



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 696 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 22nd May, 2019)

UMBERTOH DANIEL NUNGARI.....CLAIMANT

VERSUS

WILDEBEEEST CAMP & TRAVELS LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed a Memorandum of Claim on 30th April 2014 alleging his termination was contrary to the rules of natural justice and that it contravened fair labour practices. He averred that the grounds for his termination were false and exaggerated. He therefore seeks the following reliefs:-

- a) *Kshs. 60,000/= being payment of one months' salary in lieu of notice.*
- b) *Kshs. 294,000/= being service pay for 7 years (21 days for each year).*
- c) *Kshs. 720,000/= being salary for 12 months as damages for unfair dismissal.*
- d) *A declaration that the Respondent is in breach of contract, and has violated provisions of the Employment Act, Income Tax Act, Common law and Articles 41 and 47 of the Constitution of Kenya and should comply as appropriate.*
- e) *Any other relief that this Honourable Court may think fit to grant.*
- f) *Costs if suit and interest.*

2. The Respondent filed its Amended Response to the Amended Claim on 11th July 2018. It denied the allegation that the Claimant was its employee and averred that the Claimant was engaged as a consultant who was paid different rates depending on the amount of work. It further denied that the Claimant was unfairly terminated.

Claimant's case

3. The Claimant, CW1, testified that he was employed by the Respondent for 7 years. He testified that in 2007, he was offered a job at the Respondent's camp in Kibera. He testified that he was hired as a travel consultant and that he ran the affairs of the Camp.

4. He testified that he worked from Monday to Saturday, 8am to 5pm, and that his initial salary was Kshs. 20,000 which was to be renewed after 3 months but there was no renewal. However, his salary was adjusted to Kshs. 60,000 in 2009, which is the same amount he earned at the time of termination.

5. He testified that he was a full time employee and was not the Respondent's consultant. He further testified that he was a tour consultant but this was not a consultancy. He testified that he was working with the facilities given by the Respondent, he communicated to client's using a general email that was used by everyone and that he was expected to be on duty daily.

6. He testified that over the years the company grew, he became the Safari Manager and at times, he would be the Camp Manager when the directors were out of the country. He testified that he was a member of NSSF and NHIF and that he paid taxes.

7. He denied having received any payments as particularised in the invoices produced by the Respondent. He testified that in 2012 the Camp became very popular and this led to the demand to employ more employees as he would report to work at 6 am and leave at 8pm. He testified that he never had specific hours to achieve, he was never appraised and that his performance was excellent.

8. He testified that his performance was excellent in 2014 but he was terminated the same year. He testified that in 2013, he asked for time off during Christmas but the Respondent refused. He stated that he got off work on 28th December 2013 and was to report on 3rd January 2014. He however received a SMS from one of the Directors not to report on 3rd January 2014 and that he was not to do any work.

9. He testified that he was informed that his services were no longer needed. He testified that he was issued with his backdated termination letter days after his termination and after the intervention by KUDHEIHA Workers Union.

10. He testified that the letter was never delivered to him but it was issued to the KUDHEIHA. He testified that the allegations in the termination letter are false. He testified that he never received any warning from the Respondent since he was employed.

11. In cross-examination, the Claimant testified that he had no records to show he under performed. He testified that he went for Christmas and he did not receive the email sent on 27th December 2017 as it was not addressed to him. He testified that he never received any email on his performance.

12. He testified that he verbally informed the Respondent that he was overwhelmed. He further testified that he was not aware of the payment made to Kenya Revenue Authority (KRA).

13. In re-examination, he testified that he did not receive any withholding tax certificates from the Respondent. He testified that the emails produced by the Respondent were sent to a generic email. He testified that he never made any written complaint on the work load and that he had talked to the agent in Denmark about the increased work load from his end.

Respondent's case

14. Judy Njue, the Respondent's Accounts Manager testified as RW2. She adopted her Witness Statement filed on 21st September 2018 as her evidence in chief. She stated that the Claimant's concentration to his job, attitude to work had not improved despite an earlier discussion on the same.

15. She stated that the Claimant's poor performance resulted to the Respondent's financial and reputable loss. She stated that the Claimant was demanding payment from the Respondent's contracted drivers contrary to the Respondent's policy. She stated that the Claimant was engaged as a consultant and there was no contract of employment between the parties

16. In cross-examination, she testified that she joined the Respondent in 2009. She testified that she was not using the company email in her normal duties. She testified that she was not involved in what was going on and that she was not responding to the company email. She testified that it was not possible for anyone to write an email in another name.

17. She testified that the Claimant was not the Respondent's employee and that there is no consultancy agreement. She testified that at the beginning, the Claimant was an employee but there is nothing to show there was conversion to consultancy. She testified that the Claimant was expected to work from 8am to 5pm but he never used to clock in and out of work.

18. She testified that before 2009 the Claimant was never entitled to leave. She further testified that she dealt with Human Resource from 2014 after the Claimant left. She testified that in 2013 the Claimant was in charge of the camp and chairing meetings with staff but she never reported to him.

19. She also testified that the Claimant earned Kshs. 60,000 and she was withholding 5%. She testified that the invoices were written by the Claimant and by then, there was no iTax portal so she was paying a cheque and it would be stamped.

20. She testified that the Claimant's performance was measured by how clients reacted and that there was an email. She testified that there was no agreement on targets and that she did not know when the Claimant received his termination letter. She testified that the complaints against the Claimant were clear as she experienced all of them. She testified that she is not a Human Resource expert and that she did not know if there were any disciplinary processes before the Claimant's termination.

21. In re-examination, she testified that the Claimant dealt with the Danish company and he responded to the company's queries. She further testified that in the meeting the Claimant had with the directors he was given audience.

Claimant's submissions

22. The Claimant submitted that the totality of evidence does not prove that the Claimant was an independent contractor. The Claimant relied on the decision in **Kenya Hotel & Allied Workers Union v Alfajiri Villas (Magufa Ltd) [2014] eKLR** and **Kenneth Kimani Mburu & Another v Kibe Muigai Holdings Limiyed [2014] eKLR**. He submitted that the Respondent has attempted to avoid liability by creating invoices to mislead the Court.

23. The Claimant submitted that he was not given a hearing before being terminated and that he was only given a letter of termination. He submitted that the letter of termination referred to many issues but there was no formal complaint about his performance. He relied on Section 41 of the Employment Act and submitted that none of the conditions required for dismissal for poor performance was satisfied. He

relied on the decision in **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR.**

24. The Claimant urged the Court to award compensation as prayed. In addition, that the Court should be guided by the provisions of Section 49 of the Employment Act in awarding compensation.

Respondent's submissions

25. The Respondent submitted that the Claimant was not an employee and the Employment Act does not apply to him. However, should the Court find he was, to find that the Respondent heard and considered the explanations of the Claimant prior to a decision being made. It submitted that there is no requirement under the law that a notice for hearing had to be in writing. It submitted that the Claimant had failed to demonstrate how the failure to issue a written notice prejudiced him.

26. The Respondent relied on the decision in **Polkey (A.P) vs A.E Dayton Service Limited (Formerly Edmund Walker (Holdings) Limited (1987)** and urged the Court to conduct a reasonable response test to determine with particular attention to the nature of the case whether the Respondent's action in terminating the Claimant was a reasonable response to the actions of the Claimant.

27. It submitted that the Claimant has not provided any documentation supporting his position that he is entitled to Kshs. 60,000 per month. It submitted that the Claimant is not entitled to service pay as claimed. It submitted that the contract between the Claimant and the Respondent was not based on a monthly salary but on the basis of invoices raised. The Respondent relied on the decision in **Patrick Lumumba Kimuyu v Prime Fuels (K) Limited [2018] eKLR.**

28. It submitted that having demonstrated that the Claimant's termination was fair, the Claimant on a without prejudice basis, would not be entitled to more than 1 month salary. It submitted that the Claimant has not quoted any Sections of the Act that the Respondent has violated.

29. I have considered all the evidence and submissions of the parties herein. The issues for this Court's consideration are as follows:-

1. *Whether the Claimant was an employee of the Respondent or an Independent Consultant.*
2. *Whether the Respondent had valid reasons to terminate him.*
3. *Whether the Respondent followed due process before the termination.*
4. *Whether the Claimant is entitled to the remedies sought.*

Issue No. 1

30. On the 1st issue, the Claimant sought to rely on an appointment letter dated 8/8/2007 which states as follows:-

“ Daniel Nungari

P.O. Box 20184-00200

NAIROBI.

Dear Daniel

POSITION AS TRAVEL CONSULTANT

Thank you for accepting the position of Travel Consultant with our company.

We would be very pleased if you could please begin work tomorrow which will include an orientation of the day tour which we regularly run.

As discussed the starting salary for this position will be 20,000 KSH per calendar month, which will be payable at the end of each month.

This salary will be reviewed after you have completed three months probation. Also included in your package is health insurance for yourself, as we have discussed.

Your normal place of work will be at our offices at Wildebeest Travels on Kibera Road here in Nairobi, although it may be required that you will attend day trips or safaris from time to time so that you are familiar with the company's products.

Thank you again Daniel and we look forward to a prosperous future together.

Kind regards.

Signed

Alan Wickham

Director ”

31. From this letter, the Claimant's post at employment was Travel Consultant. From the same letter, the Claimant used to work and received a salary. He had also an assigned work place.

32. An employment relationship is determined by a number of factors. Blacks Law Dictionary 10th Edition at page 1479 defines an employer-employee relationship as:-

1. The association between a person in the affairs of another, who in turn has the right to control the person's physical conduct in the course of that service. At Common Law, the relationship was termed Waiter-servant”

33. From this definition, the relationship is determined by whether the employee serves and is under control of the employer in performing his services. In the case of the Claimant herein, he was employed to serve as travel consultant. His place of work was determined by the Respondent. He was paid a salary and directed on the work to perform.

34. Blacks Law Dictionary 10th Edition page 639 also defines an employee as:-

“Someone who work in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance...”.

35. Indeed the Claimant herein fits in this description. The Respondent have submitted that the Claimant was a consultant and not an employee. They however agreed that they had no consultancy agreement with the Claimant. It is therefore apt for this Court to return a finding that the Claimant was an employee of the Respondent and not a consultant as submitted by the Respondent.

Issue No. 2 and 3

36. The termination letter addressed to the Claimant is dated 6/1/2014. It refers to termination of consultancy, which I have already dispelled above as being an employment contract. In the termination letter, the reasons for the termination alluded to relate to poor performance. There is no indication that he was cautioned about the poor performance through any warnings and asked to improve.

37. Section 43 of Employment Act states as follows:-

1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

38. The reasons for termination should thus be reasons that an employer must prove through tangible evidence.

39. In this case, of the Claimant, the Respondent aver the Claimant performed poorly over time. In the termination letter various incidences have been listed. These incidences were never brought to the Claimant's attention.

40. Infact the Claimant denied receipt of the alleged warning letter dated 28/10/2013. The Respondent never provided proof that this letter was served upon the Claimant.

41. It would have been prudent to have the complaints brought to the Claimant's attention and for him to be asked to prove or disapprove. This was never done.

42. Section 41 of Employment Act 2007 states as follows:-

1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

43. In the case of the Claimant, he was never given any opportunity to be heard. He was condemned unheard. I therefore find that the

Respondent had no valid reasons to terminate the Claimant and neither did they subject him to due process.

44. Section 45(2) of Employment Act states as follows:-

(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 employee's 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.

45. Having found that there were no valid reasons to terminate the Claimant and that due process was never followed, I find the termination of the Claimant unfair and unjustified and declare it so.

Issue No. 4 – Remedies

46. The Claimant sought various remedies from this Court. I have considered the fact that the Claimant was terminated without any hearing and was not given any notice. I therefore find for him and award him as follows:-

1. 1 months salary in lieu of notice = 60,000/=

2. 12 months salary as damages for unfair dismissal – 60,000 x 12 = 720,000=

TOTAL = 780,000/= - Less statutory deductions

3. Prayer for service pay is denied as Claimant was a member of NSSF as he stated himself.

4. The Claimant to pursue the issue of Income Tax and Payee with the Kenya Revenue Authority (KRA) as appropriate.

5. The Respondent will pay costs of this case plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 22nd day of May, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties