



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT KISUMU

CAUSE NO. 87 OF 2013

(Before Hon. Lady Justice Maureen Onyango on 5th June, 2015)

DANIEL CHARLES MACOMBOGO CLAIMANT

VERSUS

ENG. PAUL ODUOL ONALO 1ST RESPONDENT

(The Resident Engineer,

Ndori-Owimbi-Luanda Kotieno Road Project

MINISTRY OF ROADS 2ND RESPONDENT

HON. ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Daniel Charles Macombogo instituted this claim by his Memorandum of Claim dated 26th June 2012 and filed on 29th June 2012. The claim was initially filed in Nairobi as Cause No. 1111 of 2012 but was transferred to Kisumu and registered as Cause No. 87 of 2013. The claim was initially against the 1st respondent alone but was amended with leave of the court to include the 2nd and 3rd respondents. In the Amended Claim the claimant seeks the following orders:-

- a. A declaration that the claimant dismissal from employment was unlawful.
- b. Full payments of the claimants' terminal benefits and other dues there to as determined by this court.
- c. Costs be in the cause.

The 1st respondent filed its response to the claim through Ms. Ochieng Opiyo & Company Advocates on 29th November 2012. The 2nd and 3rd respondents filed their response through the Attorney General's Office, Kisumu on 26th February 2015.

The case was heard on 10th March 2015. The claimant appeared in person and testified on his behalf. The 1st respondent did not attend court and did not file any submissions. The 2nd and 3rd respondents were represented at the hearing by litigation counsel S. O. Nyauma but did not call any witness. Mr. Nyauma instead informed the court that the 2nd and 3rd respondents will rely on the written submissions filed on their behalf on 20th March 2015.

The claimant's case is that he was employed by the 1st respondent from 2005 to 2010. He testified that he was terminated because he requested for Kshs 200,000/= for treatment and that his termination was verbal. His salary was Kshs 14,898/= paid monthly. There was a letter of appointment but he was not given a copy. There was agreement for payment of standing overtime of 250 hours per month which was only paid once then stopped.

According to claimant the 1st respondent received the money but did not release the money to the workers. The claimant testified that he had originally sued the 1st respondent who was the Resident Engineer, Ndori - Owimbi - Luanda Kotieno Road Project but enjoined the 2nd and 3rd respondents after the 1st respondent objected to being sued in person as he was seconded to the project as an employee of the Ministry of Roads to supervise the contractor's work.

The claimant prayed for payment as prayed in the Memorandum of Claim.

The 1st respondent admitted that the claimant was engaged on temporary basis as casual labourer at both Ndori - Owimbi and Owimbi - Luanda Kotieno road projects by the contractor Put Sarajevo Engineering Company between June 2005 and April 2007 and May 2007 and 2010 in the two projects respectively. That the claimant was laid off in mid May 2010 owing to completion of the Owimbi - Luanda Kotieno Road Project. The 1st respondent denied that there was agreement to pay overtime of 250 hours per month. The 1st respondent pleaded that the total overtime for Owimbi - Luanda Kotieno Road Project was confirmed by Put Sarajevo to be Kshs 2,413,168.50 of which only Kshs 2,882.90 was for the claimant. That the claimant's wages for the month of May 2010 was Kshs 9,741 so that the total owed to the claimant for May 2010 inclusive of overtime was Kshs 12,963.90. The 1st respondent pleaded that he was seconded to the project by the Ministry of Roads to supervise the contractor and had no contractual relationship with the claimant. He pleaded that he wrote several letters to the contractor in respect of overtime as a sign of good faith. He denied the allegations by the claimant that he was dismissed because of demanding medical assistance of Kshs 200,000/-. He averred that when he received the claimant's letter seeking financial assistance he forwarded it to the surveyor Mr. Wanyonyi with a note to arrange for a funds drive.

The 1st respondent averred that the claimant wrote numerous letters to various Government departments maligning him and he was forced to respond to the same to the Provincial Commissioner's Office and the Chief Engineer Roads among others.

He prayed that the claim against him be dismissed.

In the written submissions, the 2nd and 3rd respondents deny that the claimant was employed by the 2nd respondent as claimant did not prove the legal requirements of an advertisement, interview, academic qualifications and national identity card. The 2nd and 3rd respondents further denied that the claimant was a casual employee as he did not prove that he fits within the definition of a casual employee in the Employment Act which refers to a casual as an employee engaged for not longer than 24 hours. It was further submitted that having been a casual the claimant could not claim wrongful dismissal or terminal benefits. It was submitted that the claimant did not prove that he was owed overtime.

The 2nd and 3rd respondents submitted that any relationship between the claimant and the 1st respondent was a local arrangement for which they should not be held responsible. They also denied the claim that the 2nd respondent blocked all channels for the claimant to secure employment and prayed that the claim be dismissed with costs.

I have considered the pleadings and submissions. I have also considered the evidence adduced in court by the claimant. The issues for determination are whether the claimant was employed by the respondents, whether he was unfairly terminated and if he is entitled to any of the prayers sought.

The 1st respondent admitted that the claimant was engaged on the Ndori - Owimbi and Owimbi - Luanda Kotieno Road Projects between June 2005 and May 2010. He however avers that the claimant was employed by the contractor Put Sarajevo and not the 1st respondent.

In the letter dated 15th March 2011 signed by the 1st respondent as Resident Engineer, Owimbi - Luanda Kotieno Road Project, he states as follows in the 1st paragraph:-

"I draw your attention on my earlier letter ref; 1186/RD. 0473/VOL.1 dated 18th February 2010 concerning outstanding payments for overtime allowances due to my staff". (emphasis mine).

In all other letters annexed to the response of the 1st respondent, he is the one seeking payment from Put Sarajevo Engineering Company. All the documents annexed to the claimant's Memorandum seeking payment are addressed to the 1st respondent and not Put Sarajevo Engineering Company. At appendix 12 of the claimant's documents there is an internal Memo from the Resident Engineer to ALL RE'S STAFF. The Memo is giving notice of termination of employment to all Resident Engineers Staff following the conclusion of the Owimbi - Luanda Kotieno contract.

From the foregoing it is clear that the claimant was an employee of the 1st respondent in his official capacity as Resident Engineer of the Roads Project on behalf of the 2nd respondent. All the respondents are therefore properly enjoined in the suit.

Was the claimant unfairly terminated.

Based on the letter dated 12th May 2010 giving notice of termination to all Resident Engineer's Staff on the grounds of completion of the contract, there was no unfair termination. The claimant having been employed on a road project, could not expect to be in employment after the project was completed.

I therefore find that the claimant has not proved that his employment was unfairly terminated.

Is the claimant entitled to the prayer's sought.

The claimant prays for unspecified full terminal benefits. In his testimony he specifically prayed for overtime, April and May salary and notice.

None of the respondents stated that the claimant was paid his April and May wages. The 1st respondent admits that the claimant was not paid salary for May 2010. The claimant has however not proved that he was entitled to a standing overtime of 250 hours per month. Appendices 17 and 18 that he referred to provide for overtime for specific dates which were then paid at the end of the month. His salary is reflected as Kshs 14,898/= per month in both Appendices and not Kshs 9,741/= as stated in the 1st respondent's response to the claim.

The letter of termination states the Employment is terminated with immediate effect, meaning that there was no notice.

For the foregoing reasons I award the claimant the following:-

1. **Salary for April and May 2010 at Kshs 14,898/= per month at Kshs 29,796/=**
2. **Notice Kshs14,898/=**
3. **Overtime admitted by the respondent in the sum of Kshs 2,882.90/=**

TOTAL = KSHS 47,576.90/=

Dated and delivered this **5th** day of **June**, 2015.

MAUREEN ONYANGO

JUDGE

Appearances:-

..... for the claimant(s)

..... for the respondent(s)

CC. Wamache