



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC CAUSE NO. 531 OF 2015

(Consolidated with Cause No. 532 of 2015)

(Before Hon. Justice Hellen S. Wasilwa on 8th July, 2019)

EVANS OKULA LUKHUMWA.....CLAIMANT

VERSUS

FREIGHT IN TIME LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimants, Moses Ochieng Ogutu and Evans Okula Lukhumwa each filed their Statements of Claim dated 30/03/2015 for unlawful and unfair dismissal from employment against the Respondent, Freight In Time Limited.

2. Moses avers that he was employed by the Respondent on or about 27/07/2010 as a Palletizer earning a gross salary of Kshs. 12,803/= per month while Evans avers that he was employed by the Respondent on or about 01/02/2012 as a Palletizer earning a gross salary of Kshs. 15,010/= per month. That they were both never given contracts of employment despite pleading for the same from the Respondent. Evans avers that he later went to a driving school and upon completion of the course, was employed by the Respondent as a Driver in June 2014 but that the Respondent refused to increase his salary to reflect the minimum wage prescribed by law.

3. They both aver that they were forced to work continuously for a whole year for Moses and the entire period of employment for Evans, without being given annual leave and that despite working from 5pm-5am, Mondays to Saturdays, the Respondent refused to pay them overtime.

4. That on or about 09/02/2015, they were instructed by their immediate supervisor to transport some foodstuff and that while executing these instructions, the cold room caretaker appeared and accused them of being in a restricted area and stealing. That they denied those assertions and when investigations were carried by the Respondent, no evidence was found linking them to any theft but that when they reported to work on 10/02/2015, they were summarily dismissed by the Respondent.

5. That they have always carried out their duties with due dispatch and diligence and that their dismissal was actuated by malice and clear breach of the Respondent's statutory duty. They both particularise the malice/breach of contract or statutory duty of care by the Respondent as follows:-

a) Failing to issue the Claimants with a formal contract which stipulates and lays down the basis of the Claimants' dismissal.

b) Making false and baseless accusations of theft and therefore subjecting the Claimants to humiliation.

c) Failing to issue the Claimants with a warning letter or a warning at all.

d) Failing to issue the Claimants with a termination letter.

e) Failing to issue a notification of hearing and a disciplinary hearing, if necessary to hear their case and affording them an opportunity to defend themselves before their dismissal.

6. They continue to aver that as a result of the aforesaid, they have suffered loss and damage which they particularise as follows:-

a) The Claimants were never issued with Certificates of Service despite their efforts towards building the Respondent.

b) The Claimants were never informed of the exact reasons for their dismissal thereby causing them untold emotional turmoil.

c) The Claimants were not paid their terminal dues despite being faithful and of exemplary service to the Respondent.

7. The Claimants claim as follows:-

Moses:

i. Salary of February 2015.....Kshs. 4,546.13

ii. 1 month salary in lieu of notice.....Kshs. 12,123.00

iii. Unpaid annual leave days

2011- (Kshs. 404.10 x 21).....Kshs. 8,486.10

2012- (Kshs. 404.10 x 10).....Kshs. 4,041.10

2013- (Kshs. 404.10 x 21).....Kshs. 8,486.10

2014- (Kshs. 404.10 x 21).....Kshs. 8,486.10

iv. Overtime of 4 hours:1am – 5am, Mondays to Saturdays

(Kshs. 12,123/ 208 hours= 58.28 per hour

(58.28 x 24weeks x 4 hrs x 1 ½) = Kshs. 8,392 per month

September – December 2010.....Kshs. 33,569.98

January – December 2011.....Kshs. 100,710.00

January – December 2012.....Kshs. 100,710.00

January – December 2013.....Kshs. 100,710.00

January – December 2014.....Kshs. 100,710.00

January 2015.....Kshs. 8,392.50

v. 12 months' salary compensation

(Kshs. 12,123 x 12).....Kshs. 145,476.00

Total **Kshs. 636,447.01**

Evans:

i) One month salary in lieu of notice.....Kshs. 22,070.95

ii) Unpaid annual leave days

2012- (Kshs. 500.33 x 21).....Kshs. 10,506.33

2013- (Kshs. 500.33 x 21).....Kshs. 10,506.33

2014- (Kshs. 1,062.60 x 21).....Kshs. 22,314.60

iii) Overtime of 4 hours:1am – 5am, Mondays to Saturdays

(Kshs. 15,010/ 208 hours= 72.16 per hour

(72.16 x 24weeks x 4 hrs x 1 ½) = Kshs. 10,319.04 per month

February – December 2012.....Kshs. 114,301.44

January – December 2013.....Kshs. 124,692.48

January – May 2014.....Kshs. 51,955.20

At the rate of Kshs. 28,627.20 per month:

June – December 2014.....Kshs. 200,390.40

January 2015.....Kshs. 28,627.20

iv) Underpayment as per prescribed Regulation of Wages for

Heavy Commercial Drivers Order, 2013

(Kshs. 22,070.95 – 15,010) = Kshs. 7,060.95 per month

7 months in 2014.....Kshs. 49,426.25

1 month in 2015.....Kshs. 7,060.95

v) Days Worked at daily rate of

Kshs. 1,062.60 x 9 days.....Kshs. 9,563.40

vi) 12 months' salary compensation

(Kshs.15,010 x 12).....Kshs. 180,120.00

Total **Kshs. 831,535.53**

8. That despite issuing the Respondent with a notice of intention to sue, it has refused to settle their claims and they pray for Award/Judgment against the Respondent for a declaration that the Respondent's action in dismissing them from employment was unlawful and unfair; the sums of Kshs. 636,447.01 (Moses) and Kshs. 831,535.53 (Evans) as enumerated above; Certificates of Service; costs of this suit; and interest on the amounts awarded at Court rates.

