



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 111 OF 2014

SAMSON WANDERI WAMBUGU CLAIMANT

VERSUS

ROYAL OILFIELD LOGISTICS RESPONDENT

Mr. Rakoro for claimant

Mr. Paul Muinda for respondent

JUDGMENT

1. The suit was filed on 31st January 2014 vide a memorandum of claim seeking compensation for unlawful and unfair termination of employment and payment of terminal benefits amounting to Kshs.770,495 as set out in paragraphs 8, 11 and 13 of the memorandum of claim. the claimant also seeks certificate of service, interest and costs.

Claimant's case

2. The claimant was orally employed by the respondent on 12th July 2013 as a driver at an initial salary of Kshs.12,000 which rose to Kshs.23,000 by August 2013. Though he had no payslip the salary was deposited in his Equity bank account. The claimant was on probation for three months and on 10th October 2013 he was given a written contract dated 19th September 2013 under which he was placed on three (3) months probation again. The claimant raised the issue and was told that it would be corrected. On 23rd November 2013, the Human resource manager gave the claimant a letter indicating that the claimant was not confirmed in his employment and his employment was terminated with effect from 23rd August 2013. At the time of termination the claimant earned a salary of Kshs.25,000 per month.

3. The claimant normally reported to work at 5.30 a.m. and left at 10 p.m. in the night daily, hence working for 15 hours per day without payment of overtime.

4. The claimant was not charged with any offence at the work place, he was not given a show cause letter and did not attend any disciplinary hearing prior to the termination.

5. The respondent did not provide the claimant with a reason for the termination other than that his employment had not been confirmed.

6. The claimant was not given notice nor paid in lieu of notice and was aggrieved by the manner in which he lost his employment. He seeks payment in lieu of notice, overtime, compensation and general damages for the unlawful and unfair loss of employment.

Response

7. The respondent filed a statement of response to the claim on 12th March 2014 in which it states that the claimant was engaged on a daily casual basis during which period he worked intermittently for less than two (2) weeks. The claimant therefore denies existence of an employment contract with the claimant except a probationary contract which was subject to confirmation or termination at the instance of either party and the respondent exercised its lawful right to terminate the probationary contract.

8. The respondent therefore denies the content of the memorandum of claim in total including the particulars of claim and the reliefs sought.

9. The respondent further denies that the claimant was a dutiful and loyal employee and avers that, the claimant reported to work in a drunken stupor and could not carry his duties as a driver because he put company personnel and property at risk. The respondent simply declined to confirm his employment. The respondent refused to give in to threats by the claimant to be confirmed into employment or else he would sue the respondent.

10. The respondent filed its list of documents on 23rd October 2015 including a payslip which shows that the basic salary for the claimant as at 30th November 2013 was Kshs.26,244 and was registered with NSSF and NHIF and contributions were made.

11. The payslip for 31st October 2013 showed that the claimant had a basic salary of Kshs.28,328.

12. The respondent also attached the letter dated 23rd November 2013 which showed that the probation period would not be confirmed with effect from 23rd November 2013.

13. The respondent called Simon Njenga Mbote (RW1) to testify in support of its case. He told the court that he worked as a logistics manager for respondent in 2013.

14. That the claimant visited the respondent's garage in Ngara and RW1 found him there. Claimant borrowed money for lunch from him and told him that he had no job. The mechanics in the garage, privately hired the claimant to deliver motor vehicles. RW1 decided to employ the claimant in September 2013 as a driver. Between July 2013 and September 2013, the claimant had private arrangements with the workshop mechanics although at one point, the respondent paid the claimant on behalf of the mechanics Kshs.11,000. RW1 posted the claimant to the procurement department of the respondent. He worked between 8 a.m. to 5p.m. daily. He carried procurement staff from place to place. The claimant did not work overtime. That he worked from Monday to Friday and half day on Saturday. RW1 added that in the event, drivers work overtime, they would be given an off day. That the respondent had many drivers and they all operated the same way. That the claimant was employed on three months probation.

15. RW1 said he felt that he had betrayed his company by employing the claimant because, the claimant soon proved to be untrustworthy. RW1 received reports that the claimant sought to be paid commission unlawfully by the company vendors. The claimant also drunk a lot and suffered from hangover regularly.

16. For these reasons, his probation was not confirmed. RW1 explained to him why his employment was not confirmed. The claimant threatened to sue the company and he eventually did so. RW1 prays that the claimant's case be dismissed with costs.

