



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 489 OF 2017

JUSTIN MUTUNGA DAVID.....CLAIMANT

VERSUS

CHINA ROAD & BRIDGE

CORPORATION (K) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent his erstwhile employer for relief upon his dismissal from employment. The Claimant averred that he was not issued with a written contract of employment but was regularly issued monthly payslips and that the Respondent made contributions to NSSF on his behalf. The Claimant sought payment for overtime asserting that he worked for 12 hours and when he raised his discontent towards the remuneration, his services were terminated on 19<sup>th</sup> June 2016. He averred that he was paid an hourly rate of Kshs. 64.05 which was below the statutory minimum of Kshs. 97.90 an hour. He averred that in the dismissal, the Respondent did not accord him an opportunity to defend himself before the decision to dismiss him. He was also not issued with a notice to show cause why he should not be dismissed. He therefore sought one month's salary *in lieu* of notice – Kshs. 20,363/-; Kshs. 7,019,136/- being the underpayments for 6 years; unpaid salary for the month of June 2016 – Kshs. 14,880/-; payment in lieu of leave not taken – Kshs. 98,683.20 for 6 years; compensation for unfair termination – Kshs. 244,358.40 as well as costs of the suit together with interest. The Claimant also sought to be issued with a certificate of service.

2. The Respondent filed a defence in which it averred that the termination of the Claimant's employment arose out of the completion of the Nairobi Southern Bypass project for which all the employees were sufficiently notified. The Respondent averred that the Claimant was granted all his terminal benefits upon the completion of the Nairobi Southern Bypass project. The Respondent averred that upon receipt of the notice of intention to sue it attempted to amicably resolve the Claimant's issue to no avail. The Respondent sought the dismissal of the Claimant's suit with costs. The Claimant replied to the Respondent's response and stated that were the issue been the end of the project then the issue would have been redundancy and not termination of the contract. He denied that the Respondent made efforts to respond to his demand.

3. The Claimant testified that he used to work for the Respondent from 2003 till 2016 and that he worked daily including Sundays for 12 hours from 6.00am to 6.00pm. He began getting payslips in 2009 and the payment was Kshs. 64.05 per hour. He stated that he was dismissed without notice and not allowed to defend himself. He was cross-examined and he testified that he did not state in his statement accompanying the claim that he began working in 2003 but in 2009. He testified that they were constructing the Southern and Eastern Bypass by then. He denied signing the employment contract exhibited in the Respondent's bundle. He stated that he worked for 7 years on the Southern Bypass and 3 years for the Eastern Bypass. He testified that he was not paid his dues after completion of the work or issued with a certificate of service. He said that even if one wrote a letter of complaint on poor pay no one would listen. He stated that he was paid Kshs. 64.05 instead of Kshs. 97/- per hour. He admitted that he did not have a document on underpayment and that he knew of the deductions for NSSF. He testified that he was a union member though he did not have a membership card. He did not know the employment was governed by the CBA. He stated that the road construction was to come to an end and that at the time he left the construction had not come to an end. He admitted that the road was completed in June and that he was paid for leave not taken. He did not go to the Labour Office and that he signed the job card which the Respondent maintained. He stated that he did not attend the meeting as his previous lawyer had told him she would not manage to handle the case and so he went to another lawyer. In re-examination he testified that he did not subscribe to the union and did not authorize union dues deductions. He said that he was paid leave dues for 4 years. He stated that his colleagues continued when he left for almost a year after he left.

4. The Respondent called Delilah Wendi Amenilwa who testified that she was the assistant personnel manager of the ICD project. She testified that the Claimant was employed by the Respondent in the Nairobi Eastern and Northern bypass. She testified that the Claimant was employed in September 2009 as a labourer till May 2010 when he became a chainman helping the surveyor. She stated that the Claimant would sign the job card which would be presented to him at the end of the day capturing the hours worked. He was paid a rate of Kshs. 64.05 per hour and 20% of gross pay as house allowance. She stated that the rate per hour per the CBA was Kshs. 37.63 for a labourer and it was Kshs. 44.68 for the chainman. She testified that after the completion of the project the Claimant's services came to an end in March 2012. She stated that he was re-employed on another project the Respondent got from KeNHA – Kenya National Highway Authority. She said that the Claimant complained about some hours in June 2016 and when the matter was referred to the Labour Office at Machakos the Claimant did not disagree with the finding. The Respondent sent the cheque to the Labour Office and obtained a receipt for it. She testified that the Claimant was paid all his dues for the project. In cross-examination she stated that she was not the Claimant's supervisor and that the daily rate was Kshs. 280/- per day when he began working and that this rate was converted to hourly rate for purposes of overtime. She testified that the Claimant signed on the payroll in receipt of the dues he was paid monthly and the pay included his normal pay plus overtime when due. She stated that the Claimant was issued with a certificate of service. She testified that the Claimant was paid his pro rata leave dues, the salary in lieu of notice, overtime worked and that the Respondent could not retain the Claimant due to the completion of the project. She stated that overtime could not exceed 4 hours. That marked the end of oral testimony.

