



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1099 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 15th October, 2019)

IBRAHIM SIMIYU HASSANCLAIMANT

VERSUS

TARPO INDUSTRIES LIMITEDRESPONDENT

JUDGEMENT

1. The Claimant herein avers that he was employed by the Respondent from 2009, earning Kshs. 415/= per day. He avers that he worked for the Respondent until June 2013 when the Respondent wrongfully dismissed him. He avers that he was not given an opportunity to defend himself and that no reason was given to him prior to his dismissal.

2. In his Memorandum of Claimant filed on 26th June 2015, the Claimant seeks the following reliefs:

1. A declaration that the Respondent's action of sacking the Claimant is illegal, and/or unlawful, that the Claimant is entitled to severance pay, terminal benefits, 1 month in lieu of notice, unpaid leave, salary underpayment, transport allowance and gratuity all totalling to about 258,960/= as particularised in the claim.

2. General damages for wrongful dismissal as the Court shall assess.

3. Costs of the suit and interest.

3. In response to the Claim, the Respondent filed a Memorandum of Response on 8th July 2016. It denied having employed the Claimant for 7 years and avers that contrary to his allegation that he was dismissed, the Claimant was on a 3 month contract with the Respondent that was starting on 23rd September 2013 and was to expire on 14th December 2013. It avers that pursuant to Framework contract between the parties, the claimant not entitled to one month notice or damages as he was not terminated.

4. The Claim was heard by way of written submissions with each party filing its respective submissions.

Claimant's submissions

5. The Claimant submitted that the section 41 of the Employment Act is mandatory as an employer must first explain the reason and thereafter invite an employee to defend himself or herself. In support of this position he relied on the decision in **Victor Ouma Otieno v Carol Extreme Limited [2017] eKLR.**

6. The Claimant submitted that the Respondent did not adduce any evidence to prove that the mandatory procedure was followed. The Claimant submitted that the Respondent's evidence is based on hearsay and that it has not been substantiated with any evidence that his contract ended in December 2013.

7. He submitted that the Respondent is mandated under Section 74 of the Employment Act to keep proper records. However, no records were produced by the Respondent.

8. The Claimant submitted that he is entitled to one month pay in lieu of notice pursuant to section 35 and 36 of the Employment Act as his dismissal was wrongful. Further, that he is entitled to annual leave for the years worked as the Respondent had contravened the provisions of section 28 (1) (5) of the Employment Act. He submitted that he is entitled to transport allowance and damages for wrongful dismissal.

9. He also submitted that he is entitled to costs of the suit as he had proved his case on a balance of probabilities.

Respondent's submissions

10. The Respondent submitted that the reliefs sought by the Claimant are untenable due to the mode and framework of the contract between the parties. It submitted that the provisions of the letter of appointment dated 4th October 2013 were unambiguous as the Claimant was employed on a contract starting 23rd September 2013 and expiring on 14th December 2013. Further, that the contractor's rate of payment was to Kshs. 60 which payable in arrears for the hours worked on a weekly basis.

11. It submitted that in accordance with clause 3 and 5 of the letter of appointment, the Claimant is not be entitled to the reliefs sought and that one months' notice was not required having not terminated the services, the Claimant was not entitled to unpaid leave.

12. Further that the Claimant is not entitled to service pay as Section 35 (5) of the Employment Act recognises that an employer who pays NSSF is not obligated to pay service pay. In support of this, it relied on the case of **Nicholas Lihugu Bwumira v Colette Gurshi t/a Wild Earth Wellness Centre Limited [2016] eKLR.**

13. It submitted that the Claimant herein seeks 3 months compensation for alleged unfair termination while section 49 1 (c) of the Employment Act provides for up to 12 months compensation. It relied on the decision in **Bamburi Cement Ltd v Farid Aboud Mohammed [2016] eKLR** where the Court held that in a claim for unfair termination, the Court must be satisfied with the procedure and reason for termination.

14. It submitted that it would not have terminated the Claimant when there was not only subsistence of a contract of employment between 8th April 2013 to 29th June 2013 but also a subsequent contract between 23rd September 2013 to 14th December 2013.

15. In conclusion, it submitted that the Claimant has not proved his case and urged the Court to dismiss the claim with costs.

16. From the Respondent's Appendix 213, the Claimant was employed vide the contract dated 4/10.2013 on a 3 month contract with effect from 23rd September 2013 to 14th December 2013. The Claimant signed this contract accepting its terms. Prior to this, the Claimant had been on another 3 months contract with effect from 8.4.2013 to 29.6.2013.

17. The Claimant has however contended that he served the Respondent from 2009 until June 2013. To prove this position, the claimant produced his NHIF statement showing he had served the Respondent since 2009 and his employer was Tarpo Industries Limited, the Respondent herein.

18. It is not clear how the Claimant served the Respondent on short time contracts all these years.

19. Section 37 (a) and (b) of Employment Act states as follows:-

1) "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".

20. It is apparent that any contract in excess of 3 months cannot be casual in nature as the Respondent made the Claimant to feel and the moment the Claimant worked for the Respondent for close to 4 years he was not a casual but permanent and personable.

21. In the circumstances, his termination was subject to Section 41 of Employment Act and with valid reasons as envisaged under Section 43 of Employment Act.

22. In view of the fact that the Claimant was terminated without reasons and without due process following an illegality on Respondent's part by converting his permanent and pensionable terms into contract, I find Claimant's termination unfair and unjustified.

23. In terms of remedies, I find for the Claimant and I award him as follows:-

1. 1 months salary in lieu of notice = 29,880/=

2. Compensation for unlawful and unjustified termination equivalent to 10 months salary = 10 x 29,880 = 298,800

Total = 328,680/=

3. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this **15th day of October, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mungai holding brief Omao for Claimant – Present

Mwaura holding brief Kimani for Respondent