



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT ELDORET**

**CAUSE NO.69 OF 2017**

**SAMUEL TANUI KIPTAN.....CLAIMANT**

**VERSUS**

**INTER CONSTRUCTION CO. LTD.....1<sup>ST</sup> RESPONDENT**

**K.S GHELLOT..... 2<sup>ND</sup> RESPONDENT**

**P.S TAK .....3<sup>RD</sup> RESPONDENT**

**S GHELOT .....4<sup>TH</sup> RESPONDENT**

**JOHN NJERU .....5<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

1. On 11<sup>th</sup> May, 2017 the claimant filed the Memorandum of Claim herein. The respondent was served and entered appearance on 9<sup>th</sup> June, 2017.

2. Parties attended court on 25<sup>th</sup> September, 2017 and agreed to negotiate out of court. the respondent was also directed to file defence where there was no agreement by 27<sup>th</sup> October, 2017. The court issued a mention dated for 31<sup>st</sup> October, 2017.

3. On the due date the respondent did not attend. There was no agreement between the parties. The respondent filed a defence on 9<sup>th</sup> October, 2017. The court issued hearing directions and mention dated for 20<sup>th</sup> November, 2017.

4. On the due date the respondent was served but remained absent. On 25<sup>th</sup> April, 2018 the claimant was in court for hearing directions. The respondent was served but was absent. A hearing date was fixed for 29<sup>th</sup> June, 2018. The respondent was served, accepted notice but remained absent on the scheduled hearing date. There are returns to confirm service upon the respondent.

**Claim**

5. The claimant is an adult male. The 1<sup>st</sup> respondent is a company transacting business as Inter Construction Company Ltd. The 2<sup>nd</sup> respondent is the managing Director of the 1<sup>st</sup> respondent company and the 3<sup>rd</sup> and 4<sup>th</sup> respondents are the Executive chairman of the 1st responded company, and the 5<sup>th</sup> respondent the human resource manager of the 1<sup>st</sup> respondent company.

6. On 27<sup>th</sup> March, 2012 the claimant was employed by the respondent company, Intex Construction Company Limited as the Tiba Driver on a contract of service at a salary of Kshs.34, 416.00 per month. On 16<sup>th</sup> March, 2013 the claimant's salary was increased by three instalments of Kshs.15, 000.00 but he was only paid Kshs.24, 000.00 leaving a balance of Kshs.21, 000.00 unpaid.

7. As part of the employment terms it was agreed that the respondent company would meet the claimant's transport costs from Voi to Chesegeon at Kshs.20, 000.00 but was only paid Kshs.10, 000.00.

8. On the paid salary the claimant was deducted the sum of Kshs.2,160.00 and Kshs.320.00 where the respondent allegedly said it was for NSSF and NHIF but such deductions were not remitted.

9. On 26<sup>th</sup> August, 2016 the claimant's employment was terminated without any valid reasons or payment of the terminal dues which was wrongful and unfair. The claimant had 7 more months to his contract of service which were not paid for.

10. The respondents are in breach of contract of service for the reason that there was no valid reason to terminate the contract; transport costs due were not paid; the due salary was not fully paid; the deduction for NSSF and NHIF were not remitted; and the respondents have acted in bad faith.

11. The claimant is seeking the following;

- a. 7 months term contract due Kshs.258,120.00
- b. Unpaid salaries at Kshs.21,000.00;
- c. Transport costs kshs.10,000.00;
- d. Deducted dues for NHIF amounting to Kshs.136,080.00;
- e. Deducted dues to NSSF amounting to Kshs.20,160.00; Total dues Kshs.258, 120.00

12. The claimant is also seeking costs and interests thereof.

13. The claimant testified in support of his claim. Upon employment the claimant diligently served in his duties but on 26<sup>th</sup> August, 2016 he was dismissed from work. The respondent issued him with a termination letter which he refused to accept or sign for it. The claimant went to the head office and contested the allegations made against him but he was not returned to work. He was not paid his dues. The respondent alleged that the claimant was drunk while at work which was not true. There was no evidence that the claimant was drunk on duty.

14. The claimant also testified that he was called to a disciplinary hearing vide letter dated 5<sup>th</sup> April, 2016 and when he attended he found only three panel members while he remained alone. There was no fair procedure, he was not given a hearing and the respondent lied that he had been drunk while at work. Despite the termination the terminal dues owing were not paid.

#### Defence

15. Despite the respondent not attending, a defence was filed. The response is that the respondent company employed the claimant as a Driver but the claimed salary increments did not occur as alleged. The claimant was paid all his dues and the statutory deductions have been remitted to the requisite bodies. The respondent terminated the claimant's employment which was lawful and not unfair as alleged. The claimant has since refused to collect his terminal dues.

16. The defence is also that there was no agreement that the claimant would be paid for the balance of the contract term, the claims made are unreasonable and without justification.