5. The parties filed written submissions and the Claimant submitted that his dismissal in June 2016 amounted to summary dismissal as he was ordered to leave the premises. He relied on the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR** where Mbaru J. held that in the eventuality that an employee is to face summary dismissal or termination, Section 41 of the Employment Act now dictates that there must be a hearing to give such an employee an opportunity to defend self. The Claimant also cited the case of **David Kipkosgei Muttai v Green Palms Academy [2014] eKLR** where the court stated that an unfair termination takes place where employment is terminated without following fair procedure. Section 41(1) of the Employment Act was referred to in support of the argument by the Claimant. The Claimant submitted that if indeed there was termination on account of redundancy, the lawful procedure for terminating a contract for reason of redundancy was not followed either. The Claimant cited the case of **Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited [2013] eKLR** which dealt with redundancy under Section 40 of the Employment Act. The Claimant submitted that the Respondent had not tendered evidence to prove that the selection of the employees and the process undertaken in declaring the positions redundant was in line with the law if at all the dismissal was a declaration of redundancy. The Claimant submitted that he had proved his case on a balance of probabilities and that his pay was lower than the statutory minimum which was set by the Legal Notice No. 117. The Claimant sought therefore the sums claimed in his plaint together with interest and costs of the suit.

6. The Respondent submitted that the Claimant was unable to substantiate the underpayment he claimed or the hourly rate of Kshs. 97.90. It was submitted that the pay was per the CBA agreed between the union and the employer and the Claimant was paid a daily rate not an hourly rate. The Respondent relied on the case of **Thomas De La Rue v David Opondo Omutelema [2013] eKLR** where the Court of Appeal held that the collective bargaining agreement binds all unionisable staff of the employer who enters into such an agreement. The Respondent submitted that the Claimant's payslips show that he was compensated for the hours worked including the overtime worked. The Respondent submits that the terminal dues were paid at the Industrial Area District Labour Office. The Respondent submitted that the termination of the Claimant was not unfair and that the contract terminated upon the completion of the project. The case of **Benson Omuyonga v Laxmanbhai Construction Ltd [2014] eKLR** was cited in support of the proposition that the Claimant's case was misplaced as the contract came to an end because the project came to an end. The Respondent submitted that the Claimant's case was not proved and should be dismissed with costs.

7. The Claimant worked for a Chinese company which was constructing the Nairobi Eastern and Northern Bypasses. The project came to an end. Upon completion of the project, it is apparent that a dispute arose and the Claimant and Respondent met at the Labour Office to resolve the dispute. The Claimant's terminal dues were paid in to the Labour Office and the Claimant is entitled to collect his terminal dues made to the Labour Office amounting to Kshs. 65,000/-. As regards unlawful termination, the Claimant did not prove that his termination was unlawful as projects do come to an end as observed by Rika J. in the case of **Benson Omuyonga v Laxmanbhai Construction Ltd (supra)** cited by the Respondent. In my view, projects have a finite life span. Unlike an enterprise which may continue for a considerably lengthy period of time, a project cannot have permanent employment contemplated. In this case, the project was a road project that came to an end and therefore the Claimant could not anticipate working beyond the life of the project. A certificate of service was issued and there is none the Claimant can get in this suit. Regarding his emoluments, the Claimant was paid a rate that was captured as an hourly rate of Kshs. 52.13. This is lower than the sum of Kshs. 97.90 which is on the Regulation of Wages General (Amendment) Order, 2015 which sets the statutory minimum. The Claimant is entitled to receive the difference between the payment he received and the underpayment. Per the payslips he exhibited the rate was lower than the statutory minimum. The Claimant is entitled to only recover for the 3 years preceding the end of his contract. The previous years fall outside the limitation period. He is therefore entitled to only Kshs. 335,664/- as underpayments for 3 years for the 8 hours per day worked multiplied by the difference between the rates paid and the rate due. The Claimant is also entitled to the cost of the suit as well as interest on the sum above at court rates. All the other sums he claimed were paid as per the documents the Respondent availed and the Claimant signed for the sums. He was paid his leave entitlement and the monthly salaries as and when they fell due. He cannot recover the sums a second time. In the final analysis I enter judgment for the Claimant as follows:-

- a. Kshs. 335,664/- as underpayment
- b. Interest on the sum above at court rates from date of judgment till payment in full
- c. Costs of the suit.

It is so ordered.

**Dated and delivered at Nyeri this 19<sup>th</sup> day of November 2018**

**Nzioki wa Makau**

**JUDGE**