



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1932 OF 2012

(Formerly HCCC 10264 of 2001)

JOHN KIPTOO LAGATT.....CLAIMANT

VERSUS

NATIONAL OIL CORPORATION OF KENYA....RESPONDENT

JUDGMENT

1. This suit by the Claimant commenced at the High Court of Kenya and was transferred to this court some 11 years later. The Claimant was an employee of the Respondent from 2nd January 1998. He was a civil engineer who served the respondent at various stations. The initial contract was for 6 months and was renewable. The Claimant sought renewal in 1999 of the contract for 3 years with effect from 1st January 1999 to 31st December 2002. The Respondent did not revert until 2nd March 1999 but the Claimant found the terms proposed by the Respondent not acceptable and his reply of 17th March 1999 contained his proposals for the changes he sought. On 6th September 1999 he sought the processing of his gratuity on the existing contract which was done. On 27th October 2000 the Claimant wrote yet again seeking to know what the position was in regard to his contract. In reply, the Respondent wrote back enclosing what was titled 'local agreement', a contract that was from 1st January 1999 and set to expire on 31st December 2000. The Claimant sent the letter back on 6th November 2000 unexecuted with a request for clarification on the issues he had raised in the previous letters to the Respondent. The Claimant averred that his contract of service was severed on 26th March 2001 and that before the termination he was neither heard nor granted an opportunity to respond to any allegations made against him. He averred that he was unable to secure employment elsewhere after his termination and that he suffered anguish, public and private humiliation, mental agony, financial embarrassment and family inconvenience. He sought damages for the unlawful termination and terminal dues, costs of the suit plus interest thereon.

2. The Respondent filed a defence and counterclaim in which it denied depriving the Claimant of his employ. It averred that the Claimant was paid his gratuity upon expiry of his contract after he rejected the Respondent's offer of extension of contract on the terms it had proposed. The Respondent denied that the contract of 6th February 1998 required any clarification, verification or rectification as alleged by the Claimant. It averred that the Claimant sent the contract offered to him unexecuted with a counter offer and the Respondent rejected the counter-offer. It averred that the Claimant was paid one month salary in lieu of notice prior to his termination of contract. By way of counterclaim, the Respondent averred that the Claimant performed his duties negligently and recklessly. The Respondent asserts that he failed to send the reports as required, poorly supervised the works done causing great financial loss at the Yala Filling station to the tune of Kshs. 10 million for the relocation necessitated by setting up a structure on a road reserve, delays at the Kaplong and Bondeni sites precipitating loss due to poor and negligent accounting practices leading to loss of Kshs. 12 million, and loss occasioned by the dumping of material at the Nairobi truck loading project site which cost Kshs. 1.8 million to remove. The Respondent thus sought the entry of judgment for it against the Claimant for Kshs. 23,800,000/-, costs and interest at commercial rates.

3. The Claimant filed a reply to defence and counterclaim in which he denied being responsible for any of the losses incurred or that he performed his duties carelessly or negligently. He averred that he advised the Respondent in regard to the dumping of material on the Respondent's property or that he was the cause of the delay in carrying out the truck loading project. He sought the dismissal of the defence and counterclaim with costs.

4. Upon transfer to this court, the Claimant and the Respondent filed documents in compliance with the rules of the court including a statement of claim and a defence to the claim. There was an amended statement of claim and a re-amended statement of claim which set out the claim of underpayment as per the contract, gratuity, leave dues, leave allowance, repossessed generator, the balance of the unexpired contract, out of pocket expenses all totaling to Kshs. 3,771,909/-. In the amended defence the Respondent denied that the Claimant was entitled to payment of the sum of Kshs. 3,771,908/- or any part thereof. The Claimant and the Respondent's witnesses Beryl Harriet Adhiambo and Cecilia Kalungu Uvyu testified.

5. The Claimant's case was that he was employed to supervise the construction of petrol stations for the Respondent. He was dismissed by the Respondent who declined to renew his contract on the terms proposed despite his service to the Respondent. He stated that he rejected the offer to extend his contract on the terms that the Respondent proposed and that he returned the contract unexecuted. It was the Respondent's case that the Claimant performed the jobs so negligently that the Respondent had to redo some parts due to poor supervision or improper siting of the projects which was the responsibility of the Claimant.

6. The parties filed submissions on 24th January 2019 for the Claimant and 14th February 2019 for the Respondent. The Claimant submitted that his pay was slashed by 50% in April 1999 which was not justifiable. He submitted that the termination of employment was unfair for the reason that there was no procedure adopted in terminating his services neither was he accorded an opportunity to defend himself. The Claimant submitted that there was no evidence to support the defence of the Respondent and that the counterclaim was not merited at all. He relied on the cases of **Lawrence Ngula Kakungi v Bobs Sandwich Bar Limited [2018] eKLR** and **Benjamin Nzamba Killei v Denis Mathew t/a Matbronze [2018] eKLR**. He urged the grant of the order he sought and the dismissal of the Respondent's suit against him.

7. The Respondent submitted that the Claimant rejected the offer it gave him and that in March 2001 it paid him one month's salary in lieu of notice in accordance with the terms of his contract. The Respondent submitted that the night out allowances and mileage allowances depended on the nights he spent out and the distance he travelled for work during the period. The Respondent submitted that the Claimant's services were terminated in 2001 under the repealed Act and a reason was given for termination. The cases of **Mary Wakhabubi Wafula v British Airways PLC [2015] eKLR**, **Unilever Tea Kenya Limited v John Kememia Gitau [2017] eKLR**, **Patrick Nyakonu Ombati v Credit Bank Limited [2017] eKLR** and **David Nyamu v Insurance Training and Education Registered Trustees & Another [2017] eKLR** were cited for the proposition that the remedies one would be entitled to would only be per the repealed Act if the dismissal took place during that period.

8. The Claimant did not prove the dismissal was in contravention of his contract or the applicable law. His dismissal was presented as the culmination of a negotiation for a contract extension. The Respondent declined to accede to the Claimant's demands before finally giving him the letter of dismissal in March 2001. He was not operating under the rubric of the Employment Act 2007 which has elaborate procedure for the dismissal of employees after hearing in terms of Section 41 thereof. In his case, he was given reasons which despite his shock and trauma at being dismissed was valid.

9. The Respondent raised a counterclaim against the Claimant for the alleged losses it suffered in relation to the projects supervised by the Claimant. From a careful scrutiny of the projects, the projects were not the sole responsibility of the Claimant. The Respondent has not set out what portion of the loss the Claimant would bear. Regarding the dumping of materials on the truck loading site in Nairobi, the deal was sealed when the Claimant was still in Western Kenya and his involvement was minor. It would seem the management of the Respondent let the continued stockpiling of the material without raising a finger only to raise the issue after the Claimant sued the Respondent. The suit is not proved on either side and I dismiss it but each party will bear their own costs.

It is so ordered.

Dated at Nyeri this 25th day of February 2019

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 27th day of February 2019

Radido Stephen

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar