



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1861 OF 2014

(Before D. K. N. Marete)

JOSEPH NGANGA MUNGA.....CLAIMANT

VERSUS

DANDORA MILLERS LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Claimant's Memorandum dated 21st October, 2014. The issue in dispute is therein cited as;

Unlawful termination of employment and terminal benefits for Joseph Nganga Munga

The respondent in a response to claim dated 28th November, 2014 denies the claim and prays that the same be struck out for being frivolous, vexatious and an abuse of the process of court.

The claimant's case is that he was employed by the respondent as an Accountant on 27th January, 1993. He was later appointed as Manager of Operations for the respondent and its associated company, Njemoni Limited on 18th July, 1995.

The claimant's further case is that subject to this appointment, he earned a salary of Kshs.15,000.00 with thirty (30) days annual leave and a severance pay package of equal to 35 working days for each year worked with effect from 25th January, 1993. Termination was subjected to three months notice or three months salary in lieu of such notice.

The claimant's other case is that sometimes in April, 2014, he approached the respondents Managing Director seeking payment in lieu of untaken leave for 12 years. This was due to lack of authorization by the respondent. He was instead terminated from employment by the said Managing Director and paid 500,000.00 in part payment of his terminal dues through part payment voucher No.372079. Then, he earned a monthly salary of Kshs.80,000.00.

The claimant further avers that despite demand, the respondent has failed to pay the balance of terminal dues or even issue a certificate of service to him in breach of section 51 (4) of Employment Act, 2007. He puts it thus;

SUBMISSIONS

The Claimant having been appointed as Manager of Operation on 18th July 1995 and his employment contract having been terminated on 17th May 2014 has indeed worked for a period on Nineteen (19) Years and unlawfully terminated, he was entitled to a certificate of service under section 51(4) of the Employment Act, 2007, 3 month's notice and in lieu of notice payment of 3 month's salary. The Claimant is also entitled to dues for 12 years unpaid leave. The Respondent should be condemned to pay damages for unlawful termination of employment and costs of this claim.

He claims as follows;

Salary in lieu of Notice 3 months (Kshs.80,000 x 3) - Kshs.240,000.00

Pay in lieu of leave on (12 years, 4 months, 20 days)

12 years + $\frac{140}{30} \times 80,000$

12.38356 x 1.2 x 80,000

Kshs.1,188,821.00

Severance pay on 21 years of service

Kshs.2,352,000.00

21 x 35 x 80,000

25

Total

Kshs.3,780,821.00

Less payment through cheque No.408288

of 29/05/14 –

Kshs.5000,000.00

Total Dues

Kshs. 3,280,821.00

He prays as follows;

a) Salary in lieu of Notice 3 months (Kshs.80,000 x 3) - Kshs.240,000.00

b) Pay in lieu of leave on (12 years, 4 months, 20 days)

12 years + 140 x 30 x 80,000

365 25

12.38356 x 1.2 x 80,000

- Kshs.1,188,821.00

c) Severance pay on 21 years of service

- Kshs.2,352,000.00

21 x 35 x 80,000

25

Total

- **Kshs.3,780,821.00**

Less payment through cheque

No.408288 of 29/05/14

- Kshs.500,000.00

Total Dues

Kshs.3,280,821.00

d) A declaration that the Claimant's Employment was effectively terminated by the respondent verbally on 17th May, 2014 and that the Claimant is entitled to a certificate under section 51 (4) of the Employment Act, 2007.

e) Any other relief that the Honourable Court may deem fit in the circumstances of this claim.

f) Costs and interests from the time of the first demand, 6th August 2014.

The respondent's case is a denial of the claim.

It is her case that paragraph 5 of the claim and the facts thereon are a fabrication and distortion. She further denies that the claimant's salary had over time being increased to Kshs.80,000.00 per month adding that this is gross inflation and exaggeration of the state of affairs and puts the claimant to strict proof thereof.

