



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 881 OF 2018

(Before Hon. Lady Justice Hellen S. Wasilwa on 1st October, 2019)

ISAAC LUMUMBA OMEGA.....CLAIMANT

VERSUS

JOHN KAHITA T/A KAREN AUTO MART.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed a Statement of Claim on 22nd May 2015 alleging his unfair termination by the Respondent and its refusal to pay him his terminal benefits. He seeks the following prayers:-

- a) A declaration that the Claimant's termination from his employment was wrongful and unfair.*
- b) The Claimant be paid his terminal benefits totalling Kshs. 213,250.*
- c) The Respondent be ordered to compensate the Claimant for wrongful termination at the equivalent of 12 months gross salary.*
- d) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.*
- e) The Respondent to pay the costs of this claim.*
- f) Interest on the above Court rates.*
- g) The Respondent be ordered to issue the Claimant with a certificate of service as required by the provisions of Section 51 of the Employment Act.*

2. The Respondent filed a Statement of Defence on 10th July 2015. It denies the description of the parties and avers that the Respondent is known as John Kahita and that Karen Auto Mart is a limited liability company known as Karen Auto Mart Limited. It denies having employed the Claimant and contends that the Claimant is a serial and vexatious litigant who has repeatedly misled the Court to believe that he has been in employment and has purportedly been wrongfully terminated in some numerous and fictitious claims.

Claimant's case

3. The Claimant adopted his Witness Statement filed on as his evidence in chief. He testified that the Respondent employed him on 11th February 2014 at a salary of Kshs. 500 per day being Kshs. 15,000 per month exclusive of house allowance. He testified that the Respondent terminate him on 9th April 2014 without giving him any notice or a issuing him with a show cause letter as to why his services could not be terminated.

4. In cross-examination, the Claimant testified that there were various cases listed by the Respondent but he only knew of one claim being Cause 579 of 2010 and that he didn't appeal against the judgment. He testified that in respect of Cause 873 of 2012, he had been terminated. He averred that he had no evidence that he was employed by the Respondent. He averred that he was being paid cash and that he worked from 11th February 2014 to 9th April 2014.

5. In re-examination, he testified he had produced payment vouchers which show he was employed. He further testified that the Respondent

has not produced the proceedings in any of the listed cases showing how they proceeded.

Respondent's Case

6. Samuel Mburu the Respondent's Human Resource Officer testified as Rw1. He adopted his Witness Statement filed on 7th May 2019 as his evidence in chief. He testified that the Respondent never employed the Claimant and that the Claimant is a frivolous litigant who is using the Court as a source of income. He testified that the Claimant had instituted 8 other suits against various Respondents, involving the same subject. He urged the Court to dismiss the claim.

7. In cross-examination, he testified that he never worked with the Claimant. In re-examination, he testified that the Respondent does not hire persons orally and that there is no agreement produced in Court proving that the Respondent employed the Claimant.

Claimant's submissions

8. The Claimant submitted Section 74 of the Employment Act mandates employers to keep employment records of its employees. However, the Respondent did not provide a record or a roll of employees that worked when the suit was pending in Court. He therefore submitted that he had proved on a probability that he was an employee of the Respondent.

9. The Claimant submitted that Section 43 (1) of the Employment Act provides that in any claim arising out of termination of contract the employer is required to prove reasons for termination. He submitted that the Respondent had failed to prove any valid reason for terminating the Claimant.

10. The Claimant submitted that he was never accorded a fair hearing by the Respondent before his services were terminate in contravention of the rules of natural justice and section 41 of the Employment Act.

11. He submitted that Section 41 of the Employment Act makes provision for procedural fairness and that any breach of the mandatory provisions of the section makes the termination unfair. He relied on the case of **Enos Olungo Mangongo v Kenya Commercial Bank Limited** Cause 1994 of 2012 where the Court held that the Section 41 applies once an employer decides to subject an employee to a disciplinary process, which may lead to disciplinary action.

12. He submitted that the Court should award him one month's salary in lieu of notice as he was not given any notice prior to his termination. In respect of 12 months compensation he submitted that Section 49 as read with Section 50 provides that once is demonstrated that the dismissal of the Claimant was wrongful or that the termination was unfair then the Honourable Court may award 12 months compensation to the Claimant.

13. He submitted that he never went on leave and that under section 28 of the Employment Act an employee is entitled to at least 21 days leave for 12 consecutive months. He therefore urged the Court to award him Kshs. 2,000 as claimed.

14. He submitted that he never received any house allowance during his employment and therefore prayed that the Court does award him 15 % of the basic pay as house allowance. He further urged the Court to order the Respondent to award him a Certificate of Service.

15. The Respondent submitted that pursuant to sections 109 and 112 of the Evidence Act, the evidentiary burden that is cast upon any party is to prove a particular fact that it desires the Court to believe in its existence. It therefore submitted that the Claimant had not laid down a case for unlawful and unfair termination or proved that he was ever employed except for stating that he was not issue with a notice stating the reasons for termination.

16. The Respondent argued that though the Claimant had a constitutional right under Article 50 of the Constitution to have any dispute heard, this right should not be abused. It relied on the decision in **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009]eKLR** in which the Court cited the case of **Beinosi v Wyley 1973 SA 721 [SCA]** where the Appeal Court of South Africa held that abuse of Court process happens where the proceedings permitted by the rules of Court to facilitate the pursuit of the truth are used for extraneous purposes.

17. The Respondent argued that the Claimant has instituted 8 other suits against various Respondents claiming to have been unfairly terminated. It argued that the Claimant's conduct was pointed out in **Isaac Lulumba Omega v Babu & Sons C. S. Bharji Cause 1157 of 2012** where Marete J held:-

"This is an outright abuse of the process of the Court. I wish the Court had a way of sieving this kind of claims before they clog the Court system and therefore release its energies of Court to try worth causes."

18. It submitted that the Claimant is not entitled to the reliefs sought for reasons that notice pay is not payable to an employee on casual basis, annual leave pay and pro-rata pay does not apply to an employee who claims to have worked for 2 months.

19. It further submitted that transport, housing and leave allowance would not be payable to a casual worker and that a certificate of service can not be issued to a casual worker.

20. In conclusion, it submitted that the Claimant was not employed by the Respondent and that his frivolity is exemplified by the fact that he had not proved or filed documentary evidence to prove that he was either employed or terminated. It urged the Court to dismiss the claim with costs.

21. I have examined all the evidence and submissions of the Parties herein. The Claimant avers that he had been employed by the Respondent herein, which the Respondent denies. Despite the Claimant insisting he was an employee of the Respondent, there is no document placed before this Court to authenticate this position.

22. Even if the Respondent is custodian of employment records, there is no evidence that the Claimant wrote to the Respondent to produce the documents in question.

23. In absence of any documents to prove an employment relation between the Claimant and the Respondent, I find this claim unmerited. I dismiss this claim accordingly.

24. There will be no order of costs.

Dated and delivered in open Court this 1st day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mokaya holding brief Nyabena for Claimant – Present

Respondents- Absent