



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 574 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**MICHEAL MBOGA NJOROGE.....CLAIMANT**

**VERSUS**

**ELDORET EXPRESS COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

By his memorandum of claim dated 27<sup>th</sup> March 2017 and filed on even date the claimant avers that he was employed by the respondent, a limited liability company carrying on business in Nairobi, in January 1996 at a monthly salary of Kshs.30,000. That he was not issued with a letter of appointment. That he worked diligently and with loyalty until September 2015 when the respondent wrongfully terminated his services.

In his testimony at the hearing of the case the claimant testified that he was employed by James Musau, a Director of the respondent. He testified that in October 2014, he was unwell and went for treatment. When he went to a Manager to report that he was unwell, the Manager sent him to see the Director whom he was to meet in Kitale near the respondent's office. When he went to the Director who was in his car, the Director asked him what he wanted. He responded that he had not been paid salary for August, September and October 2014. The Director told him there was no money stacked the car and drove off leaving the claimant behind. The claimant testified that he waited till evening. The Director came back later in the evening. When the claimant went to him, the Director told him to go away and wait to be called on his phone or until someone is sent to call him. He was however never called and was also never paid the outstanding salary.

The claimant testified that he waited up to January 2015 when he realized that he had been sacked. He asked for a letter of termination but was not given. He testified that he was diabetic and used to go for clinics.

The claimant testified that his salary was Kshs.30,000/- per month and was last paid in July 2014. That the last month he worked was in October 2014.

Under cross examination the claimant testified that his basic salary was Kshs.15,000 and he was paid travelling allowance of Kshs.15,000 in advance together with salary making a total of Kshs.30,000. He clarified that he worked until 2014 and the date in the claim which refers to 2015 was an error.

Questioned about the letter of retirement filed with the claimant's reply to defence, the claimant stated that the letter was written by a Secretary by the name Ann Maina but he continued working after the date of the letter. The letter, which is written on the letter head of the respondent and signed by Ann Maina on behalf of the Director is dated 24<sup>th</sup> February 2014 and states that the claimant had been an employee of Eldoret Express Company limited from June 2004 to December 2013. The letter states that the claimant was retired on 31<sup>st</sup> December 2013. The claimant testified that the respondent paid NSSF from 2004 to 2014.

**Respondent's Case**

The respondent filed a replying memorandum in which it admits employing the claimant from 1996 at a basic salary of Kshs.14,000. It avers that the claimant had a habit of absenting himself without leave. That the claimant did not change even after several warnings. That the last respondent heard was that the claimant was in Saudi Arabia where he had secured employment. The respondent further avers that the claimant was the author of his own misery, that the claimant was never dismissed and that the suit is malicious. The respondent prays that the suit be dismissed with costs.

The respondent filed a witness statement of JOSEPH NGANGA THUNGU with the replying memorandum. Mr. Thungu, the Operations

Manager of the respondent states in the witness statement that the claimant was never an employee of the respondent as he was never issued with an identification card signed by the said Mr. Thungu, that the name of the claimant was not in the company's Master Roll or in the company's NSSF and NHIF remittance records and that there was no letter of dismissal. He concludes that the claimant must have been a casual engaged during peak seasons.

At the hearing the respondent did not call any witness. Indeed the respondent did not attend court on the date fixed for hearing of the defence case on 28<sup>th</sup> January and 22<sup>nd</sup> July 2019 and its case was closed.

### **Determination**

The issues arising for determination are whether the claimant was an employee of the respondent, the period during which he served, whether he was dismissed and if he is entitled to the prayers sought.

The respondent admitted in its reply to the memorandum of claim that the claimant was its employees from 1996. The NSSF and NHIF records filed by the claimant further reflect that the respondent paid NHIF on behalf of the claimant from April 2010 to November 2014 and NSSF from June 2004 to May 2015.

Although in the witness statement filed by the respondent there is a denial that the claimant was an employee of the respondent, it is clear from the admission in the reply to memorandum of claim and the NSSF and NHIF contributions that the claimant was an employee of the respondent. I thus find that the claimant was an employee of the respondent from 1996 as admitted in the reply to memorandum of claim, up to November 2014 as per claimant's testimony which was not rebutted by the respondent, having not called a witness to verify the averments in both the reply to memorandum of claim and the witness statement of Joseph Nganga Thungu.

The second issue is whether the claimant's employment was unfairly terminated.

No evidence was adduced to rebut the claimant's testimony that he was told to go and wait at home until he was called but was never called. The evidence in the respondent's witness statement is obvious, not reliable as it contradicts the averments in the reply to the memorandum of claim. I therefore find that the claimant's employment was unfairly terminated by the respondent as he was never subjected to a hearing, nor was he informed of the grounds for termination or issued with a letter of termination.

### **Remedies**

I now consider the prayers of the claimant.

#### **(a) Salary in lieu of notice**

He is entitled to the same in accordance to Section 49(1)(a) of the Employment Act. I award him the same at Kshs.30,000.

#### **(b) Salary arrears for August, September and October 2014**

The respondent did not controvert the claimant's averments that he was not paid salary for August, September and October 2014. I award him the same at Kshs.90,000.

#### **(c) NSSF deductions for 11 months**

The records filed by the claimant reflect that the respondent remitted his NSSF up to May 2015. The claimant is thus not entitled to the prayer.

#### **(d) Compensation for unfair termination**

The claimant having proved that he was unfairly terminated and having further proved that he was in the respondent's employment from 1996 to 2014, a period of about 19 years, taking into account the manner in which his employment was terminated and all the relevant factors as enumerated under Section 49(4) of the Act, I award him Kshs.360,00 being 12 months' salary as compensation.

The claimant further prayed for costs of the suit, interest and certificate of service. I direct that the respondent issues the claimant with a certificate of service.

Having prosecuted the suit himself, I assess costs at Kshs.30,000 which in my opinion is reasonable to cover disbursements and relevant expenses associated with the suit.

The total award is as follows –

- 1.. One month's salary in lieu of notice..... Kshs.30,000
- 2.. Salary arrears for August, September and October 2014 at

Kshs.30,000 x 3 ..... Kshs.90,000

3.. 12 months' compensation..... Kshs.360,000

4.. Costs..... Kshs.30,000

**Total Award      Kshs.510,000**

Interest shall accrue on decretal sum from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF DECEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**