



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.82 OF 2016

(Before D. K. N. Marete)

JEREMIA OKETI ESHITERA.....CLAIMANT

VERSUS

MUTAMAIYU COMPANY LTD.....RESPONDENT

JUDGMENT

This matter is originated by way of a Memorandum of Claim dated 14th April, 2016. It does not disclose an issue in dispute on its face.

The respondent in a Respondent's Defence dated 9th May, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times relevant to this case, he was employed by the respondent as a caretaker at a salary of Kshs. 6200.00. It was a term of the claimant's employment contract that he was to serve on a permanent and pensionable term with allowances and benefit appurtenant thereto. However, on 1st March, 2016 services were terminated unfairly and without notice, all to her detriment.

5. It is the claimant's case that the said termination was ill intended, unlawful, tainted with illegality breach of terms and conditions of employment, null and void, malicious and against the principles of natural justice as particularized hereunder:-

- (i) Failing to give the claimant a fair hearing which is against the principles of natural justice.*
- (ii) Failing to give the claimant a proper notice of the claimant's termination of employment.*
- (iii) Abruptly, unfairly and unprocedurally terminating the claimant employment.*
- (iv) Violating the terms of the contract of employment.*
- (v) The decision to terminate the claimant employment was arbitrary.*

6. The claimant avers that the action of his termination was unlawful, unprocedural and contravenes the provisions of Section 41, 43, 44 and 45 of the Employment Act.

7. Section 41 (11) of the Employment Act requires an employer before terminating an employment

of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language he/she understands the reasons for which an employer is considering termination. The employer is entitled to have another employee or a shop floor union representation of his choice present during this explanation. The claimant submits that the respondent violated the above mentioned provisions of the Employment Act.

He claims as follows;

i. One month pay in lieu of notices

Basic salary Kshs.21218

ii. Unpaid leave dues

4 years leave dues

Basic salary x years worked

21213 x 4 years Kshs.84852

iii. Service pay

15 x 4 years x weekend x basic/30 days

15 x 4 yrs x 21213/30 days Kshs.42426

iv. Unpaid public holiday

10 days x 4 years x 21213/30 x 2 Kshs. 56568

v. underpayment of wages legal Notice no 197 of 1st May 2013 to April 2015

Basic + house allowance – current pay

18940 + 2841 – 6200 = 15581 x 11 months Kshs.373944

(a) Legal Notice No.117 of 1st May 2015 to 1st March 2016

Basic + house allowance – current pay

18940 + 2841-6200=18194.95 x 11 months Kshs.200144.45

(b) Legal notice no.71 of 1st May 2012 to 1st April 2013

Basic + house allow-current pay

16614.40 +2492.16-6200=12906.56 x 6 months Kshs.77439.36

(c) Compensation for unfair termination

Gross pay x 12 months

24394.95 x 12

Kshs.292739.4

TOTAL CLAIM.....Kshs.11949326.21

In the penultimate the claimant prays as follows;

(a) Declaration that the dismissal was unlawful unprocedural and unfair in the circumstances the claimant is entitled to compensation as prayed for in the paragraph 11 above.

(b) The sum of Kshs.1,149,236.21 as set out at paragraph 11 above.

(c) Cost of this suit and interest on (b) above at court rates from time of filing the suit until payment in full.

(d) A certificate of service as per section 51 of the Employment Act and

(e) Any other further and better relief the Honourable Court may deem just and fit to grant.

The respondent in defence denies any employment relationship with the claimant to the position of a caretaker. It is the respondent's further case that it engaged the claimant as a casual worker at an initial salary of Kshs.4,000.00 and later increased to Kshs.6,200.00 when there was lots of work. It is her case that upon completion of work, the claimant was informed that his services were no longer necessary.

The respondent's further case is that the claimant's work was not continuous but occasionally he would take breaks and engage in other gainful employment for periods of three to four months. He had been engaged through a request by his father but would also work for neighbouring companies like Kampala coach, G4 Engineering *et al* as a casual worker. He was therefore not an employee of the respondent.

The respondent denies having terminated the services of the claimant or even engaging in unlawful and unprocedural activity in terminating the service of the claimant, or at all.

9. In response to paragraph 6 of the Memorandum of Claim, the Respondent denies that the action of informing the Claimant that his services were not needed was unlawful, unprocedural and contravened the law. It came as a result of a report of him being suspected of theft. That during the time the claimant served the respondent, the respondent constantly received reports of theft on the part of the claimant who severally confessed having stolen and was forgiven upon confession.

The respondent's case is that the claimant was summarily dismissed for gross misconduct after pursuances of due process and is therefore not entitled to a month's salary in lieu of notice

The respondent in the penultimate avers this claim is an abuse of the process of court as there never was an employment relationship with the claimant.

The matter came to court variously until the 18th July, 2016 when it was heard with the parties reiterating their respective cases in every sense of the word.

The issues for determination therefore are;

1. Whether there was an employment relationship *inter parties*?
2. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawfully?
3. Whether the Claimant is entitled to the relief sought.

4. Who should pay costs of the suit.

The 1st issue for determination is whether there was an employment relationship *inter parties*. The claimant in his written submissions anchors a case of employment and a breach of this contract without observation of the requirements for substantive and procedural aspects of termination. It is his submission that there is documentary evidence (salary vouchers) of employment and this is incorporated in S. 2 of the Employment Act, 2007 which provides as follows;

“ a person employed for wages or a salary and includes an apprentice and indentured learner.”

He seeks to rely on the case of **Walter Ogal Anuro Vs Teachers Service Commission 2013 eKlr** to establish a case of lack of process in the termination of the claimant.

The respondent does not file written submissions but restates his evidence in his witness statement dated 3rd June, 2016. The respondent in his evidence is agreeable that the claimant was employed on a casual basis and earned a salary of between Kshs. 4,000.00 and Kshs. 6, 200.00 depending on workload and performance and participation of the claimant. It is his further evidence that the claimant was not strictly bound to this employment relationship and would occasionally take breaks and simultaneously offer casual employment services to other neighbouring firms like Kampala Coach and G4s Engineering. I therefore find a case of employment of the claimant by the respondent and hold as such.

The 2nd issue for determination is whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawfully. The parties hold diametrically opposed positions on this. The respondent's evidence is that in this relationship, the claimant was discovered to harbor stealing tendencies and he and the neighbourhood would complain of cases of theft in his premises and the neighbourhood. It was on this ground that he was dismissed on grounds of misconduct. The claimant discounts this and submits a case of unlawful termination of employment.

On a balance of probabilities and preponderance of evidence, this matter tilts in favour of the respondent. It is therefore the more probable of the two scenarios and I therefore find a case of lawful termination of the employment of the claimant by the respondent.

I am therefore inclined to dismiss this claim with an order that each party bears its own costs of the claim.

Delivered, dated and signed this 14th day of November 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Wanyonyi instructed by M/s Kimaru Kiplagat & Company Advocates for the Claimant.
2. Mr. Mukhabane instructed by Nyairo & Company Advocates for the Respondent.