



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1771 OF 2014

(Before D. K. N. Marete)

MILIONZYA SAMMY.....CLAIMANT

VERSUS

TWIGA CONSTRUCTION LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by a Memorandum of Claim dated 8th August, 2014. The issues in dispute are therein cited as;

- a) Unfair/unlawful termination/Dismissal*
- b) Non-payment of terminal dues & Compensatory damages*

The respondent in a Memorandum of Response dated 15th December, 2014 denies the claim and prays that this be dismissed with costs.

This file is consolidated with Industrial Cause No. 1772 of 2014 with this as the lead file.

The claimant's case is that at all material times to this case, he was employed by the respondent as a carpenter at a salary of Kshs.700 per day but paid on a weekly basis. He worked continuously with diligence to the respondent's satisfaction.

The claimant's further case is that on 20th May, 2014 he reported on duty as usual only to be summoned and informed by the respondent's director that there was no work for him and that he should stop working and go back home as his services were no longer required. This was effectively dismissing the claimant summarily (orally?) as well.

The claimant's other case is that the respondent's actions amounts to constructive dismissal which dismissal was unlawful, wrongful, unfair and contrary to basic tenets of good labour practices as enshrined in the Employment Act, 2007 and Constitution in that;

- a) The reason for the Claimant's dismissal were false as the Respondent's company continued with normal operations at full capacity and other employees continued with their work uninterrupted.*
- b) No notice was issued to the Claimant on the Respondent's intention to dismiss him.*
- c) Due process was thrown out of the window in a haste to summarily dismiss the Claimant.*
- d) The decision to dismiss the Claimant was extremely harsh and inhumane considering that the Claimant had served the Respondent without blemish for over a period of 1 year.*

He claims as follows;

- i) One month's salary in lieu of notice*

being Kshs.700/= x 30 days.....Kshs.21,000/=

ii) Payment in lieu of untaken and unpaid leave

for the entire period of service

being Kshs.21,000/= x 1 years.....Kshs.21,000/=

iii) Service/Gratuity for the entire duration of service calculated at

15 days salary of every completed year of service

being $15/30 \times \text{Kshs.21,000} \times 1 \text{ year} \dots \dots \dots \text{Kshs.10,500}/=$

iv) The Claimant further submits that as a result of the illegal and unfair dismissal complained of above, he suffered abrupt loss of income and trauma and inability to meet his continuing obligations as a result of which he suffered damages for which he seeks compensation at 12 months' salary, being Kshs.21,000/= x 12 months.Kshs.252,000/=

TOTAL CLAIM.....Kshs.304,500/=

He prays as follows;

- a) A declaration that the Respondent's actions amount to constructive summary dismissal of the Claimant's employment, which dismissal was unfair and inhumane.
- b) A declaration that the claimant is entitled to payment of terminal dues and compensatory damages as pleaded.
- c) An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totaling to kshs.304,500/=
- d) Interest on (c) above from the date of filing suit till payment in full.
- e) Cost of this suit plus interest thereon.

The respondent's case is one of denial of the claim.

It is her further case that there is no chance that the claimant was the employer as at 20th March, 2013 at their Dagoretti Site in that that;

- a) The letter of offer of the contract for site by The Tea Board of Kenya (client) to the Respondent was done on **8th of November, 2012** and the Respondent accepted the same on **12/11/2012**. Annexed hereto and marked "**TC1**" is the letter dated **8-11-12** by The Tea Board of Kenya to the Respondent.
- b) The contract for the said works was entered into on **18th December, 2012** and work began on 17th January 2013. Annexed hereto and marked "**TC2**" is a copy of the agreement.
- c) The Respondent on **12th February 2013** subcontracted the labour aspect of the works to **Wamwetu Enterprises of P.o. Box 87, Mwingi**. The claimant was therefore an employee of **Wamwetu Enterprises** and not the Respondent. All allegations to the contrary are therefore denied in toto and the claimant invited to strict proof thereof.

The respondent's further case is that upon awareness of this labour dispute, she reported the same to the County Labour Officer, Nairobi. It was resolved but involved the claimant and his employer Wamwetu Enterprises Service - by the Ministry of Labour and Social Services.

The respondent's penultimate case is that the claim was assessed at Kshs.35,000.00 which sum she forwarded to the ministry on 30th July, 2014 with information to the claimant's advocates.

The matter came to court variously until the 15th October, 2015 when the parties agreed on a disposal by way of written submissions.

Before we embark on an analysis of the issues in dispute, let me clear air on joinder of parties in this cause. The claimant's written submissions dated 22nd October, 2018 purport to be on behalf of five causes namely Cause Nos 1770/2014, 1771/2014, 1772/2014, 1768/2014 and 1769/2014 with 1772/2014 as the lead case. The record on Cause No. 1772/2014 on 11th July, 2018 indicates that Causes No.1768/2014, 1769/2014 and 1770/2014 were dismissed for want of prosecution. Directions were issued on a further mention for Causes No.1771/2014 and 1772/2014 on 26th July, instant for further directions.

Further, a record dated 31st May, 2017 before Ndolo, J. in Cause No. 1771/2014

had directed a consolidation of the five matters with 1771/2014 as the lead case. This being the earlier record of court, the later one by Wasilwa, J. takes precedent leaving us with only two living causes, 1771/2014 and 1772/2014. These directions again pin 1771/2014 as the lead case and therefore our indulgence of the same in this judgement of court.

The issues for determination therefore are;

1. Whether the claimant was an employee of the respondent?
2. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
3. Whether the claimant is entitled to the relief sought?
4. Who bears the costs of this claim?

The 1st issue for determination is whether the claimant was an employee of the respondent. The claimant in their written submission dated 22nd October, 2018 submits a case of being an employee of the respondent for all intents and purposes. It is his case that they were employed by the respondent and would receive instructions directly from the respondent.

Further, the respondents have attached documents supporting employment by the respondent to the Memorandum of Claim. This includes responses from the respondent's advocates confirming this position and also pleading that in spite of the respondent's instructions the claimants declined obedience and absconded duty. These are annexures (i), (ii), (iii), (iv) (vi) and (vii) annexed to the claim.

The claimants further deny the allegation of being employed by a company subcontracted by the respondent. They pose the question as to why the respondent's purports to pay off the claimants when their grievances in this claim were presented to the labour office. This is as follows;

6. If at all the respondents wanted the court to believe that indeed they were not the employers of the company why didn't they seek leave of this court to enjoin the purported subcontractor as a defendant herein. Why did they proceed and purport to pay off the claim by writing a cheque to the labour office? Was this then a variation of their own terms of the purported contract. Look at item No.13 of the said contract.

7. The respondent herein having agreed to pay off the claimants through the labour office are thus stopped from relying in this clause. The respondent cannot be seen to be blowing hot and cold at the same time. In Philip Ateng Oguk & 27 others v Westmon Power [Kenya] Limited & Another [2015]eKLR, Justice Rika in finding for employees under a group of companies state inter alia that '... the presence of various legal entities at the workplace claiming to be part of a 'group of Companies' should not result in the obfuscation or defeat of their (Employees') employment rights'. Emphasis mine.

I agree with the claimant's case. It is the more practical and probable of the two. The issues raised by the claimants bring it home and *in toto* thrust out the allegation and case of the claimant's employment by the subcontracted company Wamwetu Enterprises Service. I therefore find that the claimant was an employee of the respondent.

The 2nd issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant submits a case of unfair and unlawful termination of his employment by the respondent in that no reason was given or substantiated in support of his termination of employment. This is a contravention to section 45 of the Employment Act, 2007 which provides that in a case of termination of employment, the employer must not only prove that the reason for termination or dismissal is valid and fair but also that the employment was terminated in accordance with fair procedure.

The claimant case is that they were all ordered to leave the respondent's premises as their services were no longer required. This was summary dismissal without valid reason in contravention of sections 45 and 46 of the Employment Act, 2007.

Further, the claimant was not afforded an opportunity to be heard. This was a contravention of sections 41 and 43 of the Employment Act, 2007 that mandate substantive and procedural fairness in the event of termination of employment.

The claimant in support of his case sought to rely on the authority of **Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers V Mombasa Sports Club, Cause No. 440 of 2013, at page 5** where Radido, J. observed thus;

No employer shall terminate the employment of an employee unfairly. He further went ahead to state termination of employment is unfair by an employer if the employer fails to prove (a) that the reason for the termination is valid; (b) that the reason for the termination is a fair reason ...

Again, he sought to rely on the authority of **Donald Odeke v Fidelity Security Ltd, Cause No.1998 of 2011, at page 3** where Ndolo, J. observed as follows;

That an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them. Her ladyship went ahead to add that it does not matter what offence the employee is charged of. If the employee is not heard, the termination is ipso facto unfair.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won on a case of unlawful termination of employment, he becomes entitled to the relief sought.

I am therefore inclined to allow the claim and relief as follows;

- i. One (1) months salary in lieu of notice.....Kshs.21,000.00
 - ii. Six (6) months compensation for unlawful termination of
employment 6 x Kshs.21,000.00.....Kshs.126,000.00
 - iii. Payment in lieu of untaken and unpaid leave for the entire period of service being Kshs.21,000 x 1
years..... Kshs.21,000.00
 - iv. Service/Gratuity for the entire duration of service calculated at 15 days salary of every completed year of service being 15/30 x
Kshs.21,000 x 1 year.....Kshs.10,500/=
- Total of claim.....Kshs.178,500.00**

v. The cost of the claim shall be borne by the respondent.

Dated and signed this day of 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 20th day of December, 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Mr. Njoroge holding brief for Mwangombe instructed by Mwakio, Kirwa & Advocates for the claimant.
2. Mr. Wesonga holding brief for Muli instructed by Kimathi, Wanjohi Muli & Company Advocates for the respondent.