



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 909 OF 2014

(Before Hon. Justice Mathews N. Nduma)

FRANKLIN KAIME WANYOIKE CLAIMANT

VERSUS

CHINA CAMC ENGINEERING CO. LTDRESPONDENT

J U D G E M E N T

1. The Claimant seeks compensation for wrongful dismissal and payment of terminal benefits set out in the statement of claim.
2. The Claimant relied on the statement of claim and documentation attached thereto, sworn testimony and written submissions.
3. The Respondent filed a statement of defence on 9th July, 2014 and did not attach any documentation to nor did he file any list of documents in support of its case. The Respondent did not call any witness upon close of the Claimant's case.

Facts of the Case

4. The Claimant was employed by the Respondent as a driver on 4th September, 2010 at a monthly salary of Kshs.13,000. It is in dispute whether this salary was a basic salary excluding 15% house allowance or not. The date of employment is also in dispute, the Respondent alleges in the statement of defence that the Claimant was employed vide a fixed contract on 1st January, 2014 for a period of six months. The Claimant however testified that he worked continuously for a period of four (4) years from 4th September 2010, until he was forced by the Respondent to sign a fixed term contract of six months on 1st January, 2014.

5. The Claimant produced a job card, pay slips dating back from March 2012, a letter of authority to collect logbook from Kenya Revenue Authority dated 11th December, 2013 given to him by Mr. Liqian, the Chief Representative of the Respondent in Kenya and Data of NHIF paid on his behalf by the Respondent dating back from 17th September, 2012.

6. The Claimant seeks:-

- (i) One month salary in lieu of notice in the sum of Kshs.13,000.
- (ii) House allowance calculated at 15% of Kshs.13,000 for 44 months worked, 171,600.
- (iii) Service pay for 4 years worked without any social security calculated at 15 days salary for each year worked 26,000.
- (iv) 86 leave days not taken during the period and general damages for wrongful and unfair dismissal.

Determination

7. The un rebutted testimony under oath by the Claimant corroborated by the documents produced by the Claimant clearly show that the Claimant started working for the Respondent much earlier than is alleged by the Respondent in the memorandum of defence.

8. The Claimant has proved on a balance of probabilities that he was employed by the Respondent on 4th September, 2010 and worked continuously until he was forced to sign a fix term contract of six months from 9th July, 2014.

9. The Claimant has proved all the particulars of claim on a balance of probabilities including that he worked diligently and continuously for the entire period until his employment was summarily terminated by the Respondent for no valid reason and without following any fair procedure.

10. The Claimant has shown that she did not take 86 days leave, was not given notice or paid in lieu thereof, was not registered with NSSF and is entitled to service gratuity for the period served without NSSF.

11. The Claimant has however failed to demonstrate that he was underpaid for the period worked and is not entitled to the house allowance claimed.

12. The court grants the Claimant all the terminal benefits claimed except house allowance.

General Damages

13. Whether or not the Claimant was on a six months contract during the last period of his employment does not negative the fact that the Claimant has proved on a balance of probabilities that he was summarily dismissed for no valid reason and the Respondent did not follow a fair procedure.

14. Accordingly, the summary dismissal was in violation of sections 41, 43 and 45 of the Employment Act, 2007. The Claimant is entitled to compensation in terms of section 49(1) (c) of the Act. The quantum of compensation is to be assessed as guided by sub-section 49(4) of the Act.

15. In **Nairobi E & LRC No. 969 of 2013, Dennis Kiarie v Maraisson Technologies Limited**, the Claimant who had served for eight months and was not paid any terminal benefits upon termination was awarded equivalent of three (3) months salary as compensation for wrongful termination.

16. In **E & LRC Cause No. 1891 of 2014, Ex Corporal Elija Kamolo Peter v Ali & 2 others**. The court awarded the claimant who had served for about 10 years the maximum compensation under section 49(1)(c) which is the equivalent of 12 months salary.

17. The court relied on the decision of the **Court of Appeal in Civil Appeal No. 79 of 2012, Peter M. Kariuki v Attorney General** where it said at page 43 –

“ It bears repeating that assessment of amount of damages is matter for the discretion of trial judgment, which must be exercised judiciously and with regard to the general conditions prevailing in the Country and prior relevant decisions.”

18. In the present case the Respondent was not candid at all and opted not to refute the testimony of the Claimant. The Claimant was not paid for NSSF for most of the period worked and was not paid any terminal benefits upon summary dismissal; Claimant intended to continue working even though he was subjected to unfair labour practices such as failure to grant him annual leave and forcing him to sign a short term contract in disregard of the four (4) years past service. The Claimant was finally summarily dismissed without notice to the loss and detriment of the Claimant. The court awards the Claimant equivalent of six (6) months salary in compensation for the wrongful and unfair dismissal in the sum of Kshs.78,000.

19. In the final analysis, the court enters judgment in favour of the Claimant as against the Respondent as follows –

(a) Kshs.78,000 being equivalent of six (6) months salary in compensation.

(b) Notice pay Kshs.13,000.

(c) Service pay for 4 years Kshs.26,000.

(d) Untaken 86 days leave Kshs.37,267.

Total award Kshs.154,267.

(e) The award in (a) above is payable with interest at court rates from date of judgment whereas the rest is payable from date of filing suit till payment in full.

(f) Respondent to pay costs of the suit.

Dated and Signed in Kisumu this 13th day of February, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 2nd day of March, 2018

Maureen Onyango

Judge

Appearances

Mr. Odawa & Co. Advocates for Claimant

Mr. Fred Orora for Respondent

Anne Njung'e – Court Clerk