



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.309 OF 2018

(Formerly Civil Case No. 5464 of 2011 in the Chief Magistrate's Court at Nairobi)

BONIFACE KIOKO MUTISO.....CLAIMANT

- VERSUS -

VICTORY CONSTRUCTION CO. LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 30th November, 2018)

JUDGMENT

The suit was initially commenced by the plaintiff filed on 14.11.2011 at the Chief Magistrates' Court by the claimant in person. The defence was filed on 22.03.2013 through A.I. Onyango & Company Advocates.

The memorandum of claim was filed on 13.04.2018 by way of an amendment to the plaintiff and filed through Ndemo Sagini & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Payment of a sum of Kshs.391, 799.00 being pay in lieu of notice Kshs. 12, 000.00; unpaid leave Kshs. 44, 999.00; unpaid house allowance Kshs. 118, 800.00; unpaid salary Kshs.72, 000.00; and compensation 12 months' salaries Kshs.144, 000.00.
- b) Any other and further remedies that the Honourable Court may deem fit to grant.

The claimant's case is that he was employed by the respondent in November 2005 as a driver and assigned a lorry to ferry building materials to various construction sites. The claimant was paid Kshs. 12, 000.00 per month, no annual leave, NSSF was remitted, and no housing was provided. The claimant's further case is that he was redeployed to drive a pickup which ferried fuel for use by machines on a road construction project in Taita Taveta in 2006 and later in Laikipia in 2008. It is the claimant's further case that he developed eye complications in 2008 so that he could not effectively carry out his driving duties. On 08.08.2010 he visited Eye-Care Consultants Limited and contact lenses were prescribed. He was granted sick leave from 04.10.2010 to 03.04.2011 for recovery purpose and it was his case that the eye complication arose in the course of his duties and the respondent agreed that he proceeds on leave as was prescribed.

The claimant's further case is that he was not paid salary during the period of leave and he claimed Kshs. 72, 000.00 at Kshs. 12,000.00 per month for the 6 months of leave.

The claimant further alleged that his termination from employment was unfair.

The respondent filed on 31.05.2018 the amended defence and counterclaim. The respondent pleaded as follows:

- a) The respondent admitted employing the claimant as a driver from November 2005 to 04.10.2010 when the claimant absconded from duty.
- b) At the time of employment the claimant never stated that he had a problem with his eyes or sight. If the claimant developed an eye or sight problem after the employment then he failed to notify the respondent. The issue of being provided professional medical care in that regard never arose. The respondent was a stranger to documentation from Eye-Care Consultants Limited.
- c) The claimant never reported a continuing treatment for his eyes and he absconded from work for 6 months from 04.10.2010 to 03.04.2011. He absconded from work on 04.10.2010 after being paid the October salary and attempted to resume duty on 03.04.2011 to be paid for days he had not been at work without tangible explanation.

d) The claimant was a member of NSSF, the NSSF dues were remitted, he was paid a consolidated pay of Kshs. 12, 000.00 per month and house allowance was not payable, and the claimant had absconded from duty voluntarily.

e) The claimant counterclaimed for Kshs. 12, 000.00 being one month in lieu of termination notice because the claimant suddenly absconded from duty.

The Court has considered the evidence, the pleadings and the submissions on record. The Court determines the matters in dispute as follows:

1) The Court returns that there is no dispute that the respondent employed the claimant as a driver from November 2005 to 04.10.2010.

2) The claimant testified that he did not know the name of the doctor who wrote the 6 months sick off in his favour. He confirmed that he did not go for medical check in a hospital for the 6 months of sick off and for the 6 months from 01.10.2010 to 03.04.2011 he never reported at work. He testified that as at the hearing of the case on 24.10.2018 he still had eye and sight problem but he had not filed any medical reports or record in that regard. He never gave testimony on informing the respondent about his problem or serving the 6 months' sick off he alleged was prescribed. The respondent's witness testified that the claimant was paid September 2010 salary then he absconded from duty effective 04.10.2010 and having left the respondent had no way of tracing him because the construction enterprise entailed moving from one site to another. The Court returns that the respondent's evidence was credible and the claimant failed to establish that he had been sick as alleged, that he had notified his employer and obtained leave in that regard. The Court returns that he absconded from work voluntarily and without notice. The Court further finds that he never notified the respondent about his alleged illness at the beginning of the alleged ailment.

3) As submitted for the respondent, the Court finds that the parties agreed upon a consolidated monthly pay Of Kshs. 12,000.00 and the claim for house allowance was not justified.

4) The Court returns that the claimant suddenly absconded from duty and would be liable to pay the respondent Kshs.12, 000.00 in lieu of termination notice under section 35 of the Employment Act, 2007. In any event, the claimant filed no defence to the counterclaim. However, the award will fail because the counterclaim was filed on 31.05.2018 long after the lapsing of the 3 years of limitation of such action under section 90 of the Employment Act, 2007.

5) The Court returns that there was no evidence to support the prayer for leave and in any event it was time barred under section 90 of the Employment Act, 2007 because as a continuing injury the claim was made outside the 12 months of limitation period.

In conclusion judgment is hereby entered for dismissal of the amended memorandum of claim and the counterclaim with orders each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 30th November, 2018.

BYRAM ONGAYA

JUDGE