



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2063 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 17th December, 2019)

WILSON KIBANDE ABAL.....CLAIMANT

VERSUS

KENYA TENTS LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed a Memorandum of Claim dated 06/10/2016 for wrongful and unfair termination of his services and non-payment of terminal benefits against the Respondent.
2. He avers that the Respondent engaged his services on or about February 2009 at a monthly exit salary of Kshs. 13,260/= but was not given an appointment letter. However, he has documents proving his relationship with the Respondent.
3. He contends that he served the Respondent with loyalty and diligence until 31/03/2016 when it unlawfully terminated his services and failed to pay him his dues as tabulated herein below:-

a. Salary in lieu of notice **Kshs. 18,595.20**

b. Service pay for 6 years

(18595.20 x 15 x 6) **Kshs. 55,786.00**

c. Leave for 2 years

(18595.20/30 x 21 x 2) **Kshs. 26,482.00**

d. House allowance at 15% on

the basic (18595.20 x 15% x 12 x 6) **Kshs. 200,808.00**

e. Underpayments: June 2015 to

March 2016(18595.20 - 13260)

= 5,335 x 9months **Kshs. 48,015.00**

f. Compensation for unfair termination

(18595.20 x 12) **Kshs. 223,142.00**

Kshs. 572,379.00

4. He avers that during his employment at the Respondent, it did not give him leave, notice, house allowance, service pay and underpaid him. That he is not a member of any registered pension or provident fund under the Retirement Benefits Act or a member of the NSSF, which

therefore entitles him to service pay.

5. That the Respondent did not explain to him the reason for terminating his employment or consider his representations/explanations before dismissing him on grounds of gross misconduct.

6. That he has made demand and further given notice of intention to sue but the Respondent has refused to make good the situation and he thus prays for:-

i) The sum of Kshs. 572,379.00 as particularised in paragraph 5 of the claim.

ii) Costs of this suit.

iii) Interest in (i) and (ii) above.

iv) Certificate of Service.

v) Any other relief as the Court may deem just.

7. The Respondent filed a Reply on 01/11/2016 dated 28/10/2016 denying that it terminated the Claimant's services unfairly and averring that it is he who absented himself from the work place without lawful cause since 30/03/2016.

8. It avers that when the Claimant absconded duty on the said date, all efforts to trace him even by his brother who is also their employee proved futile but his salary and statutory contributions for April and May 2016 were still processed in his absence. It also denies that he was appointed in February 2009 and avers it employed him on annual contract as evidenced in the **Appendix 3**.

9. That having absented himself from work, he is not entitled to any notice or compensation for unfair termination. Further, that the Claimant is not qualified for service pay as he is a member of the NSSF evidenced in **Appendix 1** nor is he entitled for leave as he undertook all his leave days for the entire period of employment.

10. It avers that his salary which was duly paid to him was inclusive of house allowance and that there was no underpayment as alleged by the Claimant because it paid him salary and benefits as per the gazetted labour rates.

11. It denies being served the demand letters dated 07/03/2016 and 27/06/2016 from Kituo Cha Sheria which it contends are also not attached and that surprisingly, the Claimant was still its employee on 07/03/2016 before he deserted work.

12. It avers that the Claimant wrote to Kituo Cha Sheria while still in its employment and is therefore mischievous in filing this cause and that it did not violate any employment laws.

13. It contends that the cause of action arose in Ruiru town, Kiambu County and not in Nairobi and prays that this Court dismisses the entire claim and award costs to the Respondent.

14. The Respondent also filed a Witness Statement dated 24/05/2018 made by its Accountant, Kepha Kamau who states that when the Claimant failed to show up at work on 30/03/2016, the administration assistant tasked the Claimant's supervisor and his relative named Evance Chweya to look for him. That Mr. Evance informed them he had found the Claimant in his house and who was well and that the Claimant had indicated he would report on duty on 06/04/2016, but he never did.

15. He confirmed that the Claimant failed to collect his April and May 2016 salary and that the Respondent also deducted and paid the Claimant's statutory deductions for the two months since it did not know he had left employment.

16. He also confirmed that he processed his dues which included house allowance, NSSF, NHIF and all others as per the attached payslip.

17. The Claimant filed his Reply to the Response dated 07/03/2017 averring that the NSSF contribution the Respondent alleges to have made was deposited in June 2016 after his services had been terminated.

18. He denies that his salary was consolidated and that there was a typological error on the date of the demand letter which he states is 05/07/2016 as attached in the Memorandum of Claim.

19. He further avers that the Respondent's postal address is in Nairobi and prays that the Response is struck out with costs and judgment entered in his favour.

20. The Respondent then filed a Reply to the Claimant's Reply dated 24/05/2018 averring that it employed the Claimant as a Watchman on 01/09/2010 and confirmed that the NSSF payments done on 20/06/2016 was for salary processed for the month of May 2016 which the Claimant did not collect as he had deserted duty.

21. It avers that the pay adjustment for Watchmen as from 01/05/2015 was as per the Legal Notice and that the Claimant's signed contract pay was above the gazette wage as shown in the attached copy of his payslip marked **Appendix 5**.

Evidence

22. CW1, the Claimant testified in court that he worked for the Respondent as a Tent Maker from 2009 and that he was on duty on 31/03/2016 before he was chased away from work without any reason, notice or hearing.
23. He stated that he was neither issued with an appointment letter nor given a termination letter. He stated that he seeks service pay because his NSSF was not paid.
24. He further testified that he did not go for leave for 2 years and under cross-examination, he contested the letter of offer produced by the Respondent dated 01/09/2010 stating that the signature on the said letter was not his.
25. He confirmed that he was paid his March salary and also denied that the payslip produced in Court by the Respondent was his. He stated that he had never been issued with any payslips.
26. He stated he did not know how to read as he went to school up to class 3 and accepted he was a member of NSSF but that the Respondent only paid for 1 year. Further, he stated he was not paid house allowance in March 2016 but was paid his salary of Kshs. 8,000/= and that he used to be paid cash and sign in a book.
27. RW1, Kepha Kamau Karanja testified in Court that he keeps books of accounts and deals with payments as an accountant of the Respondent and that **Appendix 8 of Respondent's documents** were prepared by him.
28. He confirmed that they paid workers in cash form after which they would sign the payslips and leave. On cross-examination, he stated that the signed payslips was not in Court.

Claimant's Submissions

29. The Claimant submits that it gave uncontested evidence even though it did not produce any documentary evidence and that since the Respondent did not give him an appointment letter, he is entitled to one month's notice pay in terms of **Section 49(1) (a) of the Employment Act**.
30. That **Section 10(7) of the Employment Act** places the burden of proof of terms of employment on an employer who fails to produce records of such employment and that since the Respondent failed to produce statutory employment records, he invites the court to rely on his evidence.
31. That he worked for the Respondent for 7 continuous years without being given leave and is thus entitled to leave as under **Section 28(1) (a) of the Act** and that the Respondent did not adhere to **Section 31(1) of the Act** with regards to house allowance.
32. He submits that his dismissal was unprocedural and unfair since the Respondent did not give him any reasons for the dismissal or consider his representations/explanations before dismissing him on grounds of gross misconduct and contravened **Section 41 of the Employment Act**.
33. Further, that the Respondent has not proved that he absconded duty. That therefore in terms of **Section 49(1) (c) of the Act**, he is entitled to 12 months' gross salary as compensation for the unfair dismissal from his employment.
34. The Claimant relies on the cases of **Paul Wachiuri Ndonga –v- Keroche Breweries Ltd, ELRC No. 374 Nakuru** where the Court awarded the Claimant notice, leave, service pay and compensation and **Ngurua Muita –v- Gyto Success Co Ltd, ELRC No. 1369 of 2016 Nairobi** where the Court awarded the Claimant notice, house allowance, service pay, underpayments and compensation for unfair dismissal.

Respondent's Submissions

35. The Respondent submits that the Court should note for the record that the Claimant initially had two witnesses named Kennedy Mategwa and Jackson Ngesa who withdrew from the matter stating that the facts were unknown to them and that they had never worked with the Claimant. The Respondent relies on the case of **Ann Njoroge -v- Topez Petroleum Limited [2013] eKLR** where the Court held that:-

“When an employee’s claim is based on unfair termination that is countered with a defence of absconding, this court is thus invited to look at the circumstances of such a case more carefully as where an employee is proved to have absconded duty this is tantamount to gross misconduct and the sanction is summary dismissal without notice. This is as outlined under section 44 of the Employment Act and more particularly as under paragraphs 44(4) (a) as read together with (c);

(a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.”

36. It submits that the Claimant did not bring any evidence to prove that he was employed as a Tailor and that it on the other hand provided a letter from one Evance Chweya dated 01/08/2010, which stated that the Claimant was employed by Evans Security Guards from January 2008 to 27/07/2010.

37. That it further provided evidence of a letter of offer and a letter of renewal of contract between it and the Claimant showing he was employed as a Watchman. It submits that since it never terminated the Claimant's employment, this suit must fail as it was filed without basis and is therefore not entitled to compensation.

38. The Respondent submits that it filed leave application forms signed by the Claimant while applying for leave and payslips showing he was paid house allowance and that the letter of renewal of contract and the said payslips show that the Claimant was not underpaid.

39. That it also provided NSSF returns showing that the Claimant was actually a member of NSSF and that it effectively made the required payments. That it is trite law he who alleges must prove and since the Claimant did not prove he did not take his leave days, the prayer must fail and that granting the Claimant the reliefs he seeks would amount to unjust enrichment.

40. I have examined evidence from both Parties plus their submissions therein.

41. The Claimant averred that he was terminated verbally by the Respondent on 31/3/2016 when he was chased away from the Respondent's premises.

42. The Respondent on the other hand indicate that the claimant absconded duty from 30/3/2016 and they made efforts to trace him even through his brother and continued to pay his statutory dues of NSSF for April and May 2016. That the Claimant failed to report to work in April 2016 and never came back work.

43. The Respondent also aver that the Claimant served on contract terms as per their Appendix 3 which the Claimant denied ever signing.

44. Despite the Respondent averring that the Claimant absconded duty, they have not produced any evidence to show how they sought him out and the results thereof.

45. The Respondent avers that they even sent his brother who found him and he did not come back. Why didn't the Respondents issue any show cause letter to him to explain why he could not be dismissed for absconding duty?.

46. On 5/7/2016, the Claimant through Kituo Cha Sheria wrote a demand notice to the Respondents demanding payment of his termination dues.

47. The Respondents replied vide their letter of 22-7-2016 indicating that the Claimant had absconded duty. The Respondents did not ask the Claimant to come back to work.

48. The contention that Claimant absconded duty is therefore not true as that is why the Respondent who knew where he could be traced never instituted disciplinary proceedings against him for absconding duty.

49. In the circumstances, I agree with the contention by the Claimant that he was chased away from work on 30/3/2016, which is the day the Respondent alleges he absconded duty and there is no valid reason given by the Respondent for the termination.

50. In the same vein, there is no indication that the Claimant was subjected to any disciplinary process before termination. I therefore make a finding that the dismissal of the Claimant was unfair and unjustified.

51. As for remedies sought, given that there was no notice I award the Claimant 1 month notice = 13,260/=. I also award him leave pay for 2 years as prayed = $2 \times 13,260 = 26,520/=$.

52. As there is no indication that his 13,260 was inclusive of house allowance I also award him house allowance payable for 3 years preceding the dismissal = $15\% \times 13,260 \times 36 \text{ months} = 71,604/=$.

53. On compensation for unlawful termination, given the unfair and unjustified termination, I opine 10 months' salary would adequately compensate him = $10 \times 13,260 = 132,600/=$.

TOTAL awarded = 234,984/=

Less statutory deductions

54. The Respondent will pay costs of this suit.

Dated and delivered in open Court this 17th day of December, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Ndegwa holding brief Mutunga for Respondent

Claimant in person – Present