The respondent's further case is a denial of the claim for 3 months salary in lieu of notice. This is deemed outrageous and unwarranted in that the claimant was retired and duly paid his terminal dues amounting to Kshs.500,000.00. A claim of unlawful termination of employment

is therefore denied.

The respondent's other case and averment is that the claimant is estopped from claiming severance pay which she deems unwarranted in the circumstances of normal retirement and payment of terminal benefits.

The respondent's penultimate case is that the claim is an attempt at unjust enrichment and is not merited, or at all. Some of the documents in support of the claim are mere forgeries and therefore unsustainable in such support of the same.

The matter came to court variously until the 19th November, 2018 when it was heard *inter partes*.

At the hearing DW1- Joseph Ng'ang'a Munga duly affirmed testified in reiteration of his case. He testified on a witness statement dated 21st October, 2014 which he wished adopted as his evidence in court. He also testified on production of his list of documents and further list of documents dated 21st October, 2014 and 19th July, 2017 respectively.

On cross-examination, DW1 testified that he was engaged as an Accountant but this changed on 18.08.1995 when he became Operations Manager for the firm. He further testified that the amount of Kshs.500,000.00 paid to him on termination was neither explained nor agreed. He signed for it and thereon imprinted part payment and not anymore.

DW1 – David Kinyanjui Nganga duly affirmed also testified a case for adoption of his witness statement dated 11th June, 2018 and also his bundle of documents in support of the defence.

It was his testimony that the claimant was an employee of the respondent not Njemoni. Njemoni is a small company associated with the respondent. He discounted the payment vouchers produced by the claimant as forgeries made and authored by the claimant. These sequentially and systematically follow each other and this casts a shadow of doubt on their veracity. It was also his testimony that the claimant and himself sat and agreed on a figure of Kshs.500,000.00 as terminal dues payable thereof.

On cross-examination, he testified that the claimant had expended a twenty one year stint of service with the respondent.

The issues for determination therefore are

1. Whether the claimant was an employee of Njemoni Limited?
2. Whether the claimant was unlawfully terminated from employment by the respondent?
3. Whether the claimant is entitled to the relief sought?
4. Who bears the costs of this cause?

The 1st issue for determination is whether the claimant was an employee of Njemoni Limited. The claimant in his written submissions dated 14th November, 2018 posits and submits that the two companies Dandora Millers Limited and Njemoni Limited paid him a salary of Kshs.80,000.00. He adduced documentary evidence of this both at examination-in-chief and cross-examination.

Of note is a letter dated 15th August, 1995 annexed to the claim and headed *Appointment as Manager of Dandora Ltd and Associated Company Njemoni Ltd*. The tone of the letter does not indicate double employment: separate employment by the two companies but a jointed employment as manager for the two companies.

The respondent in her written submissions dated 29th October, 2018 denies the claimant's employment by Njemoni Limited. It is her case and submission that the claimant was an employee of the respondent from 27th January, 1993 when a letter of appointment was issued to him. This letter spelt out the claimant's specific conditions of employment. It is her case and submission the claimant was never a manager of Njemoni Limited. Such appointment was never issued to him.

The respondent supports her case by her testimony, argument and submission that voucher no's 10847, 10848, 10849 and 10850 produced by the claimant in evidence are a forgery and not authentic in the circumstances. Their serialization follows each other. She amplifies this as follows;

8. In essence what the Claimant is trying to portray is that no other receipts were ever drawn from the receipt book within periods of close to four (4) months except his receipts evidencing payment.

9. That further, the signatures in all the receipts are the Claimant's. What this means is that the receipts were checked by the Claimant, passed by the Claimant and finally addressed to the Claimant as the recipient of the monies being checked out. This is out rightly impossible as Njemoni Ltd has a chain of command even in the finance department and such a lapse cannot be tolerated by the department.

