



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1740 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**THOMAS BACHA NDUNGU.....CLAIMANT**

**VERSUS**

**KIU CONSTRUCTION COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant was employed by the Respondent as a driver in November 2010 at a salary of Kshs.24,879.00. He served until 6<sup>th</sup> July 2015 when he was suspended indefinitely, an act he interpreted as termination of employment after the Respondent failed to respond to his Advocates' letter of 6<sup>th</sup> August 2015 requesting for clarification of the status of the Claimant's employment. As a result of this and the Respondent's failure to pay the Claimant his terminal dues or issue him with a certificate of service, he filed the claim herein seeking the following reliefs–

1. *The sum of Kshs.2,116,456.40 tabulated as follows–*
  - a. *One month's salary in lieu of notice of Kshs.24,897.60.*
  - b. *Unpaid leave for 4 years 8 months amounting to Kshs.124,490.00*
  - c. *Damages for unlawful dismissal of Kshs.298,776.00.*
  - d. *Service gratuity for every completed year of Kshs.74,692.00.*
  - e. *Unpaid overtime of (1920 hours x 830) amounting to Kshs.1,593,600.00.*
2. *Interest on (a) above at court rates from 6<sup>th</sup> July 2015 until payment in full.*
3. *Costs of the claim.*
4. *Any other relief this Court may deem fit to grant.*

The Respondent replied to the claim vide the Response to Claim filed on 28<sup>th</sup> October 2015. The Respondent denied terminating the Claimant's employment and instead averred that the Claimant had absconded duty. The Respondent contended that the claim ought to be struck out as it discloses no reasonable cause of action hence an abuse of the Court process. The Respondent further contended that an employee could be dismissed for any conduct that fell within the purview of section 45 of the Employment Act.

The Respondent averred that it was justified to suspend the Claimant for gross misconduct and that the Claimant was not entitled to pay during the suspension period. It was the Respondent's case that this suit had been instituted prematurely on account of the Claimant's presumption that his suspension amounted to termination. Lastly, the Respondent averred that the Claimant's dues were fully paid and denied owing the Claimant overtime payment or the leave days claimed.

**The Claimant' Case**

During trial, the Claimant testified as CW1 and adopted his witness statement together with the documents filed, as his evidence. He told this Court that at the time of testifying he was unemployed. He testified that during the subsistence of his employment with the Respondent, he had no rest day. He would work on Saturdays and Sundays, from 7 am to 11 pm with no overtime payment.

It was his testimony that on 4<sup>th</sup> July 2015, he was instructed to ferry a machine from Sagana to the airport. Since it was faulty, he arrived at the airport after 5 pm. He reported to work the next day and worked until 10 am, when he was summoned to the head office and issued with a suspension letter. He told this Court that he was asked to write an apology letter, which he did. The Respondent neither responded nor recalled him from his suspension.

On cross examination, it was his testimony that he was never told why he was suspended. However, he later conceded that he had been suspended for absconding duty. He contended that he was innocent of any wrongdoing. When presented with his response to the notice to show cause, he admitted to apologizing to the Respondent.

It was his testimony that he worked for an uncertain number of hours throughout the subsistence of his employment. He conceded to the inconsistency in the number of hours he had worked overtime as he had demanded overtime of 1440 hours in his letter of 24<sup>th</sup> August 2015 and 1920 hours in his Statement of Claim. He told this Court that he was not paid his salary for July 2015.

On re-examination, he denied absconding work, reporting late, reporting to work drunk or arguing with his employer.

### **The Respondent's Case**

ELIZABETH WANGUI MUNYUA, the Respondent's Human Resource Manager, testified in favour of the Respondent's case as RW1. She relied on her witness statement as well as Beth Mutea's witness statement, as her evidence. She told this Court that disciplinary measures were taken against the Claimant for absconding duty. That he was issued with a notice to show cause. Thereafter, he was issued with a termination letter because his response had not been consistent. It was her testimony that the Claimant was a member of NSSF.

On cross examination, she conceded that the records of the Claimant's absenteeism were not before this Court. She maintained that the Claimant was issued with verbal warnings and reiterated that he had been issued with a termination letter, a fact she repeated during her re-examination.

### **The Claimant's Submissions**

The Claimant submits that the termination of his employment was unlawful and in breach of the Constitution, the Employment Act and the Fair Administrative Action Act as he was never given an opportunity to explain himself. He relies on the case of **Anthony Mkala Chitavi v Malindi Water and Sewerage Company Limited [2013] eKLR** where the Court held that in a case for summary dismissal, an employer has the obligation to hear and consider an employee's representations before making a decision to dismiss or give other sanctions.

