



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI
CAUSE NO. 172 OF 2016

DAVID KELLY MUTAMBU.....CLAIMANT

VERSUS

KENYA VEHICLE MANUFACTURERS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 29th September, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 12.08.2013 through Nderitu & Waturu Associates. The claimant prayed for judgment against the respondent for:

- a. Declaration that the termination of the claimant's employment was unlawful and violated the claimant's rights to fairness and fair labour relations as provided for under Article 50 of the Constitution and the Employment Act.
- b. Special damages amounting to Kshs.471, 900.00.
- c. General damages for unfair and wrongful termination of the claimant arising from the dismissal equivalent to 12 months' salaries.
- d. Severance pay for the years of service in employment.
- e. An order for issuance of a certificate of service for 11 years of employment.
- f. Cost of the suit and interest at court rates in (b), (c), and (d) above.
- g. Any other relief the court may deem fit to grant.

The memorandum of response was filed on 29.09.2016 through Dickens M. Ouma, Legal officer, Kenya Federation of Kenya Employers. The respondent prayed that the honourable court finds that the claim has no merit and the same be dismissed with costs.

The claimant's case is that he was employed by the respondent sometimes in 2004 on 3 months' renewable contract. The claimant's further case is that the 3 months' term contract was renewed consecutively until 14.10.2015 when the claimant was involved in an industrial accident. The claimant filed a civil suit in the Magistrate's Court in Thika for the injury claims and the matter was settled. The claimant's case is that upon suing the respondent in the suit for injury claims, he was terminated from employment.

The claimant testified that he served on renewable 3 months' contracts from 2004 up to 2009 without a break. Thereafter, he served without a break and was paid at every end month until he got injured on 14.10.2015. It was his testimony that his last monthly pay as at November 2015 was Kshs.36, 300.00. In January 2016 he was paid Kshs.195, 000.00 for his injury claims and was terminated from employment on 04.01.2016. The claimant's evidence was that the accident was on 14.09.2015, he did not work in October and November 2015 on account of ill health. In December 2015 he was assigned light duties and on 04.01.2016 he was locked out by the respondent. In November 2015, he never worked but was paid Kshs.8, 333.17 in cash and without pay slip.

The respondent's case is that the claimant was a piece rate worker. He was an experienced fitter and welder engaged as and when the respondent got a contract to build motor vehicle body. The respondent's further case was that the claimant's pay was based on the number of motor vehicle bodies he was assigned to work on. After the accident he failed to avail himself for assignment of work and therefore, he was never dismissed from the respondent's employment.

The **first issue** for determination is whether the claimant was in the respondent's employment as at the time of termination or separation. The evidence is clear. First, the claimant was compensated for the injuries sustained at work on the basis that he was the claimant's employee. Second, the payslip dated November 2015 gives the claimant's staff number as 31, 217 with a pay of Kshs. 8,333.17. The statutory deductions included NHIF and NSSF. RW1 testified that the claimant was an accomplished worker and he served in other departments. RW testified that for piece rate workers, the pay varied from month to month.

The court has considered the clear evidence and returns that the claimant was clearly the respondent's employee and parties were in employment relationship as envisaged in Employment Act, 2007. Piece rate terms, if at all existed between the parties, in the court's opinion, served the sole purpose of determining the claimant's pay but did not thereby vitiate the employment relationship between the parties. Thus, the court returns that under section 18 of the Employment Act, 2007, the law reckons when wages are due in circumstances whereby a contract of service is entered into under which a task or piece work is to be performed by the employee. The court returns that piece rate or piece work is an arrangement where the contract of service provides for payment based on a task or piece of work to be performed by the employee and as such, does not vitiate the existence of the contract of service but reinforces the existence of the employment relationship. Parties in such arrangements are expected to agree upon other terms of service such as service pay or gratuity, tenure of contract and other terms of employment failing which, the court holds that the relevant minimum statutory terms and conditions of service will apply.

In that regard the court follows the judgment of the Court of Appeal (Makhandia, Ouko and M'Inoti JJ.A.) in **Krystalline Salt Limited –Versus- Kwekwe Mwakele & 67 Others [2017]eKLR** thus, **“We think however that the determination should have been made under section 18(1)(b) as read with section 35(1) (c)...A piece rate worker would, in terms of these provisions be entitled to a notice of 28 days before termination of service. These are some of the reforms in employment relationship introduced by Employment Act. Where an employee alleges that termination was unfair the evidential burden of proof shifts to the employer to demonstrate the existence of any of the circumstances enumerated under section 45. Relevant to the matter before us, the appellant was expected to prove that the reason for termination was valid, that the reason was fair in so far as it related to the respondent's conduct, capacity or compatibility. The appellant was similarly required to show that the termination was done in accordance with fair procedure.”**

The **second issue** for determination is whether the claimant's employment was unfairly terminated by the respondent. First, the court has considered the evidence by the claimant's supervisor RW1 who confirmed that the claimant was a good worker and he served in fitting and welding section as well as the respondent's other departments. Thus, the court returns that after the last 3 months' renewable contract sometimes in 2009, the claimant continued in the respondent's service without a break and upon the minimum terms and conditions of service under the Employment Act, 2007 or such better terms of service as the parties may have agreed upon. It is the respondent's case that consequential to the injury the claimant became unavailable for assignment of duties. The court finds that line of evidence incredible. In

particular the claimant had been paid in November long after the injury. The court finds that the claimant's employment was terminated by the respondent in January 2016 when the respondent locked out the claimant and as per the claimant's testimony. The court returns that there is no reason to discredit the claimant's case that the reason for the lock out related to the respondent's reaction to the claimant's genuine and valid injury claims. The court returns that the reason for termination was unfair as per section 46 (h) of the Employment Act, 2007 thus, **"46. The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty - ... (h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or..."** Thus, the court returns that the reason for termination has been established to have been unfair and further, it was not genuine as per section 43 of the Employment Act, 2007 – and the court returns that the respondent's reason that the claimant failed to report for assignment of duty following the industrial injury was not a valid or genuine reason.

The court has considered the otherwise established unfair reason for termination and the long period the claimant had served in the respondent's employment. It is clear that the claimant did not contribute to the termination of his employment. Accordingly, the court returns that the claimant is entitled to the maximum 12 months' salaries under section 49 (1) (c) of the Employment Act, 2007. His last pay was Kshs. 8,333.17 per month and per the pay slip dated November 2015 and is awarded **Kshs.99, 998.04**. He is awarded one month pay in lieu of notice making **Kshs. 8,333.17**. The claimant was in unbroken 11 years' service and under section 28 of the Employment Act, 2007, he is awarded 11 months' pay for annual leave making **Kshs.91, 664.87**. The claimant is entitled to the certificate of service but is not entitled to severance pay as the same was not justified.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a. The declaration that the termination of the claimant's employment by the respondent was unfair.
- b. The respondent to pay the claimant **Kshs.199, 996.08** by 01.11.2017 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
- c. The respondent to deliver to the claimant a certificate of service for the entire period of service (2004 to 04.01.2016) being 11 years, by 01.11.2017.
- d. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 29th September, 2017.**

BYRAM ONGAYA

JUDGE