



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1817 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

JOSEPH THIONGO MBURU.....CLAIMANT

VERSUS

AVENUE SERVICE STATION LIMITED.....RESPONDENT

JUDGMENT

The Claimant was employed by the Respondent as a driver and worked until 28th January 2014, when his employment was terminated. He filed this cause on 6th September 2016 challenging the termination and sought the following reliefs-

- a. The sum of Kshs.733,700.00 as particularized in paragraph 5 of the claim inclusive of compensation for wrongful dismissal to a maximum of 12 month's wages-
 - i. Service pay for 33 years $(14,000/30 \times 15 \times 33)$ amounting to Kshs.231,000.00.
 - ii. 1 month pay in lieu of notice of Kshs.14,000.00.
 - iii. Housing allowance $(15/100 \times 14,000 \times 33)$ amounting to Kshs.69,300.00.
 - iv. Compensation for unfair termination (8000×12) amounting to Kshs.96,000.00.
 - v. Leave allowance $(14,000/30 \times 21 \times 33)$ Kshs.323,400
- b. Cost of this suit.
- c. Interest in (i) and (ii) above.
- d. Any other relief as the Court may deem just.

The Claimant's case is that he commenced his employment with the Respondent in January 1978 earning a salary of Kshs.14,000.00. He was never issued with an appointment letter. He avers that he served the Respondent diligently and with loyalty.

It is his case that he never took his leave days and neither was he paid house allowance for the entire duration of his employment. It is his position that he was not accorded an opportunity to present his case as required in law before he was summarily dismissed. As such, his dismissal was unfair and unprocedural.

It was the Claimant's evidence in examination-in-chief that he had worked continuously. He testified that he started working for the Respondent while it was still in the business of selling fuel and his duties included organizing parked cars in the garage and other duties like taking the mechanics to buy spare parts. It was also his testimony that when there was no work in the company, he would work for other companies on a casual basis.

During cross-examination, he testified that his employment was terminated after a car accident. That during the period before he was issued with a termination letter, he was not assigned any work. He testified that his letter of termination stated that he would be called upon when he was needed. He conceded that the letter did not refer to the accident.

He admitted to accessing his NSSF dues of Kshs.25,000.00. He also admitted that he worked for Nutty Safaris from 1st September 1987 to 31st December 1988. He further admitted that sometimes he took breaks from work.

The Respondent filed its response on 2nd November 2016. It contends that the Claimant was engaged as a driver on contract basis, from time to time. The respondent denies the possibility of employing the Claimant in 1978 as alleged, as the Car Hire Department was set up in 1985. The Respondent contends that the Claimant worked for it in 1987, 1992, 1993, 2001, 2006, 2007, 2008, 2009, 2012, 2013 and 2014 and not for 33 years as alleged.

The Respondent denies wrongfully terminating the Claimant's employment or that he served with loyalty and diligence. It is the respondent's contention that the Claimant is not entitled to the reliefs sought. The respondent avers that the claimant was a member of NSSF hence not entitled to service pay, that his salary was inclusive of house allowance and that the house allowance claim is based on 33 years of service which the Claimant has not worked for, hence he is not entitled to the same. It further avers that the Claimant is not entitled to payment in lieu of notice because he absconded duty. It is also the Respondent's averment that the Claimant is not entitled to leave pay as claimed because he was always granted leave, and did not work for 33 years.

JOHN KARANJA NYINGI (RW1), the Human Resource/Administration Manager of the respondent testified that the Claimant was not a permanent employee and was employed on a contractual basis from time to time when there was work.

During cross-examination, he admitted that the Respondent did not have employment records of the Claimant. It was his testimony that the Respondent engaged casual drivers for a period of 1 year on casual basis. He conceded that the NSSF records at the Respondent's Supplementary Bundle of Documents were handwritten.

Submissions

In his submissions filed on 14th February 2019, the Claimant argues that since the Respondent failed to produce his contract of employment and muster roll, the burden of proving or disproving an alleged term of employment stipulated in the contract shifted to the respondent. He relies on the case of *Nanyuki Water & Sewerage Company Limited vs. Benson Mwitu Ntiritu & 4 Others [2018] eKLR*.

The Claimant submits that he was not a casual employee as the Respondent paid his NSSF, that he worked for more than 3 months and the nature of his work was such that it could not be completed within a month. He relies on the cases of *Krystalline Salt Limited vs. Kwekwe Mwakale & 67 Others [2017] eKLR*, *Silas Mutwiri vs. Haggai Multi-Cargo Handling Services Limited [2013] eKLR* and *Chemelil Sugar Company vs. Ebrahim Ochieng Otuon & 2 Others [2015] eKLR*.

The Claimant submits that the termination of his employment was unfair because he was not issued with a notice, was not informed of the reasons for his termination and was not given an opportunity to be heard contrary to articles 47 and 50 of the Constitution. He relies on the case of *Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR*.

The Claimant submits that he is entitled to service pay since the Respondent never remitted his NSSF deductions. He also submits that being a permanent employee, he was entitled to payment of house allowance hence the same is payable to him. It is his submission that he is entitled to leave allowance because he did not take leave. The Claimant also submits that he is entitled to compensation for unlawful termination.

The Respondent in his submissions filed on 20th May 2019, submits that the Claimant is not entitled to service pay as it had proved that he was a member of the NSSF and that the deductions were remitted for the months that the Claimant worked save for those months that the claimant worked for less than 15 days. The respondent further submits that the claimant is not entitled to service pay as he worked for a cumulative period of 4 years and 152 days, a fact that is supported by the muster roll produced in court. The respondent relies on the case of *Agnes Murugi Mwangi vs. Barclays Bank of Kenya [2013] eKLR*.

The Respondent submits that the Claimant's salary was inclusive of house allowance. Further, that if the court were to find that the Claimant is entitled to the house allowance claim, then he should only be awarded for the period between June 2013 and January 2014.

It is the Respondent's submissions that the Claimant has not established a legal basis for his leave allowance claim. Further, he did not work consecutively for 12 months. The Claimant has also not factored in the non-working stints where he would rest when the season was low.

The Respondent submits that the Claimant is not entitled to payment in lieu of notice as the notification given to him was informing him that his contract engagement was coming to an end, just like in the other instances and that the said letter was not a termination letter. The Respondent further submits that because of this, the termination was not unfair. Further, that the Claimant's last stint of employment does not meet the threshold laid down in Section 45(3) of the Employment Act and rely on the case of *Machuka Anyona Julius & 5 Others vs. Omaera Pharmaceuticals Limited; ELRC Cause 1189 of 2012*.

Determination

After considering the pleadings and analyzing the evidence and submissions presented before this Court, the issues arising for determination are as follows-

- a. Whether or not the Claimant was a casual employee.
- b. Whether the Claimant's employment was unfairly terminated.

c. Whether the Claimant is entitled to the prayers sought.

Casual Employment

Section 37(1) of the Employment Act provides as follows-

Notwithstanding any provisions of this Act, where a casual employee—

a. Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

b. Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

Section 37 (3) of the Act further provides that-

An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

Both parties testified that the Claimant was engaged from time to time vide an oral contract, whenever there was work. The Respondent also admitted that the Claimant was engaged on contractual basis from time to time when there was work. As such, the Claimant cannot be classified as a casual worker. However, his contracts were not for continuous periods and every time he was engaged as a driver, a new contract would be entered into. This is proved by the fact that in the year 2000, he wrote a letter applying applied for employment. Further both parties were in agreement that the claimant worked for other companies during the breaks in his employment with the respondent.

I thus find that the claimant was not a casual employee of the respondent but was engaged on short term/temporary terms from time to time.

Termination of Employment

Having established that the Claimant was not a casual worker, it therefore follows that he is entitled to the terms and conditions of service as provided for under the Employment Act.

The Claimant received a letter dated 28th January 2014, informing him that his services as a casual driver had been terminated effective 31st January 2014. There is no mention in the letter that the reason for such termination was because there was no work or that he would be called upon when work was available, as had been the arrangement. In the reply to memorandum of claim at paragraph 7(b) at page 2, the respondent states that in 2014 the claimant worked for 8 days then after being involved in an accident with motor vehicle registration number KBK 797D he absconded duty without notifying the relevant supervisor.

The Ministry of Labour wrote to the Respondent's Managing Director regarding the Claimant's unlawful termination and the Managing Director denied the allegation stating that the Claimant left their employ in 2013. If it is true that the Respondent had told the Claimant to leave work because there was no work available as was the testimony of RW1, the same would have been stated in the notice. From the foregoing I find that the Claimant's employment was unlawfully and unfairly terminated as the respondent did not comply with the provisions of the Employment Act.

Prayers Sought

Having established that the Claimant was unlawfully and unfairly terminated, the court awards as follows –

Service Pay

The claimant confirmed that he was member of NSSF and indeed was paid his withdrawal benefits in the sum of Kshs.21,654. Section 35(6) as read with Section 35(5) of the Employment Act provides that an employee is not entitled to service pay if the 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.

The claimant is thus not entitled to payment of service pay.

Pay in Lieu of Notice

The claimant is entitled to pay in lieu of notice having been terminated without notice and without being given an opportunity to respond to any charges of misconduct against him.

Housing Allowance

The claimant prays for house allowance for 33 years based on a salary of Kshs.14,000. There is no proof that the claimant earned a salary of Kshs.14,000. There is further no proof that the claimant worked for 33 years for the respondent. The evidence on record by both the claimant and the respondent confirm that the claimant worked intermittently with the respondent. The last time was from 28th May 2012 to January 2014. The claimant admitted that there were breaks in his service with the respondent during which time he worked for other employers.

Any claim for payment of house allowance prior to May 2012 would thus not be payable at all.

For the period 2012 the claimant was paid Kshs.13,320 against a gazetted statutory minimum wage of Kshs.11,580.30. This rate loaded with 15% house allowance of Kshs.1,735.05 would be Kshs.13,317.35. The claimant was thus paid a consolidated wage inclusive of house allowance as stated by the respondent in the reply to memorandum of claim and by RW1.

I thus find that the claimant has not proved that he is entitled to house allowance as prayed or at all. The claim is thus dismissed.

Compensation

Having found that the claimant worked for the respondent continuously during the period from May 2012 to January 2014 and further having found that he was unfairly terminated, I award the claimant one month's salary as compensation in the sum of Kshs.14,553.30 being the gazetted statutory minimum wage for 2013 inclusive of 15% house allowance.

Leave Allowance

As I have already found above the claimant worked for the respondent during the period from 28th May 2012 to January 2014. During that period the months that he worked in full were only 14. I thus award him leave at 1.75 days per month worked being in the aggregate 25.5 days. Based on the salary of Kshs.14,553.30, he is entitled to Kshs.13,713.70 which I award him.

In summary, I enter judgment for the claimant against the respondent as follows –

- i. Pay in lieu of notice Kshs.14,553.30
- ii. Compensation Kshs.14,553.30
- iii. Pay in lieu of annual leave Kshs.13,713.70

Total Kshs.42,820.30

The respondent shall pay claimant's costs for the suit and interest shall accrue at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE