



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 44 OF 2014
(Originally Nakuru High Court Civil Case No. 287 of 2010)

LUKA KIMAIYO CHEPKONGA

CLAIMANT

v

KENYA POWER & LIGHTING CO. LIMITED

RESPONDENT

JUDGMENT

1. In a Plaintiff filed before the High Court on 2 November 2010, one Duncan Kariuki Kinyanjui was named as the Plaintiff. The verifying affidavit to the Plaintiff however had one Luka Kimaiyo Chepkonga named as the Plaintiff. The Summons to Enter Appearance listed Luka Kimaiyo Chepkonga as the Plaintiff.
2. The Plaintiff and Summons were served upon Kenya Power & Lighting Co. Ltd (Respondent) and it entered appearance through the firm of Wamaasa & Co. Advocates. The Plaintiff was named as Luka Kimaiyo Chepkonga.
3. The Defence filed on 16 November 2010 also named the Plaintiff as Luka Kimaiyo Chepkonga.
4. All subsequent documents filed listed the Plaintiff as Luka Kimaiyo Chepkonga and it is a person who introduced himself as Luka Kimaiyo Chepkonga who testified as the Claimant.
5. Because the Respondent did not raise any issue regarding who the true/correct Claimant was, the Court will assume that Luka Kimaiyo Chepkonga is the true Claimant and the naming of Duncan Kariuki Kinyanjui in the Plaintiff as the Plaintiff was a typographical mistake.
6. The Cause was transferred to this Court pursuant to an order made on 21 February 2014 and after several appearances, the hearing was conducted on 11 November 2015.
7. The Claimant testified while the Respondent opted not to call any witnesses. The Claimant filed written submissions on 3 December 2015, while the Respondent filed its submissions on 16 December 2015.
8. The Court has considered the pleadings, evidence and submissions and adopts the agreed issues as filed by the parties on 3 July 2012, and will examine and address the same as identified.
9. The Court will give an outline of each party's respective case as pertains to each of the identified issues rather than set out the same out generally.

Is suit in breach of section 81 of the Employment Act or not?

10. This was the first agreed issue.
11. The Defence as advanced did not make any reference to section 81 of the Employment Act. The said section provides for offences under the Act. Rather, the section mentioned in the Defence was section 87 of the Employment Act, 2007.
12. The position advanced by the Respondent in paragraph 7 of the Defence was that the High Court lacked jurisdiction as the cause of action related to a jurisdiction granted to this Court by dint of

section 87 of the Employment Act, 2007.

13. With the transfer of the suit to this Court, the question arising under section 87 of the Employment Act, 2007 need no evaluation/determination by this Court.

Is the Plaintiff's suit time barred?

14. According to the Respondent, the cause was statute barred in terms of section 90 of the Employment Act, 2007.

15. In paragraph 7 of the Plaint, the Claimant pleaded that his employment was terminated on or around 2 November 2007 without legal justification.

16. During testimony, the Claimant stated that he received a letter informing him of the termination of his services on 2 November 2007. He produced a copy of the letter.

17. The cause of action therefore accrued or arose on 2 November 2007 for that is the day, the Claimant suffered the legal injury or actionable wrong he is complaining off.

18. The Employment Act, 2007 though assented to on 22 October 2007 only came into effect on 2 June 2008 and in my view, section 90 thereof is not applicable to the present cause of action.

19. The applicable statute, and which was/is a statute of general application is the Limitation of Actions Act. Section 4 of the Act provided for a limitation of 6 years for causes of action arising out of contract.

20. The present cause of action is contractual and the 6 year limitation lapsed only on 1 November 2013.

21. The Claimant moved Court in 2010, and therefore statutory limitation does not affect his claim.

Is the subject matter to claim an issue subject to the Employment Act or not

22. The Claimant's grouse is against the action taken by the Respondent to terminate his contract of service and therefore the subject matter is one which was covered by the employment laws in place at the material time.

23. That law was primarily the Employment Act, cap 226 (now repealed) and the common law.

Was the termination lawful or not in view of the decisions of the Industrial Court

24. Under this issue, the parties cited Cause No. 86(N) of 2009. None of the parties saw it fit to furnish a copy of the decision to the Court and therefore the Court is not able examine whether any legal principles set out therein are implicated in the instant dispute.

