



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 525 OF 2012**

*(Before Hon. Lady Justice Maureen Onyango)*

**WILLIAM KIMANI RICHO.....CLAIMANT**

**VERSUS**

**THE STANDARD LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant was employed by the Respondent on 22<sup>nd</sup> February 1995 as a driver earning a salary of Kshs.3,840. He served the Respondent until 21<sup>st</sup> July 1999 when he was dismissed. At the time of dismissal, he was earning a salary of Kshs.6,890. Being aggrieved by the dismissal, the Claimant commenced proceedings at the High Court in HCCC 378 of 2005. However, on 26<sup>th</sup> March 2012, Mutava J. directed that the matter be transferred to this court hence this claim.

In his amended Claim filed on 19<sup>th</sup> February 2013, the Claimant seeks the following reliefs:

1. Special damages in the sum of Kshs.7,000,615 computed as follows:

a. Loss of earnings for the 15 years that the Claimant would have worked until he retired.

Kshs.28,415 (current driver's salary) x 12 x 15 years totalling to Kshs.5,114,700.00.

b. Leave travelling allowance

Kshs.2,500 x 12 months x 15 years = Kshs.450,000.00

c. House allowance.

Kshs.3,000 x 12 months x 15 years = Kshs.540,000.00

d. Refund on medical expenses.

Kshs.10,000 x 15 years = KShs. 150,000.00.

e. One month's salary in lieu of notice.

f. Total expenses incurred for Court Attendance of the traffic case at Makadara for 64 days at Kshs.48,000.00.

g. Advocates fees for the Traffic case at Kshs.104,500.00.

h. Penalty for being forced work on 6 leave days at Kshs.100,000.00 totalling to Kshs.600,000.00.

i. Overtime worked from 1<sup>st</sup> July 1999 to 21<sup>st</sup> July 1999 at Kshs.7,500.00.

2. General damages for breach of employment contract.

3. Costs and interest on (a) and (b) above at Court rates.

4. Costs of this suit.

It is the Claimant's case that his contractual terms were that his employment would be on a permanent basis until the retirement age of 60 years. His contract was terminated when he was 45 years hence he had 15 more years of active service. It is his position that his current salary would have been Kshs.28,415 with a house and leave allowance of Kshs.3,000 and Kshs.2,500 respectively.

The Claimant avers that he was never given an opportunity to answer to the allegations of absenteeism. It is the Claimant's case that at the time of his dismissal, he had been receiving medical care and attending court on account of the traffic accident which occurred on 1<sup>st</sup> May 2009.

He contends that the termination of his employment was unlawful and as a result, he was deprived of his legitimate earnings and denied all future emoluments that he would have earned.

He testified that on 1<sup>st</sup> May 1999 that, he was paid Kshs.17,905.45 inclusive of overtime of Kshs.9,405.

He stated that although he was accused of being absent for over 40 days after his accident, he did not report to work for 4 days only as he was on sick leave.

In its reply, the Respondent avers that the termination of the Claimant's employment was lawful and compliant with the Claimant's contract of employment. It is the Respondent's position that although the contract provided for the retirement age of 60 years, the same was subject to clause 11 and 12, other terms in the contract and the Claimant's performance.

The Respondent avers that the Claimant is only entitled to payment of one month's salary in lieu of notice and not any of the other reliefs sought. It urged the Court to dismiss the suit with costs.

The respondent's witness, Lilian Wanjiku Mwaura, RW1, conceded that the number of days and the dates when the Claimant was absent were not stated, that the respondent only stated that he was absent in May and June. It was her testimony that the Claimant was paid Kshs.1,500 in May 1999, while on leave. She denied the allegation that the Claimant was forced to work while on sick leave and stated that he was on sick leave for 5 days.

It was her testimony that the Claimant was not issued with a notice because he was summarily dismissed.

### **Submissions**

The Claimant submitted that his employment was unlawfully terminated as the Respondent had not proved that he had absconded duty for 40 days as alleged in the dismissal letter. It is his submission that he has proved his case to justify the grant of the reliefs sought.

The Respondent submitted that the special damages sought by the Claimant comprise amounts which would have been due to the Claimant had his employment under the Respondent subsisted. The Respondent further submits that the claim for future earnings is untenable relying on the case of *Githinji vs. Mumias Sugar [1995-1998] 1 EALR 68*.

### **Analysis and Determination**

After considering the pleadings filed before this Court and analyzing the evidence adduced and the parties' arguments as set out in their submissions, the following are the issues for determination: whether the Claimant's employment was lawfully terminated and whether he is entitled to the orders sought.

### **Termination**

Section 17 (a) of the Employment Act, Cap 226 (Repealed), provides as follows:

***“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal -***

***a) If, without leave or other lawful cause, an employee absents himself from the place proper and appointed for the performance of his work”***

However, clause 12 (d) of the Claimant's appointment letter provided as follows:

***“If at any time during the service with the Company you shall-***

***d) Absent yourself therefrom without leave except in cases of illness or accidents;***

*then in each and every such cases, the Company may summarily dismiss you without notice or payment in lieu of notice and upon such determination, you will not be entitled to claim any compensation or damage for in (sic) respect of or by reason of such determination.”*

The Respondent alleged that the Claimant was absent from work for over 40 days while the Claimant contends that it was only for 5 days. The Claimant produced pay slips for the months of May and June indicating that he was paid overtime. This is sufficient proof that he was at work throughout the period. The Respondent has also failed to prove that the Claimant was absent from work for all those days.

It is further undisputed that the Claimant was involved in an accident that led to him missing work. The Respondent in its memo to show cause of 16<sup>th</sup> July 1999 acknowledges that after his accidents, the Claimant had been absent in May and June. The Claimant responded vide his letter of 19<sup>th</sup> July 1999 explaining that since his accident, he had not been able to attend to his duties because he was unwell. Once the Claimant informed the Respondent of the reason for his absence, the Respondent was contractually bound to restrain itself from summarily dismissing the Claimant, as this was valid reason or absence.

The Claimant has produced authentic medical documents indicating that he was unwell and had off days recommended. As such, the Respondent had no valid reason for summarily dismissing the claimant under clause 12(d) of his contract. The previous warnings issued to the Claimant for absconding work are inapplicable in this instance because this time, his absence was justified. I therefore find that the termination breached the provisions of the Claimant’s employment contract hence was unlawful.

### **Reliefs**

The claim for future earnings is unjustified and not founded on any law or contractual obligation. The existence of termination clause in the contract meant that the same could be terminated at the option of either of the parties thereto. In the case of **Francis N. Gachuri -vs- Energy Regulatory Commission [2013] eKLR**, the Court held that-

*“...There was no provision for payment of damages to the date of retirement. This was because employment like any other contract provided for exit from the contract. Even if the claimant's contract was referred to as permanent and pensionable, this did not mean it could not be terminated and once terminated, he could only get damages for the unprocedural or lack of substantive reason for the termination. No employment was permanent; that was why the Employment Act did not mention the word 'permanent employment.’”*

The Claimant is further not entitled to any future emoluments as no payments are due after the date of termination.

The claim for leave travelling allowance fails because the Claimant was paid the same which is only payable once a year according to clause 7 of his contract. Further, he was issued with a cheque for the payment of the 5 days accrued leave and is not entitled to the same.

The claim for house allowance also fails. The Claimant was issued with a cheque in respect of the house allowance for the month of July 1999. The claim for overtime also fails as it has not been proved. The Claimant has failed to justify the amount claimed. The claim for payment of advocate’s fees and the total expenses incurred as a result of the traffic accident fails as the Respondent is not liable for any expenses that arise out of the Claimant’s criminal responsibility.

The claim for penalty for being forced to work while sick leave fails as it is not justified and has not been proved.

Pursuant to clause 8 of the Claimant’s contract, he is entitled to Kshs.10,000 refund on medical expenses for the year 1999. He is also entitled to salary in lieu of notice in the sum of Kshs.6,890 being the salary he was earning at the time of termination. The Respondent admitted as much.

The Claimant is not entitled to award of general damages for breach of the contract. This is because, the remedy was not available under the repealed Employment Act, Cap 226, as was held in the decision of the Court of Appeal in **Unilever Tea Kenya Limited v John Kememia Gitau [2017] eKLR** where the Court of appeal in setting aside the award for damages, relied on the case **Directline Assurance Company Ltd Vs Jeremiah Wachira Ichaura CA No. 68 of 2014** wherein the issue of whether general damages are payable in a contract of Employment was considered. This is what the court said-

*“We now turn to consider whether the respondent was lawfully entitled to an award of damages in the sum of Ksh.4,200,000/- as general damages. Both parties concede that the applicable law to the dispute was Cap 226. The general rule then was that the court could not award general damages for breach of contract and or employment terms...”*

The result is that judgment is entered for the claimant against the respondent as follows –

- |                               |                    |
|-------------------------------|--------------------|
| 1. Pay in lieu of notice      | Kshs.6,980         |
| 2. Refund of medical expenses | <u>Kshs.10,000</u> |
| <b>Total</b>                  | <b>Kshs.16,890</b> |

All other prayers are dismissed.

The respondent will pay claimant's costs. Interest shall accrue from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2<sup>ND</sup> DAY OF AUGUST 2019**

**MAUREEN ONYANGO**

**JUDGE**