As regards the reliefs sought, the Claimant submits that he never took any leave days and was never paid in lieu of leave hence is entitled to the same. He contends that the Respondent never provided any records as required by Section 74(1)(f) of the Employment Act to prove that he had taken his leave days or received payment in lieu of leave. It is submitted that in the absence of such proof, the Claimant is entitled to the same. To fortify this position, the Claimant relied on the case of **Andrew M. Meongela v Mbukoni Logistics Limited [2015] eKLR**.

The Claimant submits that the Respondent failed to produce documents to show the number of hours he had worked or payment of overtime on days he worked overtime, to controvert his assertion that he had worked for 1440 hours. He contends that under the Regulation of Wages (General) Order, an employee should not work for more than 52 hours in a week.

The Claimant submits that he is entitled to compensation for unfair termination. He urged this court to award him the full twelve months' compensation as he had a family to cater for. He relied on the case of **Paul Ngeno v Pyrethrum Board of Kenya [2013] eKLR** to buttress his position. Finally, the Claimant urged this Court to direct the Respondent to issue him with a Certificate of Service as required by section 51 of the Employment Act.

### **The Respondent's Submissions**

The Respondent submits that the Claimant's explanation was full of inconsistencies as he could not explain why he never asked his supervisor for directions. The Respondent contends that work was usually allocated the previous day, as such, the Claimant's failure to report to work on 4<sup>th</sup> July 2015 amounted to absconding duty. The Respondent further submitted that the Claimant's explanation that he had gone to get a tractor in Sagana was not stated in his response to the notice to show cause.

The Respondent submits that the Claimant was issued with a termination letter, paid one month's salary in lieu of notice and given 10 days to appeal the decision to the Respondent's HR Manager and the Managing Director but failed to do so.

It is the Respondent's submissions that the Claimant's summary dismissal for absconding duty is justified under Section 44(4) of the Employment Act and that the Claimant was given the opportunity to explain himself. As such, the Respondent submits, it has proved that the reasons for summary dismissal were fair and valid, as required by section 43 and 45 (2) of the Employment Act. The Respondent has relied on the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where it was held that there must be substantive justification and procedural fairness for termination of employment to pass the fairness test.

The Respondent submits that the Claimant is not entitled to service pay and/or gratuity since he was a member of NSSF. The Respondent also submits that though it did not provide records of overtime payments, it was not a justification for the Claimant to exaggerate overtime hours. That in the event this Court finds that the Claimant is entitled to an award of the same, the Court adopts an overtime for 3 months since the Claimant admitted that the construction of the Mwingi Road was completed within 3 months.

The Respondent submits that the Claimant is not entitled to one month's salary in lieu of notice since he was already paid. The Respondent

further submits that the Claimant is not entitled to unpaid leave for 4 years 8 months since he took his leave days at the end of every project and where he did not, he was paid an equivalent of one month's salary.

Finally, the Respondent submits that the Claimant has not discharged his burden of proof as required by section 47 (5) of the Employment Act 2007 to warrant an award for compensation for unfair termination, and relies on the case of **George Okello Munyolo v Unilever Kenya Limited [2019] eKLR**.

### **Analysis and Determination**

I have carefully examined the pleadings, the evidence and submissions filed by the parties. It is now trite law that termination of employment by an employer is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. The issues for determination therefore are–

- a. Whether sending the Claimant on an indefinite suspension amounted to termination.
- b. Whether there were valid reasons to summarily dismiss the Claimant.
- c. Whether due process was followed before the Claimant was summarily dismissed.
- d. Whether the Claimant is entitled to the reliefs sought.

### **Whether the Indefinite Suspension amounted to Termination**

It was the Claimant's case that he was never issued with a termination letter, and that the Respondent failed to communicate the status of his employment even after his Advocates had written to them seeking clarification on the same. On the other hand, the Respondent asserted that the Claimant had been issued with the termination letter dated 10<sup>th</sup> October 2015.

On 6<sup>th</sup> August 2015, the firm of Paul Mwangi and Advocates wrote to the Respondent as follows–

*“Kiu Construction Co. Ltd*

*Royal Offices, 3<sup>rd</sup> Floor, Suite No. 31*

*Mogotio Road,*

*P.O. Box 10564 – 00100*

***NAIROBI***

Dear Sir,

***REF: SUSPENSION OF Mr. THOMAS BACHA NDUNG’U***

*We act for our client, Thomas Mbacha Ndung’u who has instructed us to address you as hereunder.*

*That our client has been your employee since the year 2010 as a driver earning a salary of KSHS. 24,897.00. That on the 6<sup>th</sup> day of July 2015, you indefinitely suspended our client from employment on grounds that were largely invented and unjustified in the circumstance. Our client view (sic) the said indefinite suspension without pay and privileges as illegal and unconstitutional. Further, our client states that he was required to show cause, which he did, within 3 days of the suspension date. A month is now past since and nothing has been heard from your end. The purpose of writing this letter is to enquire on the current position on the matter. Our client would like to know his fate to enable him decide the way forward.*

