



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 791 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 23rd September 2019)

DICKSON OTIENO OBINY OLOO.....CLAIMANT

VERSUS

RILEY FALCON SECURITY SERVICES.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Statement of Claim filed in Court on 6th May, 2016, in which he seeks compensation for unfair and unlawful termination of his employment by the Respondent herein. He states that he was employed by the Respondent on or about 5th March, 2009 as a Company driver earning a monthly salary of Kenya Shillings Eight Thousand Eight Hundred and Eighty Nine. He further avers that during the period of his employment with the Respondent he was never paid any house allowance.

2. The Claimant contends that he performed his duties diligently and to the Respondent's satisfaction until 27th November, 2013 when the Respondent alleged that he (the Claimant) was soliciting money from motorists and civilians. He further contends that despite this allegation the Respondent failed to report the issue to any police station.

3. The Claimant avers that as a result of the allegation the Respondent proceeded to summarily dismiss him on 16th April, 2016 when he was handed over forms and ordered to sign the same without being given an opportunity to study the forms.

4. The Claimant further avers that the Respondent's action violated the provisions of Sections 41, 43 and 45 of the Employment Act, 2007 and urged the Court to allow his Claim in terms of the following prayers:-

1) *THAT, this Honourable Court directs or orders the Respondent to reinstate the Claimant back to my former job without losing his years of service plus the days he has been put out of employment be paid to the Claimant.*

2) *THAT this Honourable Court direct or order the Respondent to pay the maximum compensation for loss of employment as per Labour Institution Act, 2007 Section 15 (c)*

3) *THAT if this Honourable Court finds that the reinstatement not possible, this Honourable Court is asked to direct or order the Respondent to pay all terminal benefits as follows:-*

- i. Notice of one month Kshs. 19,092.00***
- ii. 22 days worked Kshs. 16,155.00***
- iii. Prorata leave of two months Kshs. 2,937.20***
- iv. Annual paid leave of 6 years Kshs. 92,522.00***
- v. Overtime payment for 4608 hrs Kshs. 3,383,654.00***
- vi. Gratuity service benefits for 7 years Kshs. 77,102.00***

vii. Maximum compensation for

Loss of employment Kshs. 229,104.00

Grand Total **Kshs. 3,820,556.00**

5. The Respondent in its Response to the Claimant's Memorandum of Claim filed in Court on 23rd June, 2016 admits having engaged the Claimant as a driver on 5th March, 2009. However, it contends that the appointment was not permanent and pensionable but was contractual subject to renewal from time to time.

6. The Respondent further states that contrary to the Claimant's assertion that he worked well and to its satisfaction, the Claimant was a subject of various disciplinary complaints. It is further stated that the Claimant's services were first terminated vide the Respondent's letter dated 27th November, 2013 however, his services were reinstated vide the Respondent's letter dated 5th December, 2013 on contractual terms for one year.

7. The Respondent further contends that the Claimant was not terminated as alleged but rather that his contract with the Respondent came to an end.

8. The Respondent avers that the Claimant is not entitled to the reliefs as sought in his Memorandum of Claim as there was no termination in the first place. The Respondent urged this Honourable Court to dismiss the Claim with costs to the Respondent.

9. CW1 stated that he was employed by the Respondent earning an initial salary of Kshs. 8,800/-. That the amount was later increased to 12,800/-.

10. CW1 further stated that on 26/9/2015 he was informed by his manager not to report to work the following day, which instruction CW1 followed. However, CW1 stated that on 27/9/2015, he received a call from the manager informing him to report to work and this is when he was handed a letter informing him of theft that had occurred and that as a result he was summarily dismissed.

11. CW1 further stated that he did inform his union of the matter who intervened by writing a letter to the Respondent a result of which CW1 was reinstated back to work.

12. CW1 averred that he worked for a total of three years eight months before the Respondent's secretary sent him a contract to sign. However, he declined opting to seek for payment of his unpaid leave. He further confirmed that he was asked by the Respondent's director to leave work.

13. CW1 insisted that he was terminated without any notice and that he was not accorded any hearing prior to his termination. CW1 urged this Honourable Court to allow his claim as drawn.

14. On cross-examination, CW1 confirmed to this Honourable Court that he was employed by the Respondent herein on 5th March, 2009 and that he (CW1) did sign a contract at the start.

15. CW1 further states that he was initially terminated and was however reinstated on 5th December, 2013. He further confirmed that the leave he sought to be paid for was for the year 2013.

16. CW1 further confirmed having not signed any other contract as the same were brought 3 years latter for his signature.

17. On further cross-examination, CW1 confirmed having been a member of NSSF. He however contended that the Respondent failed to remit payments for some months to the body. CW1 further contended that his salary for the last month worked was equally not paid. CW1 further urged this Honourable Court to award his Claim as drawn.

18. The Respondent called a total of two (2) witnesses to give evidence on its behalf. RW1 Patrick Muliro Musumba, former manager at the Respondent company between the year 2014 to 2016 testified that he did call the Claimant in the year 2015 to sign a contract for the year 2014 to December 2015, his current contract having expired, which the Claimant declined to sign.

19. RW1 further testified that the Claimant worked between 8 am ad 5 pm and that for extra hours worked the Claimant was paid Kshs. 3,000.

20. On cross-examination, RW1 stated that the Clamant was asked to sign a contract for the year 2015 and not for 2014, 2015 and 2016. RW1 further confirmed to this Honourable Court that the Claimant was paid Kshs. 3,000 each month to cover any work done during overtime.

