



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO. 1433 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 31st May, 2017)

STEPHEN IRUNGU MWANGI..... CLAIMANT

VERSUS

JOSPHAT NJOROGE MWANGI..... ..RESPONDENT

JUDGMENT

1. Before the Court is a Memorandum of Claim where the Claimant prays for orders against the Respondents for the following:

1. Respondents to pay the Claimant gratuity (service) , leave and notice as quantified below:

(i) Gratuity service $333.33 \times 18 = 5999.94 \times 7 \dots$ Kshs 41,999.58

(ii) Payment in Lieu of Notice Kshs. 10,000.00

(iii) Payment in Lieu of Leave

(Seven years one month salary x 7) Kshs. 70,000.00

(iv) Public Holidays (9 Public Holidays =

Kshs 666 x 7)Kshs 4,666.70

(v) Off duty days worked and not paid (48 days per

year and 336 days for 7 years x 666)..... Kshs 223,776.00

(vi) Leave travelling allowance(Kshs.1600 x 7 years) .Kshs 11,200

(vii) Overtime (12 Hours per day, overtime 4 hours per day,

payment per hour 41.70 x 2 for extra hours 83.40 x 4333.60 x 30

=10,008 x 12,120,096 x 7).....Kshs 840,672.00

(viii) House Allowance (Kshs. 2,800 per month x 12

= 30,000 x 7Kshs 201,000.00

(ix) Thirteen worked days and not

paid in October 2012 (333.33 x 13) Kshs 4333.29

Total ClaimKShs 1,416,647.57

2. Reasonable claim for unfair termination of employment.

3. Respondent to pay the costs of this suit with interest.

4. Any other order/relief as the Honorable Court may deem fit.

Facts of the Claim.

2. The Claimant was employed by the Respondent from 1st May 2005 as a Caretaker and Guard at the Respondent's premises known as Plot Number 36/V11/135 Eastleigh Section 7 Nairobi within the County of Nairobi with a starting salary of Kshs.3,500.00 per month.

3. The Claimant was awarded various salary increments in 2005 October to Kshs.4,000.00; October 2007 to Kshs 6,000.00; October 2008 to Kshs 7,000.00 and in February 2010 to Kshs 10,000.00 per month respectively.

4. He conducted his duties diligently even taking on additional duties as messenger without extra payments. He requested for salary increment which request was turned down and was subsequently verbally dismissed in October 2012.

5. The Claimant states that he was given no warning, reason or notice, and he reported the matter to KUDHEHIA through the assistance of Mr. Munyaro Jacob the then acting Secretary General. Demand notices were made and the Respondent paid Kshs 40,000.00 via cheque to the Claimant without any indication as to the nature of the payments.

6. The Respondents have filed a Reply to Claim dated 28th October 2013, where they deny the claim and its averments therein.

7. They deny that the Claimant was employed by the Respondent and state that he was employed by other persons and that the Respondent was just an agent of the Claimant's employer. They deny salary increment putting the Respondent to strict proof thereof.

8. The Respondents deny that he assigned the Claimant extra duties and further deny that the Claimant ever sought salary increments. The Respondents deny verbally dismissing the Claimant stating that he left employment at will despite the fact that he had not given his employer due notice.

9. Further, that it was the Claimant who sought to resign and search for employment elsewhere, which was in contravention of the implied terms and conditions governing his employment with the Respondent. They state that he on numerous occasions failed to perform duties allocated to him by the Respondent.

10. The Respondent states that the payment of Kshs 40,000.00 and an additional Kshs 10,000.00 made out to the Claimant was done in settlement of the matter, he has not received further demand notices, and he does not owe the Claimant any payment or dues.

11. The Respondent states that the allegations stated within the claim are false and that the Claimant was properly and lawfully terminated.

12. They urge the Court to dismiss the claim.

13. In his written submissions, the Claimant states that there are various contradictions in the Respondent's Reply to the Memorandum. He submits that while the Respondent states that he was not an employer of the Claimant, he goes on to point out various duties assigned to him and alludes to his behavior being in contradiction to implied terms and conditions governing his employment.

14. Further, the Claimant points out that the Claimant's services were not needed after several complaints but later on goes on to state that he left at his own will.

15. The Claimant submits that his dismissal without payment of dues is in contravention of Article 41 (1) and (2) which guarantees that every person has the right to fair labour practices, fair remuneration, reasonable working conditions, to form, join or participate in activities and programs of trade unions and to go on strike. He was never given leave, or off days. He worked through holidays and was assigned extra duties without pay.

16. The Claimant further submit that his treatment was in contravention of Article 47(2) of Constitution which asks that a person is given a reason for administrative action taken against him, moreover, Article 50(1) which gives a right to hearing was also violated.

17. The Claimant submits that the Respondent was in violation of the Employment Act. He submits that Section 27(2) entitles him to one rest day; Section 2(1) entitled him to leave of not less than twenty one working days of leave with full pay.

18. The Claimant also submits that the Respondent violated Section 31(1) which states that he is entitled to reasonable housing accommodation and Section 36 which states that where termination shall be without notice, payment of remuneration which would have been earned by that other party.

19. They submit that in Section 43(1) it is required that where there are claims arising out of termination of a contract, the employer shall be required to prove reasons for termination and where they fail to do so, the termination is deemed unfair. Moreover, Section 44(1) also stipulates that summary dismissal shall take place when an employer terminates the employment of the employees without notice or with less notice to which the employee is entitled by statutory provisions or contractual term.

20. The Claimant also submits that Section 41(1) where the employee is required to explain to in a language he understands the reasons for termination was also ignored by the Respondent.