*Yours faithfully*

*Paul Mwangi & Co. Advocates”*

The Respondent never responded to this letter, prompting the said Advocates to write another letter on 24<sup>th</sup> August 2015. The letter read as follows–

*“Kiu Construction Co. Ltd*

*Royal Offices, 3<sup>rd</sup> Floor, Suite No. 31*

*Mogotio Road,*

**NAIROBI**

Dear Sir,

**REF: SUSPENSION OF MR. THOMAS BACHA NDUNG’U**

The above matter refers

You have failed to respond to our letter dated 6<sup>th</sup> August 2015 on the above subject. Consequently our client have decided to treat your letter of suspension dated 6<sup>th</sup> July 2015 as a letter of dismissal and hereby demand the followings.

(a).. 1 month salary in lieu of notice..... 24,898.00

(b).. Unpaid leave for 3 years and 9 months..... 86,269.00

(c)... Damages for unlawful dismissal (12 months).. 298,776.00

(d).. Service/gratuity for 3 years..... 74,694.00

(e).. Unpaid overtime (1440 hours x 830)..... 1,195,200.00

(f)... Unpaid wages for 6 days worked in month

of July, 2015..... 4,980.00

**Total 1,684,817.00**

**PLEASE TAKE NOTICE** that if the above amount is not paid to us within the next **7 days** of the date hereof, we have firm instruction to institute proceedings against you without further reference whatsoever and at your own risk as to cost and other consequences.

Yours faithfully

Paul Mwangi & Co Advocates”

Similarly, the Respondent did not respond to this letter to communicate a different position. The Respondent’s contention that the Claimant was issued with a termination letter is not correct as the same is dated 10<sup>th</sup> October 2015 long after it received the demand letters from the Claimant’s lawyer. Consequently, I find that the Claimant’s indefinite suspension without pay and in the absence of communication that his employment was still in force, amounted to a termination.

#### **Whether there were Valid Reasons for Termination**

The Respondent has submitted that the termination of the Claimant’s employment for absenteeism was justified by dint of section 44(4) of the Employment Act which sets out the circumstances under which an employer can summarily dismiss an employee to include *inter alia*–

**(a) If without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;**

The Claimant admitted to being absent from work on 4<sup>th</sup> July 2015. He explained that on this day, he was instructed to ferry a machine from Sagana to the airport. Since it was faulty, they arrived at the airport after 5PM. However, this was not the explanation he had given in his response to the show cause notice which read as follows –

“HR/ADMIN MANGER (sic) THOMAS BACHA NDUNGU

Kiu Construction LTD P.O. BOX 484

P.O. BOX 10564-00100 KALIMONI

NAIROBI 8<sup>TH</sup> JULY 2015

TO SHOW CAUSE WHY DISCIPLINARY ACTION SHOULD NOT BE TAKEN AGAINST ME

Dear Madam

I would like to offer my sincerest apologies for my misconduct on 4<sup>th</sup> July 2015 at 9:00pm when I was called by Engineer Kosgei and told him I was at Upperhill where we were carrying (sic) murrum to be transported to JKA (sic) Airport.

I had no idea of where I was going with no communication to direct me to Lukenya and I had no phone with me. After been stranded for minutes I decided (sic) to head home. And when ENG Kosgei called me I told am at Westlands head home (sic). That when he misunderstood me and thought I said I was at Upperhill.

I sincerely apologies (sic) for this mistake and hope you give me.

I know that in order for team to work efficiently (sic). Everyone must work together. My misconduct interrupted this flow. Hurting the company. Through making my amends individually (sic) and working hard to change my misconduct so that it will never happen again. I have great faith in the company... great work we do. Again I apologize profusely for my misconduct and I promise it will not happen again.

Sincerely.

Your faithful (sic)

THOMAS BACHA NDUNGU”

The above letter confirms that the Claimant was never sent to Sagana to ferry a machine as he had claimed in his testimony. The letter also shows that the Claimant had admitted to absconding duty on 4<sup>th</sup> July 2015. It is therefore my considered view that the Claimant was guilty of absconding duty on account of his own admission hence the Respondent had a valid reason to summarily dismiss him. It however suspended him indefinitely instead.

#### **Due Process**

Section 41 of the Employment Act requires an employer who wishes to terminate the services of an employee on grounds of misconduct, poor performance or physical incapacity, to explain to the employee in a language he understands and in the presence of a colleague or a shop floor union representative, the reason(s) the employer was considering such termination; and hear any representations that the employee and his representative may have.

The Claimant has submitted that the termination of his employment was unlawful as he was never given an opportunity to explain himself. This evidence was never controverted by the Respondent. What the parties seem to agree on is that the Claimant was issued with a notice to show cause which he responded to. However, this does not amount to due process as envisaged by section 41 of the Employment Act. In the case of **Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR** which was cited by the Court of Appeal in **National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR** the Court held as follows—

“...Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer...”

In light of the foregoing, I find that the Respondent failed to follow the procedure stipulated in section 41 in summarily dismissing the Claimant. The dismissal therefore amounted to unfair termination.

#### **Reliefs**

##### **(i) One months’ salary in lieu of notice**

The Claimant was never issued with a termination notice. The Respondent contended that the Claimant was paid one month’s salary in lieu of notice but never adduced any evidence of such payment or controvert the Claimant’s assertion that he had not been paid the same. As such, the Claimant is awarded the same as prayed in his claim in the sum of **Kshs.24,898**.

##### **(ii) Compensation for unlawful dismissal**

Having been unfairly terminated, the Claimant is entitled to compensation. Taking into account the circumstances outlined under Section 49(4) of the Employment Act, including the length of the Claimant’s service, the circumstances surrounding the termination of the Claimant’s employment and the reasons for terminating the Claimant’s employment, I award the claimant five (5) months’ salary as compensation in the sum of **Kshs.124,490**.

##### **(iii) Service gratuity**

The Claimant prayed for service gratuity for every completed year of service. However, the pay slip he provided shows that there was a deduction of Kshs.200.00 from his salary as payment for NSSF. In the absence of a claim that the Respondent failed to remit NSSF payments, the Claimant is disqualified from an award of service gratuity by dint of section 35 (6) (d) of the Employment Act. Further, the Claimant did not provide a contractual basis to justify an award of gratuity.

#### **(iv) Unpaid leave**

The Claimant seeks an award for unpaid leave for 4 years 8 months. His testimony that he had never taken leave days was not controverted by the Respondent who has an obligation under Section 74(1)(f) to keep a record of an employee's annual leave entitlement, days taken and days due. Additionally, the Respondent did not dispute the leave days as computed by the Claimant. Instead, the Respondent stated that the Claimant had taken his leave days and where he did not, he was paid one month's salary in lieu of leave. This was not backed by evidence hence remains a mere assertion. As such, the Claimant is entitled to the payment in lieu of leave which I award him at 119 days based on 21 days per year. This amounts to **Kshs.113,956.20** which I award the Claimant.

#### **(v) Overtime**

As regards the claim for unpaid overtime, the Respondent did not produce evidence to disprove the Claimant's assertion that he had worked overtime. Neither did it adduce evidence of payment to show that the Claimant had been remunerated each time he worked overtime. Further, the Respondent never provided the Claimant's daily working schedule as a way of controverting the Claimant's assertion.

On the other hand, the Claimant in his witness statement stated that upon being employed he was tasked with ferrying bitumen from Mlolongo to Mwingi. To ensure that the bitumen was delivered on time he had to be at the collection center in Mlolongo by 10PM, line up to 2:30 AM when the lorry is finally loaded and leave for Mwingi at 3AM in order to arrive at Mwingi by 8:30AM. After delivery, he would start his journey back to Nairobi where he usually arrived at 7PM. He would then proceed to his house where he would shower, change clothes, have a bite and head to Mlolongo to line up for the reloading of bitumen.

This was never controverted. On average, the Claimant worked for 20 hours a day. He testified that he had no rest, which evidence was never controverted.

He further stated in his witness statement that his posting to Mwingi lasted for 3 months, after which, he was posted to various other places *inter alia* Iten, Bogani, JKIA, Kitui, Machakos, Kakamega Airstrip, Ngecha-Gachie Road, West Pokot and Ortum. However, he never provided the number of hours he worked while working in these other stations. As such, he is only entitled to overtime payment for the 3 months worked while he was stationed in Mwingi. Having worked for 20 hours per day, he worked overtime of 88 hours per week, over and above the statutory maximum of 52 hours per week. For the 3 months he worked overtime as follows –

3 months = x 3 months worked = 12.9 weeks.

12.9 x 88 = 1,135.20. These are the hours worked by the Claimant.

Under Rule 6 of the Regulation of Wages (General) Order, overtime is provided for at of basic minimum wage. The Claimant's salary having been Kshs.24,898, his hourly rate for overtime was = 110.66 per hour. Having worked 1,135.20, he is entitled to [(1,135.2 x 110.66)1.5] which is equal to **Kshs.188,428.06**.

I have only considered normal overtime at the rate payable at 1.5

of times the normal hourly rate of pay as the Claimant did not distinguish between normal overtime and overtime on rest days and public holidays which is calculated at double the normal hourly rate of pay.

**In conclusion judgment is entered for the Claimant against the Respondent in the total sum of Kshs.451,772.26.**

The Respondent shall issue a certificate of service to the Claimant. The Respondent shall further pay the Claimant's costs.

Interest shall accrue on decretal sum at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF OCTOBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**