17. Determination

Issues for determination are as follows;

(i) For how long did the claimant serve the respondent?

(ii) Whether the respondent kept the claimant lawfully under probation and was therefore entitled to

terminate the same without notice.

(iii) What remedies if at all is the claimant entitled to?

The court will deal with the three issues together.

18. The claimant told the court that he was verbally employed on 12th July 2013 and that he was given a written contract on 19th September 2013 and was placed on three month's probation.

19. That on 23rd November 2013 he received a letter informing him that his employment was not confirmed.

20. RW1 for the respondent told the court that between July 2013 and 19th September 2013 the claimant worked on part time basis under an arrangement between the claimant and individual mechanics employed at the respondent's garage at Ngara. That during that period the claimant was not an employee of the respondent.

21. The claimant has the onus to prove that he was an employee of the respondent from 12th July 2013. The claimant produced a statement of his personal account No. 0650195973970 showing that he received a salary of Kshs.11,000 on 29th August 2013 from the respondent.

22. On the other hand RW1 explained that this was payment made to the claimant for the casual daily tasks he had performed at the Ngara garage on behalf of the mechanics employed by the claimant.

23. RW1 explained that he had sympathized with the claimant and offered him employment as a driver in September 2013. Indeed the bank statement of the claimant shows that he received a salary of 26,667 on 1st October 2013 and 24,000 on 1st November 2013 and 21,333 on 2nd December 2013.

24. The evidence by the claimant that he was employed in July 2013 at a monthly salary of Kshs.11,000 is inconsistent with the salary policy of the respondent's drivers. In any event, it is clear that, the respondent employed a large pool of drivers and gave its drivers written letters of appointment. It is the finding by the court that the claimant has failed to prove on a balance of probability that he was verbally employed by the respondent as a driver on 12th July 2013.

25. The evidence by RW1 is more plausible and consistent with the employment practices of the respondent discerned from the evidence before court.

26. It is not in dispute that the claimant was employed on 19th September 2013 and was given a written letter of appointment which he signed on 1st October 2017. The claimant was given a basic salary of Kshs.25,000 and was placed on three (3) months probation in terms of clause 3.1 of the letter of appointment. The letter of appointment provided for payment of overtime when the claimant was required to do so and clause 2.2 provided that the claimant was obliged to do overtime unless he had a valid reason not to.

27. The contract also had general terms and conditions of employment document attached to the letter of appointment in terms of which details of working overtime are explained in clause 3 and 4 thereof. It would appear, the issue of overtime was important in the operations of the respondent. In this regard, the evidence by the claimant that he worked for long hours daily, which evidence was not sufficiently rebutted by the respondent seems to hold water.

28. From an analysis of the conflicting evidence by the parties, the court has arrived at the inescapable conclusion that the claimant only served the respondent for three months on probation and in terms of section 42 (1) of the employment Act, 2007.

“The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.”

29. This means, that employer need not provide a reason to an employee or opportunity for the employee to explain himself before terminating a probationary contract.

30. The court is satisfied that there was no contractual relationship between the claimant and the respondent between the period 12th July 2013 and 19th September 2013 as alleged by the claimant except for occasional tasks performed by the claimant at the respondent’s garage in Ngara.

31. The claimant only had a three months probationary contract with the respondent between 19th September 2013 and 23rd November 2013 when the said contract was terminated by the employer.

Overtime

32. With regard to the issue of overtime, the claimant adduced evidence that he reported to work from 5.30 a.m. in the morning up to 10 p.m. in the evening daily and was not paid overtime. That he had no rest day. The only exception was on Tuesdays when the claimant left work at 5 p.m. to allow any defects on the vehicle to be attended to.

33. The contract between the parties appear to anticipate performance of overtime due to the nature of the transport business the respondent was engaged in. RW1 did not adequately rebut this credible evidence by the claimant that he performed overtime daily and was not paid. Accordingly the court finds that the claimant established that he performed 931 hours overtime for the period he served the respondent in the sum of Kshs.145,459.44 which the court awards accordingly.

34. The rest of the claims are dismissed.

35. In the final analysis the court makes the following orders in favour of the claimant as against the respondent;

- (i) Award of Kshs.145,459.44 overtime.
- (ii) Provision of certificate of service within thirty (30) days from todate.
- (iii) Interest at court rates from date of filing suit to payment in full.
- (iv) Costs of the suit.

Dated and delivered at Nairobi this 5th day of August, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE