



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC NO. 119 OF 2015

IN THE MATTER OF COMPLAINTS AND JURISDICTION ON CASES OF DISPUTE BETWEEN

EMPLOYERS AND IN THE MATTER OF UNFAIR TERMINATION SECTIONS 47

AND 87 OF THE EMPLOYMENT ACT NO 11 OF 2007 LAWS OF KENYA.

BETWEEN

ALEX LUTUNGU MATANGE.....CLAIMANT

VERSUS

KANINI HARAKA ENTERPRISES LTD.....RESPONDENT

JUDGMENT

1. The claimant sued the respondent for unlawful termination, underpayment, payment of salary for days worked in March, 2015 and annual leave pay.

2. It is stated that, the claimant was employed by the respondent on or around 21.7.2010 as a general worker earning a salary of Kshs. 9,000. The claimant had served past the probationary period and was thereof working as a regular employee on permanent basis. The claimant averred that he had diligently served the respondent for 4 years 7 months without any meaningful warning letters except for the warning letters that were issued in the year 2011 and 2015 for being late to work. He was terminated by the respondent on 16th March 2015 when he was earning a basic salary of Kshs. 14,733.58 and housing allowance of Kshs. 2,210. The claimant averred that he used to work for 7 days a week from 6.00 am to 9.00 p.m. his duties were to serve the respondent's customers as a shop assistant and giving out the already paid goods to the customers.

3. Initially the claimant started with a salary of Kshs. 9,000 which was drastically reduced in November 2010 to Kshs. 6,250 plus Kshs. 937 being housing allowance, then later to Kshs. 7,980 per month plus housing allowance of Kshs. 1,197 in 2011, Kshs. 8,074 per month plus housing allowance of 1,211 in 2012, Kshs. 8,653 plus housing allowance of Kshs. 1,298 in 2013 and Kshs. 9,539 plus housing allowance of Kshs. 1,431 in 2014. The claimant averred that the respondent underpaid the claimant on contrary to requirements of the law and their own appointment letter.

4. The claimant averred that by the actual work that he was doing, of selling the respondent's customer's tea leaves on whole sale and retail, he was not a general worker but a shop assistant. This was supported by the respondent's letter dated 26th April 2014 that was given to the claimant which designated the claimant as a shop assistant. The claimant averred that he was terminated for a reason which is not of his own making as the alleged theft of 12 cartons of tea leaves was established to have happened from the computer man who was the respondent's manager and cashier.

5. The claimant averred that when he was interrogated by the respondent director, the director remarked that he had not found any evidence on the claimant. He later involved the police who could not go far with the matter as there was no any other meaningful corroborating evidence.

6. The claimant averred that he was terminated from employment without notice and also the respondent failed to pay him his salary contrary to section 35 of the Employment Act. Several enquiries and appeal against the termination were ignored by the respondent as they never replied to the claimant's appeal. The respondent thus violated the provisions of the Employment Act section 35,41 and 45 of the Employment Act as read together with the provisions of ILO Convention No. 158 on the termination at the initiation of the employer.

7. The claimant prays for judgement against the respondent for;

- 1) **One-month salary in lieu of notice of Kshs. 14,733.58 for a shop attendant.**
- 2) **Salary for the 18 days worked in the month of March 2015 of Kshs. 10,200.**
- 3) **Underpayments on the basic salary in the year 2010, 2011 and 2012 totaling to Kshs. 130,030.20.**
- 4) **Annual leave for 4 years 7 months Kshs. 56,851.**
- 5) **Compensation based on section 49 1C that is 12 months' gross salary Kshs. 381,36.**
- 6) **Certificate of service.**
- 7) **Costs of the suit.**

8. The respondent filed a reply to the memorandum of claim and denied all the allegations contained therein and put the claimant into strict proof thereof.

9. The respondent averred that this matter had already gone through conciliation and a report filed hence the matter cannot proceed. The respondent prays to be allowed to pay what the conciliator ordered. The respondent further contended that the claim having been settled by the conciliator, this court lacks jurisdiction to entertain the same further.

Claimant's case

10. The claimant, **Alex Lutungu Matange, CW-1** gave sworn testimony and stated that he was employed as a general worker via an appointment letter dated 21.07.2010 and marked ALM 2. He was later elevated to a shop assistant via a letter dated 2nd June 2014 and marked ALM9. He testified that some slips had house allowances while others didn't have. He produced his pay-slips as exhibit no 3 to 8.

11. He further testified that he was not issued with a letter transferring him to Maua hence he never rejected any transfer and he also didn't desert employment. The claimant admitted to having gone through conciliation process but he never agreed with the decision of the conciliator as he was not paid enough for all his dues. He admitted to having been paid Kshs. 18,000 only and stated that the conciliator left out the issues of unfair termination and underpayment of wages. He requested the court to grant his prayers as prayed in his claim.

12. The respondent opted to close it's case without calling a witness. Parties were directed to file written submissions. The respondent did not file their submissions.

Claimant's submissions

13. The claimant submitted that despite the various Government general wages amendments of time to time i.e Legal Notice no. 98 of 2010, No. 64 of 2011, No. 71 of 2012 and No. 197 of 2013, the respondent continued to pay the claimant wages way below the Government orders. Therefore, the claimant is justified to claim for underpayment of wages because even after being promoted to work as a shop assistant his salary still remained that of a general worker. The claimant thus prays for underpayment of Kshs. 130,030 between August 2010 up to April 2014.

14. The claimant had informed the court that he was called along with other seven staff members to the head office in Thika by their Director on 16th March 2015. The director was with a police officer who interrogated the claimant on allegation that he colluded with one of the manager to steal from the respondent. The interrogation revealed nothing and this matter ended there, the claimant and his colleagues were never charged in court and no action was taken.

15. The claimant submitted that his services were terminated by word of mouth on 20th April 2015 by the respondent's manager Mr. Mulwa. He told the claimant to go home and wait to be called back once the respondent finds Mr. Ambani, the manager who issued the receipt which had the bone of contention on the alleged loss of money. The claimant was never called back and any effort to secure his employment went in vain.

16. The claimant submitted that it is only after this matter had stayed in court and the court referred the same to reconciliation that the respondent attached the labour payment certificate with a letter of termination dated 23rd March 2015 and an alleged letter of transfer dated 17th March 2015 which were not served upon the claimant at the time of termination. These bundle of documents were only availed to the claimant sometime in March 2018 through his advocates office.

17. The claimant submitted that the respondent also attached some alleged vouchers showing that some employees were paid some money to go on transfer on 18th March 2015. The claimant's duplicate voucher which was brought to his attention in March 2018 and the money alleged to have been paid to the claimant of Kshs. 2500 was signed by Mr. Martin or B. Munyua and not the claimant. This proves that somebody else received the money and not the claimant as the claimant had initially denied having knowledge of transfer or paid money to go on transfer.

18. The claimant maintains that he was unfairly terminated and therefore he is entitled to a claim of one month's salary in lieu of notice and

compensation for unfair termination under section 49 1(c) of Kshs. 381, 367 being 12 months' gross salary.

19. The claimant submitted that the respondent has failed to prove their case against the claimant as provided for under section 43 of the Employment Act and further that the respondent totally ignored section 41 and 45 of the Employment Act.

20. The claimant finally submitted that he has proved his case on a balance of probability hence he is justified to claim for underpayment of wages, notice and costs of this suit.

21. I have examined the evidence and submissions of the parties herein. From the letter of appointment issued to the claimant dated 2/6/2014, he was designated as a shop attendant.

22. The claimant averred that he was verbally terminated on 20/4/2015 on allegations of theft. There is no evidence produced by the respondent to indicate how the claimant was terminated.

23. The respondent filed a defence but failed to call any witness during the hearing. In essence, the respondents failed to call any evidence to counter the claimant's case. As per the ruling the Madan J in **CMC Aviation Ltd vs Cruise Ain (1) (1978) KLR 103** pleadings are not evidence.

24. The learned Madan J (as he then was) rendered himself as follows;

“Pleadings contain averments of the three concerned until they are approved or disapproved or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence.”

25. The respondents having failed to call evidence by simply relying on their pleadings, the claimants case remained uncontroverted.

26. It is therefore my finding that the claimant established his case by proving that he was terminated on allegation of theft which allegations remained as mere allegation. He was not subjected to any disciplinary hearing nor was he allowed to call evidence to controvert allegation against him.

27. Section 45 (2) of the Employment Act 2007 states as follows;

45. (1).....

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

28. The claimant having been terminated without proof of valid reason and without following due process, I find his termination to be unfair and unjustified. In terms of remedies I find for the claimant and award him as follows;

1. 1 month salary in lieu of notice = gross pay of 16,943/= as per December 2014 payslip.

2. Salary for 18 days worked in March 2015 = $18/30 \times 16,943$

= 10,166

3. Underpayments of salary as pleaded from 2012 to 2015

= $3998.30 + 6670 + 29,905 + 14,046.90 + 44,302.05$

= 98,921/=

4. Leave for 3 years the rest being time barred

= $3 \times 16,943 = 50,829/=$

5. Compensation of 8 months for unfair and unlawful termination. The 8 months being pegged on the fact that the respondent failed to prove any reason for the termination and they also failed to accord the claimant an opportunity to defend himself

= 8 x 16, 943/= 135, 544/=

Total awarded = 312,403/= less statutory deduction

6. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 6TH DAY OF JULY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Owuor for claimant present

Muthanwa for respondent present

Court assistant – Fred/Wanyoike