



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 188 OF 2015

(Before Hon. Justice Mathews N. Nduma)

GEORGE ODHIAMBO ADOYO.....CLAIMANT

VERSUS

PREMIER FLOUR MILLS LIMITED.....RESPONDENT

J U D G M E N T

1. The Claimant was employed by the Respondent as a driver on 2nd February, 2005. He worked continuously until 18th December, 2014 when he was told that the company had collapsed and they would be recalled if the company resumes operations. He was not given notice of the termination, nor was he paid terminal benefits. He was informed that the benefits would be computed at the company's Nairobi Office.
2. The Claimant earned Kshs.18,918 at that time. He produced a pay slip in support of his case. He claims payment of terminal benefits. The claimant was issued a certificate of service.
3. The Human Resource Manager of the Respondent Ms. Shaila Hassan testified as RW1. He worked with the Claimant at the Kisumu Depot.
4. She testified that the claimant was on a fixed term contract and was given notice of no intention to renew the contract.
5. RW1 testified that the Claimant was paid for days worked, overtime and in lieu of leave days not taken. He was also given certificate of service. RW1 stated that the Claimant was employed in 2009 and not 2005 as he alleges. She produced payment documents for November 2014, salary in the sum of Kshs.18,576 and a voucher for payment of Kshs.8,300 being payment of prorated leave days not taken.

Determination

6. The issues for determination are:-

- (i) Whether the Claimant was on a fixed term contract that expired on effluxion of time or not.
- (ii) Whether the Claimant is owed terminal benefits.

Issue i

7. The Claimant sought compensation for unfair termination of employment and in the alternative reinstatement to his employment without loss of benefits.
8. In the Memorandum of Claim, the Claimant stated that he earned a consolidated salary of Kshs.33,249, whereas in court he testified that he was paid a salary of Kshs.16,603, plus 15% house allowance making a total of Kshs.18,576.
9. From his own testimony before court, the Claimant worked continuously from 2nd February, 2005 until his employment was terminated on 18th December, 2014.
10. The dispute is whether he was on permanent and pensionable terms at the time of termination as he alleged or whether he was on a six months renewable contract as was testified by RW1 which expired and was not renewed.

11. Section 10(7) of the Employment Act, 2007 provides –

“(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

12. In the present case, the Claimant has testified under oath that he worked continuously from 2005 to 2014 when his employment was terminated without notice. The Respondent without producing any written contract alleges that the Claimant was on a six (6) months fixed contract that commenced on 1st May, 2014 and expired on 30th November, 2016.

13. In **Edward Isedia Mukasia vs Eldo Supermarket Limited [2015]eKLR**, D. K. Njagi Marete held –

“Section 10(7) of the Employment Act 2007, binds the employer to proof the terms of employment in the event of non production of a written contract of employment in all legal proceedings ...”

14. The Certificate of Service given to the Claimant by the Respondent dated 1st December, 2014 indicated that the Claimant worked from 1st May to 30th November, 2014.

15. On the other hand the Claimant produced several pay slips for January, February, September and November 2013, and for January, April, May, June, July, August, September, October and November 2014.

16. The Claimant also produced NHIF receipts which shows that he was registered on 28th September, 2009. The document does not indicate who the employer was. Neither party produced NSSF records for the Claimant.

17. It would appear in the least that the Claimant has worked for the Respondent for a longer period than the Respondent disclosed to the court. The Claimant pleaded and testified that he was employed on 2nd February, 2005. The burden shifted to the Respondent to rebut this evidence.

18. The Respondent produced no evidence, as is obliged by law to rebut the particulars of employment as stated by the Claimant. The court has no alternative but to find that the Claimant has proved on a balance of probabilities that he was employed by the Respondent on 2nd February 2005, and worked continuously, until his employment was terminated on 2nd February, 2005.

19. The Claimant testified in support of the Memorandum of Claim that his employment was terminated without notice, notice to show cause or opportunity to be heard as to why his employment ought not to be terminated.

20. The testimony by the Claimant is indicative of a retrenchment, due to stoppage of operations by the Respondent. However in the memorandum of claim the Claimant did not plead a case of redundancy, but one of unlawful termination of employment.

21. The Claimant sought reinstatement and in the alternative payment of General damages. The Claimant however testified, he was now employed elsewhere and only sought general damages and terminal benefits.

22. The terminal benefits sought by the claimant were not pleaded and the court cannot award the claimant that which has not been pleaded.

23. However, having found that the employment of the Claimant was terminated wrongfully and without following a fair procedure, the court finds that the Respondent violated sections 41, 43 and 45 of the Employment Act, 2007 and the Claimant is entitled to compensation in terms of section 49(1)(c) as read with subsection 49(4) of the Act.

24. In this regard, the court makes a finding of fact that the Claimant had indeed served the Respondent continuously from the year 2005 to 2014. The Claimant had therefore served for a period of nine (9) years. The Claimant’s employment was terminated without notice and without payment of terminal benefits. The Respondent failed to produce records to defeat the claim. This is indicative of bad faith on the part of the Respondent. The court finds that the Claimant though had sought to be reinstated has mitigated his loss by moving on. The Claimant did not contribute to the loss of his employment. The court also finds in absence of any documentary evidence by the Respondent that no terminal benefits were paid to the Claimant upon termination of employment.

25. Accordingly, the court awards the Claimant the equivalent of nine (9) months’ salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs.167,184.

26. The award is payable with interest at court rates from date of judgment till payment in full.

27. The Respondent to pay the costs of the suit.

Judgment Dated, Signed and delivered this 6th day of June, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Omondi for the Claimant

Mr. Abuko Respondent

Chrispo – Court Clerk