25. However, section 17 of the Employment Act, cap 226 (repealed) envisaged an employee challenging whether a summary dismissal was justifiable, or was based on lawful grounds.

26. The repealed Act had no express provisions protecting an employee from termination of employment and in many instances the fall back position was the contract itself and the common law.

27. An ordinary employee under that legal framework had no security of tenure.

28. According to the letter informing the Claimant of the termination of his employment, reference was made to clause 13 which allowed termination on payment of 1 month pay in lieu of notice.

29. Clause 13 of the Employment Agreement provided

Termination of Service

13. On completion of your probationary period, this agreement may be terminated by either party by giving one month's notice or one month's salary in lieu of notice.

30. In view of the offer and payment of one month's pay in lieu of notice to the Claimant, the Court can only conclude that the termination was anchored on contractual agreement and was therefore lawful.

31. Before discussing the issue of prayers, a brief observation on the question of natural justice in employment contracts before the commencement of the Employment Act, 2007.

32. The observation is necessitated by the Claimant's attack on his termination of employment on the

- basis that he was not afforded an opportunity to be heard.
33. The Claimant did not draw my attention to any statutory or contractual requirement as to a hearing prior to dismissal at the material time but rather took umbrage in the decision by Marete DKN in *Gedo Abdullah Muhamed v Commissioner of Police & Attorney General* (2015) eKLR.
34. However, does the reasoning in that decision mirror the chain of authorities in this country in ordinary contracts of service, not underpinned by legislation? I fear not.
35. The authorities dealing with the legal framework obtaining before the commencement of the Employment Act, 2007 include Civil Appeal No. 29 of 1985, *Cyrus Nyaga Kabute v Kirinyaga County Council* and Nakuru Civil Appeal No. 27 of 1992, *Rift Valley Textiles Ltd v Edward Onyango Oganda*, and Nakuru High Court Civil Case No. 56 & 57, *Peter Whitton & Ar v Kenya Educational Trust Ltd* and they leave no doubt in my mind that there was no statutory or common law right to a hearing before termination of a contract of employment.

Is Claimant entitled to the prayers sought?

Special damages

36. This was not set out with any particularity in the pleadings. Even during testimony, the Claimant did not make an attempt to quantify the special damages.
37. In the submissions, the Claimant made a plea for Kshs 12, 894,000/- being the income, he would have earned had he worked up to retirement at 60 years.
38. The Claimant cited the decision of Ongaya J in *Beatrice Achieng Osir v Board of Trustees Teleposta Pension Scheme* (2012) eKLR to advance the position that prospective future earnings was awardable pursuant to the powers of the Court under section 12(3) of the Employment and Labour Relations Court Act.
39. I extensively discussed the legal basis for an award such as the one sought herein in *Mary Mutanu Mwendwa v Ayuda Ninos De Afrika-Kenya (Anidan K)* (2013) eKLR.
40. I have also dealt with this head of relief in *Amos Sasine Kitaika v Masaai Mara University* (2015) eKLR where I observed that

But I must mention that it is debatable whether an award of prospective future earnings is available at all where there is a finding of unfair termination/wrongful dismissal under the Employment Act, 2007.

I express the view cognizant of the authority of *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 where the Supreme Court of Uganda held that the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

42. I am still of the same view.

General damages/compensation

43. Paragraph 11 attempted to outline the damages the Claimant was seeking but it was not set out in very clear terms.
44. There was reference to general damages and compensation, but under the prevailing legal framework then, general damages was awardable only up to the equivalent of notice period or such reasonable notice period where the contract was silent.
45. In the instant case, the period was 1 month, and the Claimant was offered 1 month pay in lieu of notice. The Claimant cannot get anything more than that.

Costs

46. The Claimant having failed would not be entitled to costs.

Conclusion and Orders

47. The upshot of the foregoing is that the Cause herein is dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 11th day of March 2016.

Radido Stephen

Judge

Appearances

For Claimant

Mr. Kimatta instructed by Kimatta & Co. Advocates

For Respondent

Mr. Wamaasa instructed by Wamaasa & Co. Advocates

Court Assistant

Nixon