9. The Respondent filed its Statements of Reply dated 29/07/2015 averring that Moses was employed on 01/08/2011 and that both Claimants were employed on fixed term contracts of 6 months each until when they absconded from work without any valid reason. It contends that it has always provided written contracts to all fixed term contract employees together and that it always gives 11.5 leave days pursuant to the contracts.

10. It avers that when the Claimants were found with packets of produce, they failed to account how they had obtained the said foodstuffs and that so as to investigate, it asked them to go home and return for a meeting. That the Claimants never returned but opted to issue demand and notice of intension to sue and it contends that it has never dismissed them nor acted with malice or otherwise breached any statutory duty. It particularises malice/breach of contract by the Claimants as follows:-

a) Absconding from work without any valid reason.

b) Termination of a fixed term contract without giving the requisite notice as required by the law.

11. The Respondent avers that as a result of the Claimants' malice and breach of contract, it has suffered loss and damage being one month notice pay at Kshs. 13,903/= for Moses and Kshs. 13,903/= for Evans. It contends that the Claimants have never been instructed to work overtime and thus denies their claims for the same while terming it as malicious and without basis.

12. It further denies that the said termination of the Claimants was unlawful, unfair, malicious or otherwise unreasonable and prays that the Claimants' claims be dismissed with costs to the Respondent and any other relief this Honourable Court may deem fit to grant.

13. The Respondent filed Witness Statements dated 07/03/2019 by its General Manager, Elijah Kiva who states that the Respondent's former Human Resource Manager Catherine Kamau had initially given a statement but that since she was unavailable to testify. He stated that the Claimants absconded from work on or about mid-January 2015 and that it is Catherine Kamau who conducted the aforementioned investigations. He reiterates that the Respondent has not refused and/or neglected to make good of any claim by the Claimants and requests the Court to dismiss their claims.

Evidence

14. CW1, Moses Ochieng testified and referred the Court to *page 1 and 2 of his documents* with regards to his salary and which are his card and his payslip. That he signed a contract with the Respondent but was never given a copy of the same and that he was never given a hearing before being sacked. That he had never been given any warning and that he was never paid any terminal benefits including notice.

15. He also produced the demand notice he served the Respondent at *page 3 to 5* to which it replied at *page 8*. In cross-examination, he confirmed that he signed the contract at *App 1 of the Respondent's documents* and that his last contract had 1 month to expire. He denied the Respondent's leave document showing he had gone on leave stating that the signature on the said document was not his and reiterated that he was never paid the final computation as per the Respondent's documents.

16. CW2, Evans Okula testified in Court that he used to be given a yearly contract and also referred the Court to *page 1 and 2 of his documents* with regards to his salary and which are his card and his payslip. He stated that when he switched to being the Respondent's Driver, his salary remained the same.

17. In cross-examination, he said he had 1 off day per week and that he only signed a contract once. That he signed a computation of final days on 12/05/2014, he used to be paid through the bank and that Cheque (item number 4) is the only cheque he was given. That he saw and signed Cheque (item number 7) but the cash or cheque was not given to him and confirmed that the signature was his. That when he became a driver, the Respondent never gave him any new contract and reiterated that they were never heard and that he never absconded duty nor was he paid all his dues.

18. RW1, Elijah Kiva stated in Court that as per the term of contract, the Claimant worked for 8 hours and was therefore not entitled to overtime and that he wished to adopt his Statements as evidence in this case. That the cheque dated 04/09/2013 is an example that they paid the Claimant what was owed to him.

19. In cross-examination, he confirmed that when the Claimants absconded from duty, he did not do anything as their contract was expiring on 28/02/2015. That Evans was a Palletizer and that they had a disciplinary manual but he did not have it in Court.

Claimants' Submissions

20. The Claimants submit that the issue of abscondment was dealt with by the Court in the case of **David Nyanjui Mburu –v- Sunmatt Limited [2014] eKLR** where your Ladyship quoted Abuodha J in ***Godfrey Anjere vs Unique Suppliers Limited: Nairobi ELRC Cause 65 of 2011*** that an employer should show what steps it took to inform the employees that their dismissal would result if they did not report back to work.

21. The Court thereat stated that this was necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse. That Court in the ***Godfrey Anjere case*** above held that in the absence of any termination or dismissal letter due to abscondment, the claimant was dismissed and never absconded. They submit that in view of the foregoing, they were terminated and did not abscond from duty.

