



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1148 OF 2015

KENNEDY COLOMBIUS BWIRE.....CLAIMANT

VERSUS

UFANISI FREIGHTERS (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

JUDGMENT

The claimant filed the statement of claim on 02.07.2015 in person. The claimant subsequently appointed Wesonga Wamalwa & Company Advocates to act in the case. The claimant prayed for judgment against the respondent for:

- a) General damages for unlawful and unfair dismissal from employment.
- b) In the alternative, special damages of Kshs 1, 414, 000.00 being:
 - i. One month salary in lieu of notice Kshs.70,000.00.
 - ii. 12 months' compensation for unfair termination Kshs.840,000.00.
 - iii. Unpaid house allowance Kshs.399,000.00.
 - iv. Service pay for 3 years served at $15\% \times 70,000 \times 3\text{years} = \text{Kshs.}105, 000.00.$
 - v. Certificate of service.
- c. Interest on (a) and (b) above.
- d. Costs of the suit.

The statement of defence was filed on 18.01.2017 through the Federation of Kenya Employers. The respondent prayed that the memorandum of claim is dismissed with costs.

To answer the **1st issue** for determination there is no dispute that parties were in a contract of service. The respondent employed the claimant as an Assistant Operations Manager effective 15.03.2010 and his last monthly gross salary was Kshs.70, 000.00.

To answer the **2nd issue** for determination, the Court returns that there is no dispute that the respondent dismissed the claimant from employment by the letter of summary dismissal dated 28.05.2013 and effective 29.05.2013. The reason for termination was that the claimant had been operating a private company known as Bell Logistics Services in which he was a director while he was in employment of the respondent and in contravention of clause 20 of the contract of service between the parties. Clause 20 provided that except with the written consent of the respondent, the claimant shall not engage or participate directly (other than as a normal shareholder for investment purposes of investment only) either alone or in partnership with or as a manager, servant or agent for any other person or otherwise howsoever in any trade or business other than that of the respondent. The letter of summary dismissal stated that the claimant had been using the respondent's time, offices and other facilities to conduct the business of Bell Logistics Services. Thus the claimant was summarily dismissed from employment and his terminal dues included pay for May 2013 for the 28 days worked Kshs.63,225.00 less lawful deductions leaving a sum of Kshs.49,949.00.

To answer the **3rd question** for determination, the Court returns that the respondent had a valid reason to dismiss the claimant as envisaged

in sections 43 and 45 of the Employment Act, 2007. The claimant admitted that he was a director for Bell Logistics Limited or an entity going by similar name and he had signed a security bond as such. He confirmed that it was at a time he worked for the respondent and by signing the bond he earned a benefit. The bond related to consignment of cargo from Arusha. He confirmed that he had signed not to engage in conflict of interest and prior to dismissal a meeting was held at the respondent's Mombasa Office at which he was shown the bond and he was told that by signing the bond he had engaged in competition with the respondent as the consignment also related to flower transactions that the respondent had engaged the claimant to undertake on the same Arusha route and market. The claimant testified, "**The employer assumed the company was in competition with the respondent. Mr. Wasike Managing Director was concerned about the issue of conflict of interest. Managing Director had no reason to doubt that I was the Keneddy Bwire involved.**" By that evidence the Court returns that the respondent as at the time of termination had a valid reason to terminate the claimant. Even if a formal show-cause notice was not issued per section 41 of the Employment Act, 2007 the Court finds that the claimant contributed 100% to his summary dismissal and is undeserving of any compensation under section 49 of the Act.

To answer the **4th issue** for determination the Court returns that the claimant has not established and justified the remedies as prayed for except the certificate of service as per section 51 of the Act. The respondent was entitled to terminate with a shorter notice than was agreed in view of the claimant's gross misconduct that breached a contractual condition of employment on conflict of interest or not to engage in alternative employment in competition with the respondent. The Court returns that the claimant is not deserving of the pay in lieu of termination notice. The claimant was a member of NSSF and is not entitled to service pay under section 35 of the Act. The claimant testified that he had been paid the house allowance and the prayer was clearly misconceived.

In conclusion judgment is hereby entered for parties for:

- a) The respondent to deliver a certificate of service per section 51 of the Act by 31.12.2019.
- b) Each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Thursday, 19th December, 2019.

BYRAM ONGAYA

JUDGE