



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.216 OF 2018**

**VICTOR NJOROGI KIMANI.....CLAIMANT**

**VERSUS**

**NAKURU EXPRESS SUPPLIES & SERVICES LIMITED.....RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent vide letter dated 4<sup>th</sup> December, 2006 as a dozer operator. By letter dated 10<sup>th</sup> January, 2016 the claimant's employment was temporarily suspended on the grounds of financial problems and given a condition that he would not be paid during the suspension period. This was for an indefinite period.

The claim is that there was constructive termination of employment which was unlawful and unfair. There was no prior notice and this made it impossible to resume duty.

The claimant is seeking the following dues;

- a) 3 months' notice pay ksh.45,000.00;
- b) 5 months unpaid salary ksh.75,000.00;
- c) House allowance Ksh.600,000.00;
- d) Accrued leave for 8 years ksh.120,000.00;
- e) Overtime ksh.225,000.00;
- f) Work during public holidays ksh.45,000.00;
- g) Off days worked ksh.240,000.00;
- h) Compensation for unfair termination of employment.

The claimant testified that he was employed as a machine operator by the respondent. his employment was terminated together with other employees on 10<sup>th</sup> January, 2016. The claimant had been admitted in hospital and when his colleagues came to visit he was told that his employment had been terminated. There was no notice of payment of terminal dues.

The claimant also testified that his employment had been terminated by the respondent and after a year he was recalled back in the year 2008. On 1<sup>st</sup> February, 2011 he was re-employed.

In defence the respondent's case is that the claimant's employment with the respondent terminate din the year 2009 and was re-employed on 1<sup>st</sup> February, 2011. The contract ended and there was no application for renewal. There was a redundancy and employment terminated on this ground.

By letter dated 10<sup>th</sup> January, 2016 the respondent informed the claimant that his services had become redundant due to lack of work. The claims made are without merit and should be dismissed.

Andrew Waitthaka Kiragu testified that he is the general administrator for the respondent and worked with the claimant who had been

employed on 22<sup>nd</sup> October, 2006 as an Assistant machine Operator until 30<sup>th</sup> March, 2009 when his employment was terminated for using company assets outside work requirements. The claimant dug a dam for a private person and received payment and on these grounds his employment was terminated. Later the claimant was re-employed on contract on 1<sup>st</sup> February, 2011. The contract was renewed annually. In the year 2012 the contract was not renewed for the reasons that the claimant was unwell and work was not continuous and was on and off. The claimant was called and paid his dues. even when there was no work, the claimant received his monthly pay.

The letter of suspension issued to the claimant was by mistake. The claimant was on contract and it ended and there was no application for renewal.

The claimant went on annual leave of 42 days.

The claims made for 3 month notice pay is not justified. There was rest days taken and compensation is not due as employment terminated lawfully.

At the close of the hearing both parties filed written submissions.

By letter dated 10<sup>th</sup> January, 2016 the claimant was informed by the respondent that his employment had been suspended due to lack of work and cash flow. That during such period no salary would be paid.

The respondent's witness Mr Kiragu who is the administered testified that this letter was issued to the claimant by mistake since he was on contract which had ended and there was no renewal. However, upon the 'mistake' there was no follow up letter to withdraw it.

Save for the evidence by Mr Kiragu, the defence filed is with regard to the claimant's position having been declared redundant. The evidence that the letter of 10<sup>th</sup> January, 2016 being a 'mistake' only arose during the hearing.

On the work records filed by the respondent, the claimant was re-employed vide letter dated 1<sup>st</sup> February, 2011 with a condition that such contract would be renewed after every year and at a salary of ksh.12,000.00.

The follow up renewal of such contract is not made available. I take it the claimant continued working under similar terms as under the letter and contract dated 1<sup>st</sup> February, 2011 when his employment was suspended due to low cash flow and lack of work in January, 2016.

Stoppage of work due to cash flow problems or due to lack of work is a matter addressed under the Act in section 40. This addresses a redundancy which is defined under section 2 of the Act as resulting from abolition of office, job or occupation where due to operational reasons the employer is forced to take such action. This results in termination of employment due to no fault of the employee as held in the case of **Heritage Insurance Company Limited versus Christopher Onyango & 23 others [2018] eKLR** and **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**.

With the suspension of employment and as directed, the claimant was not paid his salary. There was no letter terminating employment and there is no record that the contract commencing February, 2011 was terminated on its terms. Left with the letter dated 10<sup>th</sup> January, 2016 where the respondent was faced with a redundancy as set out in the defence, reason demanded adherence to the provisions of section 40 of the Act. without the due notices issuing and even where the letter suspending employment was directed in this regard, payment in lieu of notice and upon the redundancy is due. under section 40(1) the claimant is entitled to one (1) month notice pay assessed at his last paid wage at ksh.12, 000.00.

The defence is also devoid of any work records. The term contracts issued to the claimant as stated under paragraph 3 of the Response to the Memorandum of Claim is left bare. The court is left with the records submitted by the claimant being his letter of appointment dated 4<sup>th</sup> December, 2006.

Without the respondent complying with the provisions of section 10 (6) and (7) of the Employment Act, 2007 (the Act), the court shall rely on the filed records from the claimant.

As there was no work performance after the letter dated 10<sup>th</sup> January, 2016 to claim for a salary for 5 months is without justification. The reason(s) for work suspension were given by the respondent.

The rationale for the claim for a house allowance is not set out. This does not relate to a contract term or premised on wage orders. Had there been a claim for underpayment of wages, the claim for house allowance would have found a justification. This claim as placed is far-fetched.

The respondent filed the work records on the due leave days of which the claimant had exhausted. The claim for 8 years of annual leave is lost.

The claim for overtime was not addressed in the pleadings or in the claimant's evidence. The pleadings only set out that work was from 7.30 to 5.30 without an elaboration as to how this arose. Where the claimant reported to work early by half an hour or left half an hour late was not explained. The tabulation is also premised on a work duration of 10 years which is contrary to the letter of re-employment where work started from February, 2011 to January, 2016. These claims are obviously exaggerated and thus lost.

Similarly, the claims for work during public holidays and rest days are pegged on a 10 years period without an elaboration as to how such days arose and whether the claimant was at work. These claims are declined.

**Accordingly, save for the award in notice pay at ksh.12, 000.00 the other claims fail and are hereby dismissed. Each party shall bear own costs.**

**Delivered at Nakuru this 28<sup>th</sup> day of March, 2019**

**M. MBARU JUDGE**

**In the presence of:.....**