10. What this therefore means is that the Claimant stole the receipt book belonging to Njemoni Ltd and drew receipts in his name assigning himself monies, signed them himself and purports to rely on the same before this Honourable court. In our legal understanding and deduction, this is clear forgery.

The claimant's further lists of documents dated 19th July, 2017 intended to list the following documents;

1) *Payment slips from Dandora Millers Limited dated;*

- 31st March 2013

- 30th April 2013

- 31st May 2013

2) *Payment vouchers from Njemoni Limited dated;*

- 18th December 2012

- 3rd January 2013

- 2nd February 2013

- 8th March 2013

3) *Business card issued by Dandora Millers Limited.*

However, only Petty Cash Voucher No's 10847 dated 18th December, 2012 and 10849 dated 2nd February, 2013 are enlisted. Vouchers no.10848 and 10850 are not included. The respondent's case on this subject is more compelling than the claimant's. It is the more probable of the two. The payment vouchers to the claimant by Njemoni Limited lack authenticity and veracity therefore derailing the claimant's case. It is built on quick sand. It cannot stand the test of the day. I therefore find that the claimant had only one employer, the respondent. He had no employment relationship as such with Njemoni Limited.

The 2nd issue for determination is whether the claimant was unlawfully terminated from employment by the respondent. The claimant pleads and submits a case of unlawful termination of his employment by the respondent. The respondent denies the same.

The claimant's submits that his termination of employment was not done in good faith. There were no allegations (of misconduct?) nor were there any warnings of misconduct on his part. His termination of employment was therefore a contravention of section 45 of the Employment Act, 2007 which provides as follows;

45.(1) *No employee shall terminate the employment of an employee unfairly.*

(2) *A termination of employment by an employer is unfair if the employer fails to prove-*

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

(3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

(4) *A termination of employment shall be unfair for the purposes of this Part where-*

(a) the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

(5) *In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-*

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(f) the existence of any previous warning letters issued to the employee.

The claimant is particularly emphatic and relies on sections 45 (2) (a) and (b), section 4 (b) and 5 (a), (b), (c) and (f) as emphasized by underlining above.

The claimant further supports his case in the authority of **Walter Ogal Anuro Vs Teachers Service Commission [2013] eKLR** where the court held thus;

“... 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 in effecting the termination.”

Again, he relied on the authority of **Alphonse Machanga Mwachanya vs Operation 680 Limited [2013] eKLR** where the court observed as follows;

a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;

b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

c) That the employer has heard and considered any explanations by the employee or their representative;

d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

It is his penultimate submission that none of these tenets of sections 41 and 43 of the Employment Act, 2007 were pursued. This is as follows;

- The Respondent did not explain to the Claimant in a language the Claimant understand the reason why the termination was being considered.*
- The Claimant submits that the Respondent did not allow the Claimant to have someone present during this explanation.*
- The Claimant submits that the Respondent did not hear and consider the explanation given by the Claimant.*
- The Claimant submits that he was not given notice of termination of his employment.*
- The Claimant submits that the termination was substantively and procedurally flawed. It was unfair.*
- The Claimant submits that the Respondent is in breach of the laws on termination of employment.*

The respondent did not address this issue in her written submission. Perhaps she sought to rely on her case as expressed in her pleadings and testimony.

The claimant has not established a case of termination or even unlawful termination of his employment by the respondent. He merely pleads and states such case. He does not establish this on a preponderance of evidence or even balance of probabilities. His case lacks merit and sounds an afterthought. I therefore find a case of no termination of the employment of the claimant by the respondent and hold as such.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of termination and or unlawful termination of employment, he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

Dated and signed this 14th day of February 2019.

D.K. Njagi Marete

JUDGE

Delivered and signed this 22nd day of February 2019.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Mr. Leparmayani holding brief for Githinji instructed by Githinji Kimamo Advocates for the claimant.
2. Mr. Kahiga instructed by Mirugi, Kariuki & Company Advocates for the respondent.