21. In support of his case, the Claimant relies on **Industrial Court of Kenya at Nairobi Cause No 758 of 2012 Milkah Khakayi -vs.- Sanstorm (Africa) Limited (2014) eKLR** Judgment by Linnet Ndolo J.:-

The Learned Judge made a finding in favour of the Claimant that: **“there was no evidence of the Claimant having been taken through a disciplinary process a kin to what is prescribed in Section 41 of the Employment Act and I therefore find that in terminating the Claimant's employment the Respondent failed to follow dues process.”**

It was further held by the Learned Judge **“overall I find the termination of the Claimant's employment unfair for want of substantive justification and procedural fairness and award her 4 months' salary in lieu of notice. In view of my finding on the legality of the termination of the claimant's employment her half salary withheld during suspension period is payable”.**

22. They ask the Court to draw similarities of this decided case and the Claimant's case, and grant the claim as prayed.

23. The Respondent has filed written submissions dated 24th January 2017 where he relies on his pleadings and states that the Claimant was never in his employment but only engaged with him on a day to day basis.

24. He submits that the Claimant has failed to prove that a relationship existed, that the length of their engagement was for 7 years and states that via his testimony, it was on and off basis for 5 years.

25. He submits that Section 47 (5) of the Employment Act is clear on unfair termination as it states that the burden of proving such termination rests on the employee while that of justifying that the termination was fair rests on the employer. They cite the matter; **George Onyango Akuti vs G4S Security Services Kenya Ltd [2013] eKLR** where the Court rendered itself thus:

“an employee therefore has burden of proving that an unfair termination of employment has occurred. Unfair termination could be because no notice was given as required by Section 35(1); no reasons were given or because the employee was not afforded a hearing as required by Section 41 of the Act. The reasons can be various based either on failure to comply with the statute or the terms of the actual employment contract...”

26. They submit that the Claimant has not discharged the burden that the law places on him in a complaint such as one has one initiated in this matter.

27. As to the remedies sought, the Respondents submits that although the Claimant has pleaded for gratuity and overtime, he has failed to prove them as he did not refer to them in his evidence and the same should be dismissed.

28. They submit that similarly, the payment in lieu of leave, public holidays and off duty day worked and not paid is yet to be proved. The same applies to overtime worked and house allowance.

29. As to reasonable compensation for unfair termination, the Respondent submits that the learned Judge ought to take into consideration the factors as set out in Section 49(4) of the Employment Act 2007.

30. They submit that the said Section stipulates that the Claimant was wholly responsible for the breakdown of whatever relationship existed between the parties as the Court should exercise its discretion against making any award as guided by Section 49(4)(b) of the Employment Act 2007.

31. The Section also states that making an award under this head would not be justified given the nature of the Respondent’s engagement of the Claimant was not such as to create a reasonable expectation that the relationship was to last longer than a day at a time. This factor is found at Section 49(4) (f) of the Employment Act 2007.

32. The Respondent was candid in his testimony that he would give work to the Claimant if and when work was available. They submit that it is unreasonable for the Claimant to expect their relationship to have continued into the future.

33. They further submit that the Court should consider the Claimant’s age and that he can easily get another job.

34. In conclusion they submit that the Claimant has failed to show the existence of an employment relationship between them and that he was unfairly terminated.

35. They ask the Court to dismiss the claim with costs.

36. Having considered evidence on record plus submissions filed by both parties, I find the evidence and submissions of Respondent contradictory in that the Respondent is double speaking. On one hand the Respondent states in their evidence that there was no employment relationship between him and the Claimant. He also avers that he gave Claimant work on contract basis and used to pay him at times weekly and at times monthly and he worked from 2005.

37. The Respondent also stated that he paid 50,000/= to the Union for Claimant to finalize the matter and they had an agreement dated 20.11.2012 in absence of the Claimant.

38. In his statement of reply to claim, the Respondent has admitted that Claimant was in his employment and chose to resign. It is therefore this Court's finding that as per the Respondent's own paragraph 6 that he employed Claimant and cannot state there was no employment contract between him and Claimant.

39. Given this finding, it is not clear how the relationship then ceased. There was no written appointment letter and there is no dismissal letter. The Respondent has averred that the Claimant resigned but there is still no resignation letter.

40. The Claimant had averred that he was verbally dismissed on 31st October 2012 without any reason, warning or notice. The fact that the Respondent paid 40,000/= to the Claimant is proof of the obligation.

41. Having found as above, I find as per Section 10(7) of Employment Act where there is no written contract, the onus of proving any term of the contract lies on the employer.

42. In that respect, I find that the Claimant worked for the Respondent and was dismissed for no reason and without following due procedure as envisaged under Section 43 and 41 of Employment Act respectively.

43. Under Section 45 of Employment Act 2007:

(1) No employer shall terminate the employment of an employee unfairly.

(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.

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

(4) A termination of employment shall be unfair for the purposes of this Part where:

(a) the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider:

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected

with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(e) the existence of any previous warning letters issued to the employee.

44. In the circumstances, I find for Claimant and I award him as follows:

1. 1 months' salary in lieu of notice = 10,000/=;

2. Service pay 15 days pay for each year worked = $\frac{1}{2} \times 10,000 \times 7 = 35,000/=$;

3. 1 year leave = 10,000/=;

4. House allowance of 15% of 10,000 x 7 years = $1500 \times 12 \times 7 = 126,000/=$;

5. 6 months salary as damages for unlawful termination = $6 \times 10,000 = 60,000/=$;

Total 241,000/=

6. Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Read in open Court this 31st day of May, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Obutu holding brief for Ashiruma for Claimant

No appearance for Respondent