



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIORBI
H.C.CIVIL CASE NO.67 OF 1999

STEPHEN WALWE SHEM & 3 OTHERS PLAINTIFFS

VERSUS

UNITED INTERNATIONAL INVESTIGATIVE

SERVICES (K) LIMITED DEFENDANT

J U D G M E N T

The Plaintiff was employed by the defendant on 19th November, 1996 his services were terminated on the 1st October, 1997 he received a letter informing him that his services has been terminated and the reason given was that he had participated in a strike. He filed this suit against the defendant claiming that the defendant had refused to pay his full benefits and salary arrears as per his Contract of employment Contained in the Collective Bargaining Agreement entered into with the Management of the defendant on 28th February, 1997.

The prayers in the plaint were as follows:

1. Unremitted balance of salary as per the CBA from 1/3/1997 to 1/10/98 at **Shs.6450/=** totaling **Shs.122,550/=**
2. Untaken leave and leave travelling allowance for 2 years 1996 to 1997 and 1997 to 1998 at **Shs.15,400/=** totaling **Shs.30,000/=**
3. Unpaid salary in lieu of notice for 3 months at **Shs.12,900/=** totaling **Shs.38,700/=**
4. Unpaid balance on Christmas bonus for 1997 as per CBA totaling **Shs.9,100/=**
5. Unpaid salary for 15 days being 10 days carried over from September, 1998 and 5 days worked in October, 1998, totaling **Shs.6,450/=**.
6. Unpaid balance of overtime worked from April to November, 1997 as per CBA (worked 5 days instead of 4 days per week) totaling **Shs.11,753/=**
7. Unpaid balance of overtime worked from December, 1997 to February, 1998 as per CBA (worked 6 days instead of 4 days per week totaling **Shs.10,074/=**
8. Unpaid balance on overtime from March to September, 1998 as per CBA (worked 5 hours instead of 4 hours per week) totaling **Shs.11,753/=**.

9. Unpaid salary and allowance on the balance of 3 years contract due to breach (i.e 11 months) totaling Shs.247,600/= 10. Service payment on the two years worked at 19 days salary for every year worked at **Shs.8,169.90** for the two years totaling **Shs.16,340/=**

The first issue to determine is whether or not the termination of the Plaintiff's employment was unlawful. The reason given for terminating the Plaintiff's employment was that he participated in a strike. What he did was that he matched with other employees to the American Embassy, the client of the defendant his employers. Counsel for the Plaintiff submitted that this was not enough to warrant termination of the Plaintiff's employment.

The terms of termination of service are contained in clause 10 of the contract entered into by the Plaintiff and the defendant dated Which was produced as Exh.P.2.

Clause 10 of the said contract provide as follows:- The Agreement may be terminated forthwith by the company without prior notice if the employee shall be at any time:- (a) Be guilty any act or omission amounting to grave misconduct as specified in section 17 of the Employment Act Cap 226 Laws of Kenya. They are as follows:-

- (i) Being absent from duty without leave
- (ii) Being intoxicated during working hours.
- (iii) Willfully neglects to perform duty
- (iv) Using abusive or insulting language or behaving in a manner insulting to employer.
- (v) Failing or refuses to obey orders by employer
- (vi) Being arrested for a cognizable offence punishable by imprisonment and not released on bail within 10 days.
- (vii) Committing a criminal offence against employer or employer's property
- (b) Committing any serious or persistent breach the company's regulations or instructions
- (c) Be recommended by a medical practitioner to be unfit for gainful employment.

2. The Agreement may be terminated by either of the parties hereto giving to the either of them one calendar month's written notice to that effect or by payment of a sum equivalent to one months basic salary in lieu of such notice. Neither the company nor the employee shall be under any obligation to give any reason for terminating the Agreement under this sub-clause

The evidence does not disclose that the Plaintiff had committed any of the acts as stipulated in clause 10 of the Agreement and therefore the termination of his services was unlawful. Having made such a finding the next issue is what the Plaintiff is entitled to.

The Plaintiff had listed the prayers in his plaint as stated above. The Plaintiff has not proved that the defendant owes him unpaid balance of over time worked as prayed. But even if he did, the claim could be dismissed under clause 6 of the Agreement. Exhibit P.2 clause 6© provides as follows:-

The employee shall notify the company in writing of any discrepancy in the payment of his salary, or benefits within the next two week s following such payment .

In default, the employee has no right of a future claim against the company. The discrepancies alleged occurred between 1/3/1997 and 1/10/1998 the date the Plaintiff's services were terminated. The Plaintiff also claimed payment of all his salary and allowances for the period remaining in their employment contract as per the Collective Bargaining Agreement.

The Plaintiff is not entitled to this claim. The employment Agreement is very clear. Either party could terminate the agreement by giving one month's notice or by payment of one month's basic salary in lieu of notice. In this case the Plaintiff is only entitled to one month's basic salary in lieu of notice.

In determining the Plaintiff's monthly basic salary, the Plaintiff quoted the CBA dated 1st March, 1997. There were two CBA one dated 21st March, 1997 and the other dated 28th February 1997. A Collective Bargaining Agreement could only become effective after it had been registered with the Industrial Court CBA dated 28th February, 1997 was not registered. But the CBA dated 21st March, 1997 was registered. On 8/4/1997 and therefore was the only valid legal documents in respect of determining the basic salary of the Plaintiff per month.

On the issue of gratuity, the contract Agreement stipulates that an employee is entitled to 15 days pay for every complete year of service. The Plaintiff had worked for less than 2 years. So he is entitled to for 1 complete year of service. In the up shot the Plaintiff is entitled to the following amounts. The salary for the month of September, 1998 for which he had worked.

Shs.7906.00. One month's basic salary in lieu of notice **Shs.7,800.00/=** One month's salary in lieu of leave and leave allowance = **Shs.7,800.00/=** Gratuity for one complete year = **Shs.4,600.00/=**

Accordingly there shall be Judgment for the Plaintiff and against the Defendant for **Shs.28,106.00/=** with costs and interest.

Dated and delivered at Nairobi this 20th day of June, 2000

J.L.A OSIEMO

JUDGE