



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1967 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

SAMUEL MURAYA.....CLAIMANT

VERSUS

VICTORY CONSTRUCTION COMPANY LIMITED.....RESPONDENT

CONSOLIDATED WITH

CAUSE 1968 OF 2012

MICHAEL MUTISYA.....CLAIMANT

VERSUS

VICTORY CONSTRUCTION COMPANY LIMITED.....RESPONDENT

JUDGMENT

The Claimants, Samuel Muraya and Michael Mutisya, instituted their individual claims each by a Memorandum of Claim dated 2nd October 2012. On 13th May 2013 the court ordered that the two files number 1967/2012 and 1968/2012 be consolidated. Thereafter the claimants filed an Amended Memorandum of Claim dated 12th July 2013 seeking compensation for unfair/unlawful dismissal and payment of their terminal dues against the Respondent, Victory Construction Company Limited.

They aver that the Respondent employed them as Drivers for the Resident Engineer constructing the Bomas-Kiserian Road on or about January 2007 for Michael and July 2007 for Samuel with a monthly salary of Kshs.15,000/= and Kshs.17,000 respectively, served the Respondent with loyalty and diligence under difficult times until 15th February 2011 when the Respondent unfairly and un-procedurally terminated their services without notice. That they were not given letters of appointment and so their appointment was founded on an oral contract. That upon termination, the Respondent refused to pay their terminal dues as follows-

Samuel Muraya:

- a) Notice Pay Kshs.17,000
 - b) Unpaid Salary for 6 months Kshs.102,000
 - c) Annual Leave for 3.67 years Kshs.43,673
- Total .Kshs. 162,673

Michael Mutisya:

- a) Notice Pay Kshs.15,000
- b) Unpaid Salary for 6 months Kshs.90,000

c) Annual Leave for 4.17 years Kshs.43,785

Total .Kshs. 148,785

The Claimants pray that this Court awards them as follows:

- i) The sum of Kshs.162,673 for Samuel and Kshs.148,785.00 for Michael as particularised in paragraph 7 of their claims.
- ii) Compensation for wrongful dismissal to a maximum of 12 month's wages amounting to Kshs.204,000.00 for Samuel and 180,000.00 for Michael.
- iii) Costs of this suit.
- iv) Interest in (i) and (ii) above at bank rates from March 2011 to full payment.
- v) Any other relief as the court may deem just.

Respondent's Case

The Respondent filed its Memorandum of Reply dated 24th May 2013 and later filed an Amended Memorandum of Reply dated 24th July 2013 denying that it employed the Claimants and denying that the dues claimed are payable to them by the Respondent. That it could not therefore make good the demand letter and notices to sue it received from the Claimants. That it is in the business of road construction as a road contractor and secured the contract for the construction of the Bomas-Kiserian Road from July 2008 to February 2010 from the Government of Kenya through the Ministry of Roads.

Further, that the Resident Engineer's expenses including motor-vehicle, fuel, drivers, that the said drivers' emoluments were specifically provided for by the government being that the Resident Engineer was supervising the construction on behalf of the government and that the same was negotiated by the said Resident Engineer together with the Claimants to the exclusion of the Respondent. That the respondent had no right to alter the provisions with regard to operational benefits in the contract of the Resident Engineer. That the Claimants were therefore at the construction site under the direct control, instructions and employment of the Resident Engineer and the Ministry of Roads/Government of Kenya and that since the sum payable to the Claimants was specifically provided for in the said contract, when it disbursed the said sums to the said engineer he had the sole responsibility to pay the Claimants and further, that any claim with regard to the Claimants' employment would lie with the Resident Engineer and by extension the Government of Kenya.

Evidence

The Claimants testified that they were engaged to drive the Resident Engineer

and his staff before being dismissed from employment. They deny that the Resident Engineer was their employer. It was the testimony of both claimants that they took their vehicles for service to the Respondent's offices in Baba Dogo and were told to wait, that after waiting for three days, they were told no vehicle would be released to them. That when they asked the Directors of the Respondent to pay them their dues, one of the directors punched Samuel Muraya in the face. They did not go back to the said offices after that day because the guards were instructed not to let them into the premises. They testified by then that they had each not been paid for six months, were not allowed to go on leave during the period they worked for the Respondent and were never informed why their employment was terminated. That their NHIF and NSSF cards show that their employer was the Respondent which cards they produced as evidence in court to prove the same. They testified that the agreement attached to the Response does not relate to them but to the casual workers on site. Michael Mutisya testified that he was issued with a payslip and that they signed on the payroll and received payment from the Respondent in cash.

Claimant's Submissions (Michael Mutisya)

The Claimant submits that it is not true the contract the Respondent secured from the government had drivers as employees of the Resident Engineer who is actually an employee of the Ministry of Roads. That an interrogation of the contract documents does not disclose any reference the overall supervision and payment of the drivers. The claimant denies that the contract was negotiated with him as a party as there is no contract showing the same and that he cannot comment on the said contract. Further, that this court should not approve an implication of his terms in the contract. That since the government provides pay slips for its employees, the Respondent should have approached the relevant Ministry and requested for the same and that if indeed the Respondent was not his employer, it would not have been paying his NHIF contributions which it duly remitted. He urges this Court to find that he was employed by the Respondent.

He submits that Section 35(1) of the Employment Act provides for a mandatory one month's termination notice for contracts of employment where salary is paid monthly and prays that since no notice was issued before termination of his employment, he is entitled to one month's pay in lieu. That the Respondent did not contest that it had not paid him salary for six months and if it does contest, it is obliged to keep employment records and should therefore produce document to prove the payment of the same. That pursuant to Section 28 of the Employment Act, he is entitled to annual leave and he prays that the court allows his claim for the same. That procedural and substantive guarantees under Sections 41, 43 and 45 of the Employment Act were never complied with by the Respondent and in view of the unlawful termination, he prays for maximum compensation assessed at 12 month's salary.

The Claimant finally submits that he has proved his case that the Respondent was indeed his employer while the Respondent was not keen in defending the case and that since the other prayers were uncontested he prays that they are awarded to him.

Respondent's Submissions

The Respondent submits that its averments are supported by documents in its List of Documents filed on 01st November 2017 being a copy of the *Form of Agreement* and copies of the *Payment, Requests and Vouchers*. That the drivers would be paid under appropriate items in the Bills of Quantities as shown in paragraph 5 of page 4 of the Lists of Documents and that it had no control over them as is the general set practice in construction contracts. That the payment vouchers show that the Respondent duly disbursed to the Resident Engineer staff allowances directly every time he requisitioned and he specifically requested for payment for his staff including the Claimants. Further, that in all the Requisitions, the Engineer stated that he would make all the disbursements to the casuals under item 1.07 in the Bill of Quantities, that the Respondent remitted all the casual dues until it completed the contract.

The respondent also submits that it relies in the Witness Statements filed in court on 13th September 2018 emphasising on the technical position of the contracts concerned and that it prays that there be a finding that:-

1. The Claimants were the Resident Engineer's casual workers in terms of the form of agreement and requisition made directly by the resident engineer to that effect.
2. Accordingly, the claimants were not the Respondent's workers/ drivers as claimed.
3. Both Claims should be dismissed with costs to the Respondent.

Determination

The first issue for determination is whether the Claimants were employees of the Respondent. The second issue for determination is whether the termination of claimant's employment was unfair/unlawful. The third issue for determination is whether the Claimants are entitled to the prayers sought.

The Claimants stated that they worked as Drivers for the Respondent, at the Respondent's construction site and were attached to the Resident Engineer. While they contend that they were employed by the Respondent in 2007 even before the contract with the government started in July 2008, the Respondent denies that it was their employer stating that the Resident Engineer was their employer. The Claimants produced NHIF member data summary indicating the Respondent as their Employer together with a history of their contributions. The respondent having failed to call any evidence to controvert the averments of the claimants, in the absence of rebuttal and in view of the testimony of the claimants supported by NSSF and NHIF records, I find that the claimants were in the employment of the respondent. Refer to the case of *Jorum Kainga Muriithi -V- Chairman Kithoka Farmers Co-operative Society Limited (2018) eKLR*.

The Respondent did not comply with fair procedure as provided under Section 41 of the Employment Act in dismissing the Claimants who had worked for it since 2007. The Claimants have proved that they were unfairly/ unlawfully terminated from their employment while the Respondent has not justified the grounds for termination as per Section 47(5) of the Employment Act which provides that:

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

Remedies

Having worked for the respondent for about four years and taking into account both the length of service, the manner in which the termination of employment occurred and the fact that the claimants were without salary for over six months, further taking into account that they left employment without any terminal benefits and all other relevant factors as set out in Section 49(4) of the Employment Act, I award each of the claimants seven (7) months' salary as compensation.

The claimants are entitled to the unpaid salary arrears for six months as prayed which the respondent did not controvert. The respondent further did not deny that the claimants were not given annual leave for the period they worked being 3.7 years. I award them 75.25 days each at 21 days leave per year or 1.75 days per month worked. I further award them one month's salary in lieu of notice.

In total I award them as follows –

Samuel Muraya:

- a) Compensation at 7 months Kshs.119,000
- b) Unpaid Salary for 6 months Kshs.102,000
- c) Notice Kshs.17,000
- d) Leave 75.25 days Kshs.49,202

Total Kshs.287,202

Michael Mutisya:

a) Compensation at 7 months Kshs.105,000

b) Unpaid Salary for 6 months Kshs.90,000

c) Notice Kshs.15,000

d) Leave 75.25 days Kshs.43,414

Total Kshs.253,414

The respondent shall also pay costs for each claimant and the decretal sum shall attract interest at court rates.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE