability the said respondents have established the reason for termination as envisaged in sections 43 and 45 of the Employment Act, 2007. The claimant does not deny that on the material date of dismissal he walked away denying the said respondent's any further chance of engagement. The warnings and then the walking away are factors the Court would consider as aggravating the situation as to completely disentitle the petitioner to any compensation under section 49 of the Employment Act, 2007 even if the Court were to find (but which is not the finding) that the 2nd, 3rd and 4th respondents were liable.

To answer the 3rd issue for determination, the Court returns that the petitioner has failed to show that his constitutional rights were threatened or violated as alleged in the petition. In any event the alleged claims were coined as flowing from the alleged contract of service and in such circumstances, the Court considers that the claims would be properly ventilated in a proceeding against the 2nd respondent as the employer as opposed to the constitutional petition that was filed in the instant proceedings alleging that the employer was the 1st respondent.

The Court observes that while denying the existence of the 1st respondent the 2nd, 3rd and 4th respondents have failed to explain why the payslips both parties have relied upon are bearing the 1st respondent's name. Nevertheless, the Court has found that the petitioner failed to show by evidence that the 1st respondent indeed exists and the earlier findings on the fate of the petitioner's claims and prayers against the 1st respondent will fail. However, in view of the apparent mix-up and which is not explained by the parties, each party shall bear own costs of the suit.

In conclusion the petition filed herein on 02.05.2019 is hereby dismissed and each party to bear own costs.

Signed, dated and delivered by the court at Nairobi by video link this Friday, 9th October, 2020.

BYRAM ONGAYA

JUDGE