22. They submit that the Respondent did not have any valid reasons as under **Section 43 of the Employment Act** and that it did not produce any evidence in Court to confirm its allegations against them which is a requirement under **Section 45 of the Act**. In this regard, they rely on the case of **David Gichana Omuya vs. Mombasa Maize Millers Ltd [2014] eKLR**. That their termination was procedurally unfair as well since they were never accorded any disciplinary hearing as required under **Section 41 of the Act** and that the Respondent did not produce any evidence to the contrary.

23. It is submitted by the Claimants that the Respondent did not also produce any evidence to prove that it gave them any notice pay and that they are entitled to the claim of annual leave by virtue of **Section 28 of the Employment Act** and which was not proved to the contrary by the Respondent in Court. That it also failed to produce the attendance register which would have shown the hours they both worked and/or the check-in and check-out time and that they are therefore entitled to the claim for overtime.

24. That duly guided by **Section 49 of the Employment Act**, they appeal to this Court to exercise its full discretion and award them each 12 months' salary compensation. That the Respondent should also be made to bear the costs of both suits because they both served it with demand letters and it refused to settle their claims.

25. The 2nd Claimant, Evans submits that the Respondent failed to adhere to the ***Regulation of Wages (General Amendment) Order, 2013 for Heavy Commercial Drivers*** and should thus pay him the difference for the underpayment and that RW1 failed to explain why he was not earning the same as the 1st Claimant if indeed they were in the same designation. That this Court should be convinced that he was indeed a Driver.

26. He prays that the Court also allows his claim for the 9 days he worked in February before his termination. The Claimants finally submit that they have been able to satisfy both the evidentiary and legal burden of proof required of them and that their claims should be allowed as prayed.

Respondent's Submissions

27. The Respondent submits that they treated the Claimants as deserters from duty without notice and that therefore no payment of salaries or any dues will be made on absconding of duty. That **Section 44(4) (b) (d) and (e) of the Employment Act** provides for gross misconduct and that the Claimants are not entitled to any of the reliefs sought because termination was fair and lawful in accordance with their employment contracts and the Employment Act. That the Claimants did not prove they were unfairly terminated to rebut the accusation that they absconded from duty as required under **Section 45 of the Act** and that their claim for unfair termination should therefore fail.

28. It submits that it exercised the power granted to an employer to terminate a contract under **Section 42 (2) of the Employment Act** and that the Claimants absconded from duty after all the payments had been made. It relies on the case of **BIFU –v- Barclays Bank of Kenya Cause 1660 of 2013 (unreported)** where Mbaru J held that the employer cannot be faulted when an employee invited to a disciplinary hearing fails to attend without any justifiable cause. It contends that it has established the basis for summary dismissal under **Section 44 of the Employment Act**.

29. I have considered all the evidence and submissions of the Parties herein. From the evidence of the Claimants, they were summarily dismissed on 10/2/2015.

30. The Respondents on their part aver that the Respondents were found with packets of produce and were asked to go home and return for a meeting. That the Claimants never returned and so were treated as deserters. The Respondent's witness also indicated that the Claimants had fixed term contracts, which were set to expire on 28/2/2015 and so they did not see the need to contact the Claimants.

31. Claimants gave their oral evidence in Court and CW1 admitted that Appendix 1 of Respondent's documents was a contract he signed with the Respondents. He also admitted that he was sacked on February 2015 and that the contract in question was for 6 months.

32. CW2 on the other hand also admitted signing a contract with the Respondent dated 1/8/2014. Appendix 1 of Respondent's documents filed in respect of Moses was signed on 1/9/2012 and the contract was to commence on 15th September 2014 and its duration was 6 months. Its end date was 28/2/2015.

33. The other contract in respect of Evans commenced on 1/8/2014 and it was for 6 months with effect from 1/8/2014. It was to end on 31/1/2015.

34. The above contracts were the last contracts served by the Claimants and which the Claimants admitted signing. There is no indication that fresh contracts were signed after this. In case of the Claimant, Moses he averred that he was dismissed on 10/2/2015. This was 18 days to the date of contract was to end.

35. On 23/2/2015, the Claimant's Counsel wrote a demand notice to the Respondents on account of the wrongful dismissal of Moses, and this was responded to on 17/3/2015 and the Respondent indicated that the Claimant's contract had ended on 28/2/2015.

36. For Evans by 10/2/2015, his contract ended on 31/1/2015 and the issue of a dismissal on 10/2/2015 would not have arisen.

37. As for Moses, he was indeed terminated before his contract ended. He is therefore entitled to his salary dues for the remainder of his contract period which was 18 days = 4,546.13. I also award him 1 months' salary in lieu of notice = 12,123/=.

38. The Claimant also sought for payment of overtime pay and leave pay. The Claimants however failed to prove the claim for overtime nor the fact that they sought to go for leave and were denied the same. I find the prayers sought in this regard not tenable. I therefore find that the Claimant Evans's case not prove and I dismiss it accordingly. The only award for him is issuance of a certificate of service.

39. As for Moses, I award him a total of Kshs.16,669.13 plus issuance of a certificate of service. There will be no orders as to costs.

Dated and delivered in open Court this 8th day of July, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties