



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

IN NAIROBI

CAUSE NO. 601 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 30th April, 2019)

DENIS KIMATU WATHOME.....CLAIMANT

VERSUS

HARSHIV AUTO SPARES.....RESPONDENT

JUDGMENT

1. The Claimant, Denis Kimatu Wathome, filed this claim vide a Statement of Claim dated 30th March, 2015 on 16/04/2015 seeking payment of terminal dues against the Respondent, Harshiv Auto Spares. He avers that he was employed by the Respondent as a Driver from 23/09/2010 up to 11/08/2014 earning Kshs. 500/= per day which translated to Kshs. 15,000/= per month and that he at all times discharged his duties effectively, diligently and satisfactorily.

2. That on or about 11/08/2014, he decided to honourably leave the employment due to circumstances well known to the Respondent and effectively wrote to the Respondent requesting for payment of his terminal dues but that his letter elicited no response. That consequently, the Transport Workers Union of Kenya wrote to the Respondent requesting it to meet the union officials on 06/09/2014 in their offices to amicably settle the dispute within the County’s established industrial relations machinery.

3. That on or about 17/12/2014, the Ministry of Labour wrote to the Respondent requesting payment of the said terminal benefits as had been agreed in the meeting but to no avail. He prays for judgment to be entered against the Respondent for:-

a. 11 days wages.....Kshs. 5,500.00

b. Annual Leave *4.....Kshs. 60,000.00

c. Service Pay.....Kshs. 30,000.00

d. Overtime *4.....Kshs. 270,000.00

e. I rest day per week.....Kshs. 96,000.00

TOTAL.....Kshs. 461,500.00

f. Costs of this suit together with interest thereon at such rate and for such period as this Honourable Court may deem fit to order.

g. Any other just and equitable relief as this Honourable Court may deem appropriate.

4. The Claimant also filed his Witness Statement dated 30/03/2015 stating that he further claims from the Respondent his Certificate of Service and that he reported to the Respondent’s company on 3 occasions asking for his dues but his efforts were futile and that on the last occasion, he was told to attend a meeting in the Labour Office which also bore no fruit. He thereafter filed his Issues for Determination dated 20/03/2018 listed as follows:-

1. Was the Claimant employed by the Respondent on fixed term or on Annual contract from year 2010 to year 2014?

2. How, when and why was the Claimant terminated?

3. Were the Claimant's dues and or Terminal Benefits paid upon the termination of his contract?

4. Was the termination fair?

5. Should the Claimant be paid the reliefs sought in the Memorandum of Claim?

6. Who bears the costs of this suit?

5. The Respondent filed its Conditional Statement of Defence dated 27th July, 2015 denying that it employed the Claimant as a driver and stated that he was employed as a Store Keeper from 01/03/2012 until 11/08/2014 when he voluntarily ended the employment and that his working hours were 8:00am to 5:00pm from Monday to Friday and was paid Kshs. 15,000/= per month.

6. It admits to a meeting being held at the union's offices where it was resolved that the sum of Kshs. 20,000/= was due to the Claimant in full and final settlement of his terminal dues. It further denies the reliefs and/or benefits sought by the Claimant in his claim and states that it reserved the right to apply for further and better particulars of the reliefs sought.

7. That the Claimant is not entitled to Service Pay because he voluntarily ended the employment without being declared redundant and that it was entitled to set off against the Claimant's claim the sum of Kshs. 22,000/= on account of the loan it advanced to him at his request and instance. It contends that this Claim is time barred in its entirety by dint of the provisions of the Employment Act and that since the claim does not disclose a reasonable cause of action, it should be dismissed with costs.

8. The Respondent filed a Witness Statement dated 24/05/2018 sworn by Samson Kariuki Machau who categorically denies receiving any alleged demand letter and notice of intention to sue dated 19/08/2014.

9. He states that the Respondent had procured the Claimant's membership of the NSSF and remitted monthly contributions on his behalf as has been evidenced in the Claimant's NSSF contributions Statement on *pages 33 to 37 of the Respondent's List of Documents*.

10. That the claim for 1 rest day weekly is also unjustified since he worked Monday to Friday while that for overtime is unfounded in light of his working hours being 8:00am to 5:00pm. That the Claimant had the benefits of the leave days due to him in the course of his employment and so his claim for unpaid leave days is unmeritorious. The Respondent also filed its List of Issues dated 24/05/2018 as follows:-

1) Whether the Respondent is non-suited.

2) What were the Claimant's terms of employment?

3) Whether the Claimant voluntarily discharged himself from employment.

4) Whether in light of the settlement agreement reached between the parties, the Plaintiff is estopped by conduct and waiver from making the claim under consideration.

5) Whether the Claimant's claim for unpaid leave days and overtime is barred by the limitation of actions.

6) Whether the Claimant is entitled to the relief sought.

7) Who should bear the costs of this suit?

Evidence

11. CW1 who is the Claimant testified in Court that he felt the work was very stressful as he was assigned work by many people and thus decided to resign. That he was a driver and used to drive even at night without rest and when he explained to the company, no one listened to him and that he was not paid anything when he stopped working. That the letter from Ministry of Labour showed what he was to be paid and stated that he would like to adopt his Witness Statement and documents filed in Court as his evidence.

12. In cross-examination, he testified that the Respondent wanted to pay him Kshs. 27,000/= but they had not agreed for him to be paid that amount and stated that he worked for 4 years. He stated that he had no letter showing the hours of work done to entitle him to payment of service pay and that he also did not have proof that it served the Respondent with the demand notice. He confirmed in re-examination that he was not given any written contract with the Respondent.

13. RW1, Samson Kariuki stated in court that he would like to rely on his Witness Statement and all other filed documents as his evidence. He stated that he works for the Respondent as Supervisor from 2010 and that the Claimant had been employed as a store keeper and not officially a driver.

14. In cross-examination, he confirmed that the Claimant worked as a driver at all times and stated that he did not know the Claimant's salary. That he knew the Claimant did not go on leave and also confirmed that he did not have any evidence in Court that the Claimant had a loan. It was also his statement that he did not see the name of the Claimant on the payslip in Court.

Claimant's Submissions

15. The Claimant submits that since he resigned as a result of harsh working conditions, his resignation was constructive dismissal and he cites the Supreme Court of Canada case of **Potter –v- New Brunswick Legal Aid Services Commission, 2015 SCC 10**, where the learned Judges discussed the question of constructive dismissal stating that:-

“The test for constructive dismissal has two branches. The Court must first identify an express or implied contract term that has been breached and then determine whether that breach was sufficiently serious to constitute constructive dismissal. However, an employer’s conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract...”

16. He submits that he therefore deserves to be paid his terminal dues being Kshs. 461,500/= as prayed in the Statement of Claim and urges this Honourable Court to find in favour of his Claim with costs to the Claimant.

Respondent's Submissions

17. The Respondent submits that its main defence is that the Claimant voluntarily retired from employment and has failed to discharge the burden of proof in respect to the reliefs he claims in his Statement of Claim.

18. That the Claimant is estopped from making this instant claim because the dispute between them had been resolved following conciliation under **Part VIII of the Labour Relations Act** spearheaded by the Transport Workers Union of Kenya and the Ministry of Labour and which culminated in a settlement agreement. That the settlement was affirmed by the union in their letters dated 20/12/2014 confirming the agreed terminal benefits due to the Claimant as Kshs. 26,000/= made up as follows:-

- Payment for unpaid days.....Kshs. 5,000.00
- Payment for leave days.....Kshs. 31,000.00
- Less loan taken from company.....Kshs. 10,000.00

Total.....Kshs. 26,000.00

19. That in the case of **Kenya Plantation & Agricultural Workers Union –v- Maji Mazuri Flowers Industrial Cause 1365 of 2011**, Justice Nduma Nderi summarized the objective of the provisions of **Section 68 of the Labour Relations** and the mode of enforcement of the settlement agreement by stating that enforceability of conciliation matters is linked to the principle of self-determination and that it is for the parties to determine whether the settlement agreement is a legally enforceable contract or a non-binding agreement.

20. That where the intention is for it to be binding and therefore enforceable, such an agreement is ordinarily presented before court and made an order of the Court. The Respondent further submits that the Claimant admitted in paragraph 6 of his Statement of Claim and under cross-examination in court that a settlement agreement had been arrived at and that this unequivocal admission does not challenge the legal enforceability of their Settlement Agreement.

21. It is further submitted by the Respondent that the Claimant appears to be speculating that by filing the instant proceedings, this Honourable Court has the power to re-write contracts for the parties which cannot be legally right. It relies on the case of **National Bank of Kenya Limited –v- Pipeplastic Samkolit (K) Limited Civil Appeal No. 95 of 1999** where the learned Judges cemented the principle that a court of law cannot re-write a contract between parties who are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.

22. It submits that the Claimant herein has not by all accounts suggested that he was under duress or coercion to participate in the conciliation process and the settlement agreement and that it would be unjust and inequitable for the Claimant to now claim the sum of Kshs. 461,500.

23. The Respondent thus urges this Court to firmly reject the Claimant’s enticement to re-write the terms of the Settlement Agreement which are already clear and unambiguous and enjoin the Respondent to honour its obligation to pay the agreed terminal dues.

24. As to whether the Claimant is entitled to the reliefs sought, the Respondent cites the case of **Miss Nduta Mbite –v- John Gachau Gitonga, Civil Appeal No. 299 of 2015** where the Court of Appeal explained the employee’s burden of proof in that the employee ought to adduce evidence that he took leave or worked overtime for the court to allow the reliefs.

25. That the Claimant in this case has failed to meet the threshold warranting the grant of the reliefs for *annual leave, overtime and 1 rest day per week* as he did not substantiate them in court and prays that in the circumstances, this Court awards him leave days for 1 year amounting to a month’s salary of Kshs. 15,000/=.

26. The Respondent further submits that it has shown through the payslips at *pages 2 to 32 of the Respondent’s List of Documents* that the Claimant was engaged in March 2012 and not in 2010 as he has alleged in his pleadings. That a perusal of the Claimant’s NHIF statement of account also reveals that up until March 2012, he was self-employed and made his own contributions while the Respondent made statutory contributions from the year 2013.

27. That pursuant to **Section 35(6) (d) of the Employment Act**, the Claimant is therefore not entitled to service pay as claimed which was fortified in the case of **Martin Ileri Ndwiga –v- Oleria Management Limited ELRC Case No. 725 of 2016** but that if this Court is inclined

to award the Claimant service pay, the award of 15 days' pay for the 2 years worked amounting to Kshs. 15,000/= is satisfactory. That it has also established on a balance of probability that it is entitled to set off against the Claimant's claim the sum of Kshs. 22,000/= on account of the loan advanced to the Claimant.

28. The Respondent finally submits that costs follow the event and since the Claimant has not proved his case on a balance of probability, it prays that this Honourable Court dismisses this suit with costs to the Respondent.

29. I have examined all the evidence and submissions of both Parties. The issues for determination are as follows:-

1) Whether this claim is time barred as submitted by the Respondent.

2) Whether the Claimant was unlawfully terminated by the Respondent.

3) Whether the Claimant is entitled to the remedies sought.

30. On the 1st issue, the Claimant indicated in his Memorandum of Claim that he left employment on or about 11th August 2014. He later filed this Claim on 18/4/2015. This was within the requisite period of 3 years provided under Section 90 of Employment Act and therefore this claim is not time barred.

31. On the 2nd issue, the Claimant has submitted that he left work voluntarily and honourably. He even wrote a resignation letter dated 19.8.2014. The issue of unfair termination does not therefore arise.

32. The Claimant had submitted that he was subjected to hard working conditions, which made it impossible for him to work hence he claims constructive dismissal.

33. The letter in which the Claimant indicated he was leaving employment did not make any reference to any difficult working conditions nor any action by the Respondent which made it difficult for him to work. Infact, in the letter, the Claimant stated that he had decided to leave the services due to unavoidable "circumstances" which he did not explain.

34. The issue of difficult working conditions was never stated therein and this appears to be an afterthought. I will take it that the Claimant resigned on his own volition and the issue of unfair dismissal or constructive termination does not arise.

35. On the last issue of remedies, the Claimant has sought various remedies including 11 days wages for August 2014, leave service pay, rest day, overtime and issuance of a certificate of service.

36. Section 35(6) of Employment Act states as follows:-

6) "This section shall not apply where an employee is a member of:-

a) a registered pension or provident fund scheme under the Retirement Benefits Act;

b) a gratuity or service pay scheme established under a collective agreement;

c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

d) the National Social Security Fund.

37. There is no indication that the Claimant was a member of NSSF or a Provident Fund. He is therefore entitled to service pay being 15 days salary for each year worked and this comes to $\frac{1}{2} \times 15,000 \times 3 = 22,500/=$.

38. I also award Claimant leave for the 3 years = $3 \times 15,000 = 45,000/=$.

39. On issue of overtime, the Claimant was unable to demonstrate the length of time he worked as overtime and therefore I am unable to award him anything on this limb.

40. As to rest day I will award him 1 day rest per week = $52 \times \frac{1}{30} \times 15,000 = 26,000/=$.

TOTAL AWARDED = 93,500/=

41. The claim of wages for August 2014 is denied as Claimant did not give notice before his resignation.

42. The Claimant is also entitled to issuance of a Certificate of Service plus costs and interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 30th day of April, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Nassanga holding brief Mr. Njogu for Claimant – Present

Respondents – Absent