



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 247 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

CALVINCE OKOTH OTIENO.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF HOMA BAY.....RESPONDENT

JUDGMENT

By memorandum of claim dated 6th July and filed on 9th July 2015 the claimant avers that he was unfairly dismissed by the respondent who also failed to pay his salary for 6 months. He prays for the following remedies –

- i) Maximum compensation for wrongful termination equivalent to 12 months gross remuneration for loss of employment amount of Kshs.18,880 x 12
- ii) Terminal benefits in accordance with the Employment Act, 2007 including total remuneration in lieu of the period notice.
- iii) General damages for unlawful dismissal.
- iv) Costs of the suit together with interest.

The respondent filed a reply to the claim in which it admits engaging the claimant as a Driver but denies dismissing him. The respondent further denies owing the claimant any terminal benefits.

At the hearing of the claim the claimant testified on his behalf while the respondent called SAMSON OKUMU its Transport Officer, RW1.

The parties thereafter filed and exchanged written submissions.

The claimant testified that he was engaged as a Driver by the respondent in January 2014 at a salary of Kshs.15,000 per month on a 3 months renewable contract. The contract was renewed once on 1st May 2014 at a salary of Kshs.18,888 per month. He was paid in cash from January to May 2014. After that he was paid through Co-operative Bank, Homabay Branch. After the first renewal, his contract was not renewed again. He was told he was on probation and worked without a contract from May to December 2014 when the respondent stopped paying his salary. When he followed up why the salary was stopped he was informed by the Transport Officer that they were working on it.

The claimant testified that he was transferred to Rangwe sub-county from 16th March 2015 and worked for 2 months until May 2015. When he went to follow up his salary the Transport Officer told him to go home. He was not given any reason. He was also not given notice.

On cross-examination, the claimant testified that his contract lapsed in July 2014 and he was not issued with a letter of renewal. He testified that he was paid 5 times through the bank at Kshs.18,888. He stated he had no letter of transfer to Rangwe Constituency and that the proof that he worked until May 2015 was the work ticket, a copy of which was not in his possession. He stated he did not receive any letter of overpayment of salary.

For the respondent SAMSON OKUMU RW1 testified that as Transport Officer for the respondent he is in charge of transport and logistics. He is also responsible for supervision of staff in the transport department who comprise drivers and support staff.

RW1 testified that the claimant was engaged as a driver during the period 1st May 2014 to 31st July 2014. He was assigned duties to drive

the CEC Agriculture, Livestock and Fisheries and was reporting to the Transport Officer. He testified that the claimant left employment on 31st July 2014. He stated that he was aware that the claimant continued to earn a salary after his contract had lapsed and measures are in place to recover the salary paid to the claimant after July 2014.

In the submissions the claimant has relied on the following cases

1. **Kenya Oil Field Services Limited -v- Peter Njoroge (Nairobi) Civil Appeal No. 124 of 1985.**
2. **Dalmas Ogoye -v- KNTC Limited Nairobi Civil Appeal No. 125 of 1996.**
3. **The Principal and BOG Machakos Teachers College -v- Wambui Muange Civil Appeal No. 15 of 2009.**
4. **Kenya Ports Authority –v- Festus Kipkorir Kiprotich [2014] eKLR.**

All the cases relate to termination of employment before the Employment Act 2007 came into force and are therefore not relevant to the case herein.

Determination

I have considered the pleadings and evidence. The issues for determination are when the claimant was employed, when his employment ceased and whether he was dismissed or his employment contract lapsed. The final issue is whether he is entitled to the prayers sought.

Date of Employment

The letter of appointment of the claimant dated 1st May 2014, claimant's appendix 1 states as follows –

“OFFICE OF THE GOVERNOR

Our Ref: HB/CTY/EG.VOL2/76

HOMA BAY COUNTY

P. O. Box 469 – 40300

HOMA BAY

1st May 2014

Calvince Okoth Otieno

P. O. Box 30041 – 00100

NAIROBI

Thru'

ECM Agriculture, Livestock and Fisheries

RE: APPOINTMENT AS A DRIVER

I refer to this office's letter No. HB/CTY/APP/VOL1/26 of 18th December 2013.

I am pleased to inform you that your engagement as a driver in the department of Agriculture Livestock and Fisheries has been renewed for three (3) months effect from 1st May 2014.

The wage attached to this is Kenya Shillings Eighteen Thousand Eight Hundred and Eight and Eight only (Kshs.18,888/=) per month consolidated.

Please indicate your acceptance of this officer in writing and report the officer in-charge for deployment.

SIGNED

ISAIAH OGWE

COUNTY SECRETARY”

The letter refers to an earlier letter dated 18th December 2013 and specifically states that the contract has been “renewed”. This therefore means that there was a previous contract.

From this letter I believe the claimant was employed from January 2014 as he alleges and not from 1st May 2014 as alleged by RW1. The claimant stated that he was paid cash up to April 2014 and through his bank account at Co-operative Bank, HomaBay from May 2014.

I therefore find that the date of the claimant’s employment is 1st January 2014.

Date when Claimant’s Employment Ceased

According to the bank statement, the claimant was paid salary up to January 2015 (salary paid on 2nd February 2015). No logical explanation was given by the respondent why the claimant continued to earn salary up to January 2015 if indeed his employment terminated in July 2014 as alleged by the respondent. The claimant testified that he was assigned to drive the County Administrator for Rangwe Sub-County Mr. Omune, a fact that was not denied by the respondent. It would not have been difficult for the respondent to produce the work ticket for the vehicle used by Rangwe-County Administrator, which in the demand letter is stated to be Toyota Station Wagon Registration No. KAZ 183Q. It would also not have been difficult to call Mr. Omune to testify or file an affidavit if indeed the claimant was not his Driver as alleged by him.

Again if it is true that the claimant was paid beyond the period covered by his contract and that there are measures in place to recover the salary overpayments as alleged by RW1 he would have produced some evidence to prove the same. The claimant denied that he had received any letter of overpayment of salary.

For the foregoing reasons I believe that the claimant’s version is the correct position backed by the provisions of Section 10(2),(3),(6) and (7) of the Employment Act which shifts the burden of proof to the employer where no employment records are produced by the employer whose responsibility it is to keep and produce employment records as provided in Section 10(3)(a). The Section provides that an employer should keep records to be sufficient to enable the employee’s entitlement on the termination of employment to be precisely calculated.

Whether the Claimant was Dismissed or his Contract Lapsed

Having found that the claimant’s employment terminated on 12th May 2015, I find that he was verbally dismissed as his contract terms converted to monthly contract after the lapse of his contract on 31st July 2014. The respondent did not deny the averments in the letter of demand to the effect that “... on 12th May 2015 our client paid a visit to your office. You verbally terminated his services whereupon he was ordered to handover the keys of Toyota Station Wagon Registration No. KAZ 183Q to the Transport Manager.”

Remedies

The claimant is entitled to salary up to 12th May 2015. The last salary having been paid in January 2015, the claimant is entitled to salary for February, March, April and 12 days of May 2015 in the sum of Kshs.65,381.50.

He is also entitled to one month’s salary in lieu of notice in the sum of Kshs.18,888.

In view of the length of service and circumstances under which he was terminated I award him two months’ salary as compensation in the sum of Kshs.37,776. No general damages are payable for termination of employment and the prayer is dismissed.

Conclusion

Judgment is entered for the claimant against the respondent in the total sum of **Kshs.122,045.50** as more particularly set out above. The respondent shall pay claimant’s costs.

Decretal sum shall attract interest from date of judgment at court rates.

DATED AND SIGNED AT NAIROBI ON THIS 8TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 25TH DAY OF OCTOBER 2018

MATHEWS NDERI NDUMA

JUDGE