



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 235 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 13th December, 2018)

HENRY WASIKE TUMBU.....CLAIMANT

-VERSUS-

CHINA JIANGXI INTERNATIONAL (KENYA) LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed a Memorandum of Claim dated 20th February, 2014, where the Claimant states that he was wrongfully, unlawfully and maliciously terminated from the Respondent's employment.
2. He states that he was employed by the Respondent since July 2012 as a general labourer until September 2013 when he was maliciously, wrongfully and unlawfully dismissed from the Respondent's employment with no reason and/or proper explanation contrary to the Employment Act, terms of service and other relevant statutes.
3. The Claimant further states that on 30th September, 2013 while on duty, he was abruptly served with a termination letter. He avers that he was not accorded any written and/or oral reason for his termination.
4. The Claimant avers that prior to his termination he was never issued with a warning letter and/ or show cause notice on any impropriety hence his contention that his termination was unlawful, malicious and wrongful. He further states that he was not given any layoff notice as alleged by the Respondent.
5. The Claimant further avers that he did not resign from the Respondent's employment as alleged in his termination letter. He goes on to state that at termination he was forced to sign the acknowledgement of no further claims against the Respondent despite the fact that he had not received any of his final dues.
6. In his Memorandum of Claim the Claimant prays for the following:-
 - a. One Month's salary pay in lieu of notice of Kshs. 416 per day which amounts to Kshs. 12,500.*
 - b. Unpaid leave of two months for 2 years worked which amounts to Kshs. 25,000.*
 - c. Service for 2 years @ ½ monthly salary Kshs. 6,450 which amounts to Kshs. 12,500.*
 - d. Unpaid monthly house allowance @ Kshs. 2,740 per month for 2 years which amounts to Kshs. 63,760.*
 - e. 12 months compensation for unlawful termination @ Kshs. 12,500 per month which amounts to Kshs. 150,000.*
7. He also claims the Court finds the actions by the Respondent of arbitrarily terminating his employment be unlawful, null and void. He also claims costs of the suit as well as interest thereon from the date of filing the Claim.
8. The Respondent in its Memorandum of Defence dated and filed in Court on 11th March, 2014 avers that it did not dismiss the Claimant as indicated in his Memorandum of Claim. The Respondent avers that the Contract of Service was for a specific period of time further that when the project came to an end, the contract automatically followed suit.

9. The Respondent further states that it did through an internal memo dated 8th August, 2013 and a subsequent Memo of 2nd September 2013, informed all its employees affected of this position.

10. The Respondent avers that the Claimant was served with a contract termination letter on 30th September, 2013 following the internal notice to all employees that the project would come to an end.

11. The Respondent further avers that the Contract of employment was terminated lawfully and therefore the Claimant is not entitled to prayers as highlighted in his Memorandum of Claim. The Respondent further urges the Court to dismiss the Claim with costs.

Evidence

12. The Claimant gave his evidence on 6th December, 2016. He was later recalled upon Application by the Respondent to re-open the case to cross examine on 8th February, 2018. The Claimant (CW1) in his testimony stated that he was employed by the Respondent in July 2012 as a builder. He further stated that he worked for 1 year & 2 months. That his services were terminated in September 2013.

13. It was his evidence that he was earning Kshs. 416 per day. He further states that he was not given any notice and/or reason for termination.

14. CW1 in his evidence stated that during the subsistence of his employment they were not allowed to go on leave and no leave allowance was paid. He further states that he was not paid for NSSF despite the fact that the deductions were made.

15. On cross-examination, CW1 stated that he did not see any notice from the Respondent to all workers informing them that the project would be coming to an end.

16. On further cross-examination, the Claimant stated that he was working at ICPAK building and the same building was not completed in August 2013. The building was infact completed in December 2013. It was further his evidence that once the projects were done the Respondent would move them to other projects.

17. In further cross-examination, CW1 stated that he was injured in the cause of his duty and was treated. However, the Respondent Company failed to settle the hospital bill. It was after this incident that the Claimant states that he was dismissed.

18. The Claimant further avers that he was not paid his salary for August 2013 and that he was never paid for overtime.

19. The Respondent did not call any witness. The Respondent through its Advocates urged the Court to rely on its Statement of Defence and all documents filed in this Claim.

20. The Respondent urged the Court to dismiss the instant Claim with Costs.

Submissions

21. The Claimant submitted that before termination he was never notified by the Respondent of the reasons of such an abrupt action. The Claimant further submitted that despite the Respondent being served with a demand letter upon his termination, the Respondent have failed to make good the demand.

22. It is submitted that the Respondent did not comply with the provisions of Section 41 (1), 43(1), 44(4), 45(2), 45(4) and (5) of the Employment Act while terminating the Claimant.

23. The Claimant further submitted that the Respondent's actions are in breach of Article 47 of the Constitution which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

24. It is submitted that the Respondent has failed to prove the reason for terminating the Claimant as provided for under Section 43(1) of the Employment Act and Article 47 of the Constitution of Kenya, 2010 and as such the termination is deemed unfair. The Claimant relies on the case of **Bernard Ngugi v G4S Security Services Kenya Limited (2013) eKLR** in which it was observed as follows:-

“Accordingly, it is the opinion of the Court that the Employment Act, 2007 envisages serious due process of justice on the part of the employer in event of alleged misconduct, poor performance or seven physical incapacity of an employee. It is not a casual undertaking that can lead to termination of employment without adequate explanation of the circumstances and the reasons taken into account before making the termination decision. To put emphasis on the seriousness of the decision to terminate, Section 78 of the Act provides that an employer shall notify the termination of every employment and of each lay off of a person in writing to the nearest employment and service office within two weeks of the termination or lay-off.”

25. On his entitlements to the reliefs sought the Claimant submitted that he is entitled to his prayers as drawn in the Memorandum of Claim. The Claimant relies on Sections 31 and 35(5) of the Employment Act, 2007.

26. The Claimant further submitted that the claim be allowed as drawn.

Respondent's submissions

27. It is submitted by the Respondent that the Claimant was a casual labourer for a specific project for a fixed time. The Respondent further submits that the Claimant was aware of this fact.

28. The Respondent states that during the course of the Claimant's contract while working at ICPAK complex they did serve all employees with a memo dated 8th August 2013 notifying all employees of the lay-off and that all terminal dues will be calculated and paid off. It is submitted that this is in line with Section 18 (5) of the Employment Act which provides that:-

“Upon termination of a contract of service-

a. By effluxion of time, it shall be the duty of the employer to ensure that the employee is paid the entire amount of the wages earned by or payable to the employee and of allowances due to him as have not been paid.”

29. It is the Respondent's submission that the Claimant's employment came to an end by effluxion of time and that all his dues were paid at the point of termination. The Respondent relies on the authority of **Samuel Chacha Mwita vs Kenya Medical Research Institute (2014) eKLR** where it was held as follows:-

“fixed term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) constitute a dismissal, as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer. There is a definite start and a definite end. Thus, the contract terminates automatically when the termination date arrives; it is no longer a fixed term contract.”

30. The Respondent further submits that parties to a contract have the freedom to enter into contracts of their choice. The Respondent relies on the case of **Rajab Barasa & 4 Others v Kenya Meat Commission (2016) eKLR** which it is stated that:-

“Where the intention of the parties is to have the contract for a fixed term, upon expiry, either party can opt out or invite the other to a new contract as the previous one has ended. The relationship must be renewed under a new contract. Otherwise there would be no need for a fixed term contract. This is not a departure from the Employment Act as the law recognises the freedom of the parties to enter into fixed term contracts, seasonal contracts or in some cases piece-work contract. Where the intention of the parties is to rely on any other document in terms of how the employment relationship is to be governed, such must be set out under the written or fixed term contract. To hold otherwise would be to defeat the very purpose of such a contract.”

31. The Respondent further submits that the employment of the Claimant came to an end, once the project he was working on came to an end and to assert otherwise is to depart from the intention of the parties to the contract. The Respondent relies for emphasis on the authority of **Samuel Chacha Mwita vs Kenya Medical Research Institute (2014) eKLR**.

32. It is submitted that in the circumstances the Claimant's termination of employment was fair as the Respondent followed due procedure as stipulated by the terms of the employment and the laid down laws in the Employment Act, 2007.

33. The Respondent further submits that the Claimant is not entitled to any of the reliefs he seeks as all dues were settled when the contract came to an end.

34. The Respondent submits that the claim is not genuine and should fail as it lacks merit since in his pleadings the Claimant states he worked for a period of 1 year, yet in tabulating his dues he claims for 2 years. Further that an employee whose services have terminated is not entitled to general damages. The Respondent relies on the case of **Kenya Ports Authority v Edward Otieno (Civil Appeal No 120 of 1997 (Unreported)** as it was quoted in **Walter Musi Anyanje v Hilton International Kenya Ltd & Another (2008) eKLR**.

35. It is the Respondent's submission that the contract terminated when the project was completed and that the Respondent cannot be forced to retain the services of the Claimant yet it does not need them.

36. I have examined evidence adduced before me plus the submissions. It is noteworthy that the Respondent never called any evidence and therefore the Claimant's case remains uncontroverted.

37. In Civil of Appeal No. 140/2008 at Nairobi **JJA Visram, Mwilu (as she then was) and Otieno Odek** rendered themselves as follows:-

“in Der Raj Sharma vs Reginam 1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification and that the few exhibits should be confirmed to articles which have been fairly probed and admitted in evidence. In the Nigerian case of Michael Hausa vs the State (1994) 7-8 SCANJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial Judge and the Judge cannot use the document as evidence”.

38. Thus, where a party fails to call any evidence and decides to rely on Pleadings filed, a witness should be available to adopt the said Pleadings as his evidence as Pleadings are not evidence.

39. From the Claimant's evidence, he avers that he was terminated without any Notice to Show Cause or any disciplinary hearing and there is no reason given for the termination. In the circumstances, the termination of the Claimant was unfair and unjustified in terms of Section 45(2) of Employment Act 2007 which states as follows:-

2. "A termination of employment by an employer is unfair 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:-

i. related to the employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure..".

40. I therefore find for the Claimant and enter judgement for him as follows:-

1. 1 month salary in lieu of notice = $416 \times 30 = 12,480/=$.

2. Unpaid leave for 1 year = 12,480/=.

3. Unpaid house allowance for 14 months = 15% of 12,480x 14 = 26,208/=.

4. 8 months' salary as compensation for unlawful termination= $8 \times 12,480=99,840=$.

Total = 151,008/=

5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 13th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for the Parties