17. The claimant was on several occasions reported to work while drunk and was cautioned after causing accidents due to drunken and reckless driving. On 21<sup>st</sup> March, 2016 the claimant reported to work while drunk and intentionally avoided direct contact with the site workshop manager and administrator and was issued with a show cause notice when they realised he was intoxicated while on duty. The claimant refused to respond to the show cause notice. The claimant was issued with a warning but he failed to change and the subsequent termination of employment was lawful. Dues owing to the claimant have been computed but he failed to collect the same and the suit should be dismissed with costs.

18. At the close of the hearing and there being no evidence called by the respondent defence closed, the claimant filed written submissions.

#### Determination

19. Effectively, the claimant was the employee of the 1<sup>st</sup> respondent company. Others are officers therein. The records filed, the 1<sup>st</sup> respondent issued letter of employment.

20. The respondents herein failed to attend court to urge their case. The claimant testified in support of his claims and these shall be assessed based on the pleadings, the evidence and the submissions filed.

21. Section 44(4) of the Employment Act, 2007 allow an employer to summarily dismiss an employee found during working hours, is intoxicated. Such provisions must however be read together with section 41(2) of the Act, which requires that;

- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make

22. The claimant testified that he was issued with a show cause notice by the respondent and attended before a panel of disciplinary committee at the head office on 5<sup>th</sup> April, 2016. This is confirmed by the respondent in the defence and the filed work records where there

are minutes of 5<sup>th</sup> April, 2016 where the claimant was heard on the alleged drunkenness while at work.

23. Present at the disciplinary hearing were respondent officers and the claimant. Procedurally, section 41(2) read together with section 44(4) of the Employment Act, 2007 required that the claimant be accompanied by another person *chosen by the employee within subsection (1)*. A person of his choice be present.

24. From the filed records, there was no person present with the claimant based on his choice. The chairman, secretary and complaint were all representatives of the respondent.

25. Following the disciplinary hearing, the claimant was dismissed from his employment with the respondents. There had been a warning issued to the claimant. This then culminated in the disciplinary hearing. The only lapse was failure by the respondent to adhere to the provisions of section 41(2) of the Employment Act, 2007.

26. The claimant was under a contract of service as a Lorry Driver for the respondents. The respondent as the employer has submitted the contract noting it commenced on 27<sup>th</sup> May, 2013 but with no end date. The claim that there was a term of 7 months not served is thus lost. The claimant did not submit any record to suggest that there was a fixed term to his contract which was not served and hence a breach of the same.

27. Upon such written contract, section 13 of the Employment Act, 2007 provides that;

13. Statement of changes

(1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change.

28. Where the employment contract is varied, changed or new terms agreed upon, the employer has the duty to issue the amended contract, if any. Where there is no review, variation or change, the issued contract of service must be interpreted in its terms and to imply any other term as being part of the same, reason demands that he who alleges must prove.

29. In this case, the claimant has asserted that his contract was varied with a salary increase. The contract salary is gross at Kshs.31, 574.40 per month. The pay statement for June, 2013 has a gross wage of Kshs.34, 416.08 which then is an increment from the initial pay of Kshs.31, 574.40 per month.

30. In computing any dues entitled to the claimant, the applicable gross wage is Kshs.34, 416.08.

31. Putting the above into account, the claim for salaries due and unpaid on the evidence that the claimant was entitled to had a salary increase of Kshs.15, 000.00 to be paid in three instalments is not justified. There is no variation of the contract in accordance with section 13 of the Employment Act, 2007 to suggest that the claimant's salary was increased by such an amount. I find no evidence in this regard.

32. Clause 5 of the contract of service made provision that the claimant would be transferred to any location in Kenya depending on the work requirements. There is set travel amounts of kshs.20, 000.00 as claimed set for such transfer. I take it the respondent had reasonable provisions for such transfers. The claim set out is not justified.

33. The claims made with regard to NSSF and NHIF deductions such deductions are not due to the claimant even where they are deducted and not remitted. These are statutory payments to the requisite bodies and where not remitted, the only claim an employee can make is for service pay but not to be paid the deducted amounts.

34. The claim for damages for breach of contract is made on the basis that the claimant had a term contract and 7 months remained not served as analysed above, such term contract did not apply to the claimant. The alleged breach does not arise.

35. The claimant has not made a claim for compensation for unlawful termination of employment. I take it, being well represented by an advocate, this was not by error but deliberate.

36. For any dues owing to the claimant in terms of salary due, leave days untaken and a letter to NSSF for collection of benefits, the respondent in the letter dated 26<sup>th</sup> August, 2016 on summary dismissal has directed the claimant to clear with them and upon which should terminal dues are payable. Clearance with the employer is imperative for the claimant to get his terminal dues.

**Accordingly, the claims herein are without merit and the same is hereby dismissed. As he respondent did not attend at the hearing, each party shall bear own costs.**

**Delivered in open court at Eldoret this 12<sup>th</sup> day of July, 2018.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistants: Nancy & Robert

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