



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 2076 OF 2011**

**JAPHETH KITHIA MUNYA.....CLAIMANT**

**-VERSUS-**

**DODHIA PACKAGING LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for terminal benefits plus compensation for unfair termination of the Claimant's contract of service by the respondent on 2.7.2011. In total he claims Kshs.528,410 plus costs and interest. He also prays for a certificate of Service to be issued to him.
2. The respondent denies the alleged unfair termination of the claimant's contract of service and avers that the fixed terms contract lapsed after an effluxion of time. She further avers that she paid the claimant all his rightful dues after the lapse of his contract and prayed for the suit to be dismissed with costs.
3. The suit was heard on 16.5.2018 when the claimant testified as Cw1 and the respondent called her HR Manager to testify as Rw1. Thereafter both parties filed written submissions on 12.9.2018 and 5.10.2018 respectively.

**Claimant's case**

4. The claimant testified that he started working for the respondent in 2000 and continued until 6.6.2011 earning Kshs.8,761 per month. He further testified that on 6.7.2011 he attended work as usual but he was locked out without any prior notice and was verbally dismissed.
5. He further testified that on 28.6.2011 he was paid Kshs.10,417 by the Deputy Personnel but he never signed for it. That again, on 11.8.2011 he went to the company and he was given a letter dated 11.8.2011 to sign at the gate. He however denied ever signing any short term contract dated 2.1.2011. He contended that when he refused to sign the short term contract he was dismissed. That the reason why he refused was because he was going to lose his years of service.
6. He produced Employment Card, payslips for April – June 2011 and NSSF Statement showing that the respondent remitted his NSSF contributions from 2007 – June 2011. That NSSF was not being remitted until he demanded refund of the sum deducted from his salary from 2000 – 2007.
7. He contended that from 2000, he worked without any written contract and he was to work until retirement. He denied ever seeing the contract dated 3.1.2011 and denied the signature thereon. He contended that the said contract was given to him at the gate on 2.6.2011 but he declined to sign. He contended that on the 2.6.2011 he found the Manager Mr. Sammy Nkaye at the gate and he read names of employees who were not going to get work as per the instructions from the Management.
8. In conclusion, the claimant contended that he was assigned three payroll numbers as shown in the payslip being 00627, 023 and 027. He prayed for 3 months salary in lieu of notice, overtime and service pay for 11 years as pleaded in the claim.

**Defence Case**

9. Rw1 is Mr. Vincent Okoth Akulo. He joined the respondent as the HR Manager after the claimant had left the company. He however testified that he had interacted with the claimant's personnel records and noted that he was employed under a fixed term contract of 6 months from 2.1.2011 to 2.7.2011. That his last day at work was to be 2.7.2011 unless the contract was renewed. That the contract was not renewed and the claimant was paid service pay for the said contract period, leave earned plus overtime worked totalling to Kshs.10,417 for which he

signed a settlement agreement. That the overtime paid was for Kshs.5,125 for the said contract period of 6 months. He denied claim by the claimant for more dues.

10. On being shown NSSF statement for the claimant, Rw1 admitted that the respondent was reflected thereon as the claimant's employer from January 2000. He however maintained that the claimant signed the contract dated 3.1.2011 because the signature thereon resembled the signature he had signed elsewhere. He further admitted that the settlement agreement never referred to any attached Breakdown of payment.

### **Analysis and determination**

11. After careful consideration of the pleadings, evidence and submissions presented to the court, there is no dispute that the claimant was employed by the respondent. The issues for determination are:

- a) Whether the claimant was employed from 2000 to June 2011 under a term less contract or from 2.1.2011 to 2.7.2011 under a fixed term contract.
- b) Whether the said contract was unfairly terminated by the respondent or it lapsed by effluxion of time.
- c) Whether the claimant is entitled to the reliefs sought.

### **Duration of Employment**

12. The claimant contends that he worked for the respondent without any written contract from 2000 to June 2011. That from 2000-2007 he was deducted NSSF contributions but the same was not remitted and after demanding for refund, the employer started remitting the contributions to the NSSF. Rw1 has however maintained that the respondent only employed the claimant for 6 months in 2011.

13. I have carefully perused the NSSF statement produce and confirmed that the respondent started remitting NSSF contribution for the claimant from 16.4.2007 and did so without any break until June 2011. It is therefore not true what Rw1 alleged that the clamant was only employed by the respondent from 2.1.2011 to 2.7.2011. The truth is that the parties herein were in an employment relationship as early as April 2007 as evidenced by the NSSF statement produced by the claimant.

14. The foregoing view has found support from the defence counsel who has admitted that the claimant was initially employed without a written contract but that engagement was terminated and a new contract entered in writing from 2.1.2011 for 6 months subject to renewal upon mutual agreement. The claimant has however denied ever signing the said contract and averred that the contract was shown to him on 2.6.2011 at the gate and when he refused to sign, he was terminated thereafter. He explained that his reason for refusing to sign the contract was the risk of losing benefits for the years served before then.

15. The burden of proving that the claimant signed the fixed term contract on 2.1.2011 was upon the respondent to prove that the claimant signed the written contract. However, that burden has not been discharged because the person who witnessed the claimant signing the contract was not called to testify. Secondly, after the claimant disowned the signature appearing on the contract, the respondent did not call any Expert opinion from a Document Examiner to confirm that the disputed signature belongs to the claimant. Consequently, I return that the fixed term contract produced by Rw1 was never signed by the claimant. Even at a glance, the said signature does not resemble the signature appearing on the verifying affidavit filed with the statement of claim. It is my finding based on the NSSF statement that the claimant was employed without any written contract from 16.4.2007 to the 6.7.2011 when he was locked out.

### **Unfair Termination or Expiry of Contract**

16. Flowing from the foregoing finding that the alleged fixed term of contract was never signed by the claimant, I find that the claimant's contract of service never lapsed by effluxion of time on 2.7.2011 but it was unfairly terminated by the respondent on 6.7.2011. The foregoing opinion is fortified by the unrebutted evidence by the claimant that he was locked out and summarily dismissed verbally without any prior notice. That the Manager Mr. Sammy Nkaye met him and others at the gate and read the names of the people who were no longer going to get work and upon the claimant's enquiry about the termination, the Manager responded that he was just given the names without further details.

17. Under section 45(2) of the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and the procedure followed was fair. In this case the respondent never adduced any evidence to prove that she terminated the claimant's contract for valid and fair reason or after following a fair procedure. All what Rw1 stated was that the claimant was under a fixed term contract which expired.

18. Valid and fair reason is one, which relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure on the other hand refer to the process of explaining to the employee the reason for the intended termination and thereafter according him a chance to defend himself before the termination as required by section 41 of the Employment Act. Consequently, I return that the termination of the claimant's employment through lockout on 6.7.2011 was unfair within the meaning of section 45 of the said Act.

### **Reliefs**

19. Under section 49 of the Employment Act, I award the claimant one month salary in lieu of notice plus 10 months' salary compensation for the unfair termination of his contract of service. In awarding the said reliefs, I have considered the length of period served from 2007 to 2011 and also the fact that he never contributed to the termination through misconduct.

20. The claim for service pay is however dismissed because the claimant has produced NSSF statement showing that the employer regularly remitted his NSSF contributions from 2007 – June 2011. He is therefore disqualified from claiming service pay by dint of section 35(6) of the Employment Act.

21. The claim for overtime worked in June 2011 is dismissed for lack of evidence. Finally, the claim for refund of unremitted NSSF contributions at the rate of Kshs.400 per month is also dismissed for lack of evidence that the said money was indeed deducted from his salary. In addition, the claim is statute barred by dint of section 90 of the Employment Act which limits the time within which to sue for a continuing injury to 12 months after the cessation of the injury. In this case, the alleged failure to remit monthly NSSF contribution ceased in April 2007 after the claimant demanded a refund of the unremitted contributions and the respondent started remitting the same till June 2011. Consequently, I return that the claim for the unremitted contributions expired 12 months from 16th April 2007, which was 16th April 2008.

**Conclusion and disposition**

22. I have found that the claimant has proved that he was employed under a verbal contract from April 2007 to 6.7.2011 when he was locked out. I have further found that the said lock out amounted to unfair termination of the claimant’s contract by the respondent. I therefore enter judgment for the claimant as follows:

(a) Notice ..... Kshs. 8,761.00

(b) Compensation..... Kshs.87,610.00

**Kshs.96,371.00**

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He will also have costs and interest from the date hereof. The award will also be subject to statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 7th day of December, 2018**

**ONESMUS N. MAKAU**

**JUDGE**