21. RW2, Mary Indisa, Huma Resource Manager at the Respondent Company testified that the Claimant had been working for the Respondent up to 2013 when his services were summarily dismissed. However, RW2 stated that following intervention from the Claimant's union, the Claimant was reinstated back to work and continued to work until 2015 when he was invited to the Respondent's head office for purposes of signing a fresh contract which was not done.

22. RW2 also confirmed that the Claimant was a member of NSSF and NHIF and that the Respondent made the necessary deduction ad

remitted the same to the statutory bodies. RW2 further confirmed that the Claimant was not paid for the 22 days he worked. However, she insisted that the Claimant was not entitled to payment of leave as the Claimant went on leave.

23. RW2 further contended that the Claimant is not entitled to the reliefs as sought in his Claim as his contract with the Respondent expired.

24. Parties were thereafter directed to file and exchange written submissions to the Claim. The Claimant however, opted not to file any submissions on his part leaving this Court to examine the submissions on record filed by the Respondent herein.

Respondent's Submissions

25. It is the Respondent's submission that the Claimant's services were not terminated by themselves as alleged by the Claimant but rather that the Claimant failed and/or refused to sign and/or renew his contract following the expiry of his contract, a fact that was not disputed in evidence by the Claimant, resulting in termination of his employment for want of contract.

26. It is further submitted that the Claimant has failed to prove that his termination was unfair and wrongful as required under the provisions of Section 47 (5) of the Employment Act, 2007. To fortify this argument the Respondent relied on the Court of Appeal decision of **Chengo Kitsao Chengo Vs Umoja Rubber Products Ltd (2017) eKLR** where it was held:-

"For any claim anchored on unfair termination or wrongful dismissal from employment the burden of proving that unfairness or wrongful dismissal from employment has occurred is always on the employee."

27. The Respondent contends that the Claimant is not entitled to the reliefs as sought in his Memorandum of Claim as the Claimant has failed to meet the minimum threshold and/or discharge the standard of proof for a claim of wrongful termination since the Employment Act does not provide for wrongful termination but unfair termination and that the two are distinct. To fortify this argument the Respondent cited and relied on the Court decision in **Nation Media Group Limited Vs Onesmus Kilonzo (2017) eKLR** where the Court held that:-

"The fact that the remedies for wrongful dismissal and unfair termination are similar does not transform a wrongful dismissal into unfair termination. The two are distinct concepts. It is clear from the statutory provisions that Section 45 (3) applies to a claim for unfair termination and not to a claim for wrongful or unlawful summary dismissal."

28. In regards to the prayer for reinstatement, the Respondent submits that the same cannot be granted as an Order for reinstatement is an order of last resort that is only granted in special circumstances. The Respondent relied on the case of **Kenya Airways Ltd Vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR**.

29. The Respondent contends that the Claimant is not entitled to Notice Pay as at the time of the Claimant's alleged termination there was no valid contract of service between the Claimant and the Respondent herein.

30. The Respondent further contends that the Claimant failed to avail any evidence and/or give clarity by way of evidence or his pleadings of the pay for 22 days worked ad as such urged the Court to dismiss the same.

31. It is further submitted that the Claimant is further not entitled to leave pay as the Respondent witness produced in evidence leave forms duly signed and approved pursuant to Section 74 (1) (f) of the Employment Act indicating the Claimant duly went on leave. Further that the Claimant did not challenge the evidence. The Respondent urged this Court to dismiss the Claim for payment on that basis.

32. The Respondent further submitted that the Claimant was duly paid for the extra hours worked at Kshs. 3,000 which fact, which was also not disputed by the Claimant. It is further submitted that the Claimant has failed to give evidence for the 4608 hours, which he claims to have worked as overtime. The Respondent submitted that the Claim should equally be dismissed.

33. The Respondent urged this Court to dismiss the Claim for Gratuity as Claimed by the Claimant given that the Claimant was a member of the National Social Security Fund. To fortify this argument the Respondent relied on the Authority of **Wells Fargo Limited Vs Julius Ihomba Gatete (2018) eKLR**.

34. The Respondent urged this Honourable Court to dismiss the Claim filed herein with costs to the Respondent.

35. I have examined all the evidence and submissions of both Parties. The Claimant has averred that he was terminated by the Respondent but the Respondent aver that the Claimant's contract came to an end.

36. From the documents before Court, the Claimant had been summarily dismissed vide a letter dated 27.11.2013. He was however reinstated vide a letter dated 5.12.2015 and given a one year contract which he signed and accepted.

37. He was now issued with another contract on 3.1.2015 which he did not sign but seems to have continued working and was now offered to sign another contract dated 28th January 2016 and asked to sign it and he refused.

38. He was now issued with a termination letter dated 16.4.2016 which indicated that his contract had expired in December 2014 and he was required to sign another contract in 2015 which he refused to sign and then yet another of 15th April 2016 which he also refused to sign hence the termination.

39. The Claimant has not denied the dismissal in 2013 and the re-employment on 15.12.2015 where he was issued with a one year contract. This contract terminated and the Claimant's contract was never renewed.

40. As he continued to work after this expiry of this contract for another one year an indication that the contract became renewed until its expiry when the Claimant was asked to sign another contract one year down the line and he declined.

41. This issue of the termination in my view does not arise as the 1 year contract had lapsed and the Claimant refused to sign another contract. His insistence that he had been terminated unfairly does not hold any water.

42. I find the contract terminated by effluxion of time and the claim by the Claimant is not tenable. I dismiss this claim accordingly with no order as to costs.

Dated and delivered in open Court this 23rd day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Omoiti for Respondent – Present

Claimant – Present in person