



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 130 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

CHRISPO AMUDOLI SUNGUCLAIMANT

-Versus-

JIANGXI ZHONGMEI ENGINEERING

CONSTRUCTION LTDRESPONDENT

JUDGEMENT

The Claimant was employed by the Respondent as an Environment, Health and Safety Officer on 1st June, 2013. He was terminated on 19th May, 2014. The Claimant alleges that the termination was unfair and seeks the following remedies;

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|----|---|-----------------------------------|
| a) | Unpaid days worked in May | Kshs. 31,666.70/- |
| b) | Salary for 16 years * 12 * 50,000/- | <u>Kshs.9,600,000.00/-</u> |
| | Total | <u>Kshs.9,636,666.70/-</u> |
| c) | Costs of this suit and interest on (b) at court rates | |
| d) | Interest on (a) and (b) at Court rates | |

The Respondent filed a Response denying the claim and avers that due process was complied with. The Respondent avers that they had valid reason to terminate the employment of the Claimant, that he colluded with unscrupulous employees to steal from the company and received bribes through M-Pesa from drivers and prospective employees.

At the hearing the Claimant testified and called one witness David Wafula Natembea. The Respondent called one witness. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant testified that he was employed by the Respondent as an Environmental Health and Safety Officer on 18th June, 2013. His salary was a gross of Kshs.50,000, and a net of Shs.49,600 after deduction of NSSF and NHIF. On 13th May, 2014 he received information from an informer that fuel was being syphoned from the Respondent's trucks. He rushed to the scene with the Acting Personnel Manager Mr. Lee Long. When they arrived at the scene they met two other officers of the Respondent,

Mr. Nq, the Laboratory Technician and Mr. Long, the Production Manager. They managed to arrest one person whose home was being used to keep the syphoned diesel with assistance of police officers from Makuyuni police station and Administration Police Officers from Malili AP Camp.

The Claimant testified that thereafter he received a phone call from David Wafula Natembea alerting him that drivers had warned him of dire consequences if he continued pushing the matter of syphoned diesel.

On Saturday 17th May, 2014 while in Eldoret he received a phone call from Mr. Yu Long Deng the project Manager at about 3pm informing him that they would talk on Monday. On Monday 19th May, 2014 he received a call from Mr. Lee who informed him drivers were on strike regarding the raid at Malili. Mr. Lee told him to go and address the striking drivers. He went and found all the drivers in the compound but no one wanted to talk to him. The project manager told him that because of the strike the company will not compromise the job of one person and that he was no longer needed. That is how he lost his job, without notice or a hearing. He denied receiving the letter inviting him for hearing dated 17th May, 2014 and the letter of termination of employment dated 20th May, 2014, both of which are annexed in the Respondent's bundle of documents filed in court. He also denied knowledge of an Mpesa statement of David Wafula Natembea which is also part of the Respondent's bundle of documents. He testified that Wafula was his business partner in a business of buying and selling tomatoes and that Wafula was also an employee of the Respondent. The Claimant urged the court to grant his prayers.

David Wafula Natembea CW2 testified that he knew the Claimant who was his business partner and they also worked together for the Respondent. He stated that he left employment on his own in June 2014. He testified that he gave his Mpesa statement to the Claimant after a disagreement over payment due to the claimant from the business. He denied giving the Mpesa statement to the Respondent.

Respondents Case

Mr. JOU Sangwei testified that he was the Respondent's Personnel Manager responsible for human resource and Public Relations. He testified that the reason for the termination of the Claimant's employment was that there were complaints from drivers about bribery. They asked the drivers to submit evidence and investigations were carried out. Among the documents the Respondent received was the Mpesa Statement of David Wafula, one of the drivers which had suspicious transactions. The Claimant was called for a disciplinary hearing on 17th May, 2014 but failed to attend. The Claimant's was as a result terminated. He was called to collect his terminal dues but did not turn up.

Under Cross examination Mr. Sangwei stated that he was on annual leave during the period when the Claimant's employment was terminated by his assistant who was acting personnel officer. He stated that he did not get any report that the Claimant arrested somebody syphoning fuel. He stated that the Mpesa statement was given to the Respondent by David Wafula. He stated that David Wafula did not have a tomato business while working for the Respondent as a driver as he was too busy with his work.

Determination

The issues arising for determination from the evidence before the court are whether the claimant was unfairly terminated and if he is entitled to the prayers sought.

The law

The law on termination of employment is contained in section 41 and 43 of the Employment Act. Section 41 provides for procedural fairness while section 43 provides for substantive fairness, that is, valid reason for termination.

In this case the Claimant states that he was not given a hearing. He also denies colluding with drivers to syphon fuel from the Respondent's vehicles.

The Respondent on the other hand has produced a letter dated 17th May 2014 inviting the claimant for a

disciplinary hearing and stated that the Claimant failed to attend the hearing.

The Claimant's letter of termination however refers to the Claimant's representation.

From the evidence on record, I find that there is no proof that the Claimant received the invitation for disciplinary hearing of the Claimant's case making the termination of his employment procedurally unfair.

Remedies

The Claimant prayed for 19 days worked in 2014, and 16 years salary.

The Respondent admitted that the Claimant is entitled to the salary for 19 days worked which he failed to collect. I award him the same as prayed at Shs.31,666.70.

On the prayer for 16 years salary, the claimant's justification is that his retirement age was 60 years and he is entitled to salary to date of retirement. The claimant however did not submit evidence of his age. He also did not provide any proof of permanency of his employment. He did not have a letter of appointment.

The Respondent on the other hand submitted evidence that its road construction contract was for 24 months. A copy of the contract signed between the Respondent and the Kenya National Highways Authority (KeNHA) for rehabilitation of the Webuye - Kitale Road is for a period of 24 months. The Respondent testified that the contract was extended.

This court has held time and again that there is no permanency in employment contracts. The law does not even provide for a retirement age. This is left for an employer to determine.

In the case of **D.K. Njagi Mareta v Teachers Service Commission [2013]eKLR** which has been relied upon by the Respondent Rika J held that the Claimant was not entitled to anticipatory damages to retirement age.

In the Case of **Menginya Salim Murgani v Kenya Revenue authority** that is cited with approval by Rika J. in the **D.K. Njagi Marete** Case, Ojuang J. held that it would be injudicious to found an award of damages upon sanguine assessments of prospects. He observed that the Plaintiff was able bodied, intellectually and professionally well-endowed and likely to find occupational engagement outside the defendant's employ.

This court also decided in the case of **Engineer Francis N. Gachuri v Energy Regulatory Commission [2013]eKLR** that there is no provision for payment of damages to the date of retirement because employment like any other contract, provides for exit. The court further held that even where a contract is referred to as permanent and pensionable it does not mean that it cannot be terminated and if terminated unfairly, the only damages payable are for lack of procedural or substantive fairness as provided under section 49 of the Employment Act.

In this case the Claimant can only have recourse to the compensation provided for under the Employment Act. Having worked for the Respondent for a period under one year from 1st June, 2013 to 19th May, 2014, I award him one months salary as compensation in the sum of Shs.50,000/-.

Having substantially failed to prove his claim of Shs.9,600,000 and having been offered and failed to collect the salary for days worked in May 2014. I award the Claimant 50% of his costs.

Judgement Dated, signed and delivered this 23rd day of June, 2016

MAUREEN ONYANGO

JUDGE