



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 242 OF 2015

BETWEEN

CHARLES KYALO MUTUA.....CLAIMANT

VERSUS

THREWAYS SHIPPING SERVICES [K] LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Ms. Kayata Advocate, instructed by M.K. Mulei & Company Advocates for the Claimant

Ms. Ombat Advocate, instructed by Cootow & Associates, Advocates for the Respondent

ISSUE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27[1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his Statement of Claim, on the 20th April 2015. He states he was employed by the Respondent as a Supervisor, in the year 2006, on a monthly salary of Kshs. 56,896. His contract was terminated by the Respondent on 19th November 2013, on the allegations of theft. He feels termination was unfair and unlawful, and seeks the following orders against the Respondent:-

- a. A declaration that termination was unfair and unlawful.
- b. The Respondent pays to the Claimant 1 salary in lieu of notice at Kshs. 56,896; 19 days worked at Kshs. 51,477; off days since 2006 at Kshs. 130,047; public holidays [2006-2013] at Kshs. 151,723; and severance pay at Kshs. 284,480- total Kshs. 674,623.
- c. General damages for unfair and unlawful dismissal.
- d. Costs, Interest and any other reliefs.

2. The Respondent filed a Statement of Response dated 12th May 2015. The Claimant was implicated in theft, which occurred at the Respondent's yard. This necessitated his suspension. While he was on suspension, his contract lapsed on 30th December 2013. The Respondent was not under duty to follow the provisions of Section 41 of the Employment Act, the contract having so lapsed. His contract was not unlawfully and unfairly terminated by the Respondent as alleged; it lapsed while the Claimant was on suspension. The Respondent urges the Court to dismiss the Claim.

3. The Claimant testified, and closed his case on the 24th September 2015. Respondent's Human Resources Manager, Fredrick Michaael Otieno Opot, testified on the 9th February 2016 when hearing closed. The dispute was last mentioned in Court on the 20th June 2016 when Parties confirmed the filing of their Final Submissions, and the decision of the Court reserved for 29th July 2016.

4. The Claimant told the Court he was employed by the Respondent in April of 2006, and was initially stationed in Kampala Uganda. He worked there until July 2011, when he was transferred to Mombasa.

5. His last salary was Kshs. 56,896. He had climbed up to the position of Supervisor. There was theft reported in his department. Motor vehicle parts were reported to be stolen on the 6th November 2013. The Claimant recorded a statement with the Police at Changamwe. Subsequently the Claimant was asked to step aside by the Respondent in a letter dated 19th November 2013. He was advised he would be recalled, once the investigation was concluded. He was not recalled.

6. In April 2014, he went to the Respondent's Offices to enquire about his employment status. There was no response on this. There was no letter of termination. Police arrested some Employees. The Claimant was bonded to attend Court as a Witness. He gave evidence.

7. Afterwards the Claimant sought legal advice. Demand letter issued. The Respondent did not lift suspension. He was left with no choice but to file this Claim.

8. He stated on cross-examination that he did not have any document to show he was employed by the Respondent in 2006 as a Mechanic. He started on a salary of Kshs. 20,000. His contract was not terminated; he was asked by the Respondent to step aside.

9. He had been asked by the Respondent to keep his contact available during the suspension. He was contacted and attended Court. After he gave evidence, he was not contacted. He went to record statement with the Police, and attended the trial, on the instructions of the Respondent. He had the duty, as Supervisor, to ensure everything was correctly done. He fulfilled his role; he reported theft to the Respondent. He closed his evidence upon redirection with the clarification that he has never been charged with any criminal offence. He was called as a Witness.

10. Opot told the Court he had worked for the Respondent for 1 year, as of the date he gave evidence. He was not working for the Respondent at the time of the incident, and relied on the Claimant's employment record, in familiarizing himself with the matters in dispute.

11. The employment record showed the Claimant was on a fixed term contract, from 1st January 2011 to 1st January 2013. He was suspended on 19th November 2013. About 1 month remained to the end of his contract. He signed the contract –Respondent's exhibit 3 [b].

12. He was implicated in theft of motor vehicle parts. Suspension was to facilitate investigation. The contract lapsed during the suspension period. The Claimant was not reachable on his phone. The Respondent attempted to contact him in vain. His contract was not terminated by the Respondent. He does not merit compensation and notice pay. He was paid the entire November 2013 salary. He is not entitled to 19 days' salary. His contract was from 2011, not 2006. He did not work on public holidays. There was no provision for severance pay. The Claimant was a Member of the N.S.S.F. He did not approach the Respondent for the certificate of service.

13. On cross-examination, Opot testified record showed the Claimant worked from 2011, not 2006. Opot was not there during the theft incident. Respondent's tyres and other parts were stolen. The Claimant was a suspect and was asked to step aside. The Claimant was a Witness. Opot testified he was not aware other Employees were charged with the offence. He was aware 2 criminal cases were pending over the allegations. He could not say if the Claimant was charged.

14. The Respondent was not able to reach the Claimant after termination. Attempts were made to reach him through phone. There was no evidence of these attempts brought before the Court. The Respondent did not write to the Claimant. Police Officers were able to bond him to attend Court as a Prosecution Witness. There is no notice of termination after suspension. The pay slips did not capture public holiday pay. There was no evidence that deductions on the N.S.S.F were remitted to the Fund. Opot clarified on redirection that there would be penalties for failure to remit N.S.S.F contributions. The Claimant was aware about the start-lapse dates in his contract. Opot could not tell who determined the Claimant becomes a Witness at the criminal trial.

15. The Court understands the issues for its determination to be whether the Claimant's contract of employment was terminated at all by the Respondent; whether if terminated by the Respondent, termination was unfair and unlawful; and whether the Claimant merits the remedies pleaded.

The Court Finds:-

16. It is accepted by the Parties that the Claimant was employed by the Respondent Transportation Company as Senior Officer- Engine Maintenance [Fleet Operations Department].

17. The date of employment is disputed. The Respondent states it employed the Claimant under the terms and conditions of service contained in the contract dated 1st January 2011. This was a 2 year contract, which was to lapse on 30th December 2013. He was not employed in 2006.

18. The Claimant's position is that he was employed in 2006, and initially posted to Kampala, Uganda. He was relocated to Mombasa in 2011. The date given by the Respondent, as the date employment commenced, would therefore seem in the evidence of the Claimant, to be the date he relocated to Mombasa.

19. The commencement date in any employment contract is a term of employment. Section 10 [2] [d] of the Employment Act 2007 requires the contract to state the date of commencement of employment. Section 10[7] states if, in any legal proceedings an Employer fails to produce a written contract or written particulars prescribed in subsection [1], the burden of proving or disproving an alleged term of employment stipulated in the contract, shall be on the Employer.

20. The Claimant's position is that he was employed in 2006, and stationed in Kampala before relocation to Mombasa. The Respondent as observed above, holds the Claimant was employed in January of 2011, and relies on the contract document made on 1st January 2011.

21. The Court finds the Respondent did not prove the employment commenced in January of 2011. Secondly, it did not disprove the Claimant's assertion that he was employed in 2006.

22. The contract dated January 2011 is between the Claimant and a Ugandan Company named Transtrac Limited of P.O. BOX 12028 Kampala. It is not between the Claimant and the Respondent. The Respondent did not explain its association with the Ugandan outfit.

23. If the Respondent is a sister company to the Ugandan one, then the Claimant's assertion that he was initially employed by the Respondent in Kampala, in the year 2006, would appear more probable than the position advanced by the Respondent. The contract produced by the Respondent states the Claimant would render his duties at Plot 87, Jinja Road, Kampala Uganda.

24. The wording of the contract was such as to add weight to the Claimant's position that he was

employed before 2011. The contract indicates the probation period would be 0 months. The period could be extended by 0 months. There was no need for probation, probably in the view of the Court, because the Claimant was an old Employee. The contract made on 1st January 2011, supports the evidence of the Claimant that he worked in Uganda. It was not disputed by the Respondent that the Claimant worked in Mombasa in 2011. It would not make sense to have a contract placing him in Uganda in January 2011, while at the same time, it is not disputed he worked in Mombasa from 2011. The employment in Uganda was in all likelihood, and the Court so concludes, prior to 2011.

25. The Respondent did not affirm its 2011 date, or disaffirm the 2006 date given by the Claimant. The Court must go by the 2006 date given by the Claimant.

26. It was alleged the Claimant was implicated in theft of motor parts. He was sent on administrative leave by the Respondent, through a letter dated 19th November 2013. The letter advised the Claimant there would be investigation carried out, and if the Claimant was proved innocent, he would be reinstated.

27. It was not clear if the Respondent carried out its own internal investigation separate from that carried out by the Police. There was evidence the Claimant was involved in the Police process. He was not charged with any offence. He was called as a Witness for the Prosecution. He gave evidence. The promise by the Respondent that it would reinstate him if he was proved innocent is understood by this Court to mean, the Claimant would be reinstated, if either the internal or external processes did not result in any finding of culpability on the part of the Claimant.

28. The Respondent did not try the Claimant for any employment offence. There was no finding that he was involved in theft of motor parts, or even as the Supervisor, that he was derelict in discharging of that role. He was not tried alongside other Employees with the criminal offence. The Respondent was the Complaint and would have the obligation to forward to the Police any evidence which implicated the Claimant. There is no process, internal or external, showing the Claimant was not proved innocent. Why then did not the Respondent reinstate him?

29. The Respondent gives 2 answers. First, it is that the Claimant was unreachable and did not keep his lines of communication open, as had been advised upon him, by the Respondent on suspension. Second, it is that his contract lapsed during suspension, in December 2013.

30. Both answers are unacceptable. The Claimant was reachable, having been traced and bonded to give evidence against his fellow Employees, by the Police. The Police would be expected to have obtained Claimant's personal details from the Employer. It is also clear that the Claimant had contacted the Respondent enquiring about his employment status. The Respondent did not write any letter communicating anything to the Claimant after suspension. Not even a letter advising the Claimant that his contract would be deemed to have lapsed in December 2013. He was not advised not to expect renewal.

31. This aside, the Court cannot adopt start-lapse dates contained in the contract dated 1st January 2011. This contract as seen above was between the Claimant and a Ugandan Company, whose association with the Respondent was not explained to the Court. Clause 19 of that contract states the applicable law in event of a dispute would be the law of the State of Uganda, to the exclusion of the law of any other forum. It was not shown that the Claimant served the Respondent under a 2 year contract, which lapsed in December 2013, in the period of suspension.

32. His contract of employment, on the strength of the evidence on record, was an indeterminate contract. This contract stretched from the year 2006, to 19th November 2013, when the Respondent placed the Claimant on indefinite suspension. The Respondent had the obligation to demonstrate valid reason or reasons for termination under Section 43 and 45 of the Employment Act. There was an obligation to hear the Claimant, under the procedure contained in Section 41 and 45 of the Employment Act 2007.

33. The 2 reasons given by the Respondent are not valid reasons. It is not a valid reason to say the Claimant placed himself out of reach after suspension. It is not a valid reason to say that termination was by lapse of the fixed period. There was no hearing of any sort afforded the Claimant after suspension. He

was not given a letter of termination. Termination was unfair and unlawful.

34. It is declared termination was unfair and unlawful.

35. The claim for 1 month salary in lieu of notice at Kshs. 56,896 is allowed.

36. The Claimant was suspended on 19th November 2013. There was no evidence that he was paid his salary for the 19 days worked. There was no pay slip for the month of November 2013. **The prayer for salary for 19 days worked in November 2013 is allowed at Kshs. 41,577.**

37. The prayers for off days and public holidays were not supported by proper evidence. The number of days is unknown. It is unknown how the amounts of Kshs. 130,047, and Kshs. 151,723 respectively were arrived at. The Claimant's position, which the Court has endorsed, is that he worked in part, in Uganda. He worked in Kenya for the other part. He claims off days and public holidays from 2006 to 2013. He was not clear if Kenya and Uganda share public holidays and off days, so as to claim these under same heads. These prayers are rejected.

38. The evidence does not suggest the Claimant left employment on redundancy. Severance pay is considered under Section 40 of the Employment Act 2007. There was no redundancy situation to justify the prayer for severance pay. If the Claimant intended to pursue service pay under this head, he was subscribed to the N.S.S.S.F, and ineligible for such pay under Section 35 [6] [d] of the Employment Act.

39. Compensatory award is allowed under Section 49 of the Employment Act, and Section 12 of the Employment and Labour Relations Court Act [previously Industrial Court Act 2011]. **The Claimant is granted 10 months' salary at Kshs. 568,960 in compensation for unfair termination.**

40. The Respondent shall release to the Claimant his Certificate of Service forthwith, as commanded under Section 51 of the Employment Act 2007.

41. No order on the costs and interest.

IN SUM, IT IS ORDERED:-

a. Termination was unfair.

b. The Respondent shall pay to the Claimant: notice pay at Kshs. 56,896; 19 days' salary at Kshs. 41,577; and 10 months' salary in compensation for unfair termination at Kshs. 568,960 – total Kshs. 667,433.

c. The total amount shall be paid within 30 days of delivery of this decision.

d. Certificate of Service to issue.

e. No order on the costs and interest.

Dated and delivered at Mombasa this 29th day of July, 2016.

James Rika

Judge