



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 157 OF 2018

JOHN KASSIM KIRAGA.....CLAIMANT

VS

MOHAMMED MUSTAQUIM YUSUF ADMANI.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 19th March 2018 and filed in court on 21st March 2018, the Claimant brings a claim for unlawful termination of employment, against the Respondent. In response, the Respondent filed a Statement of Response on 22nd May 2018.
2. The matter came up for pre-trial directions and a hearing date was fixed; first, for 24th September 2019 and subsequently, for 28th September 2020.
3. However, the Respondent did not attend trial in spite of due service. The Court therefore heard the Claimant *ex parte*. In arriving at its judgment, the Court has considered both parties' pleadings as well as the Claimant's testimony and submissions.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent as a general factotum/house help from 22nd November 2006 until 7th March 2016. He claims to have earned a monthly salary of Kshs. 7,000.
5. The Claimant states that on 7th March 2016, the Respondent's mother sent him to pick coconuts for the Respondent and while the Claimant away, the Respondent's mother invited a lady to the house. After the lady had left, it was discovered that the Respondent's phone had been stolen.
6. The Claimant avers that the Respondent turned on him, alleging that he had failed to avert the theft of the Respondent's phone. The Claimant states that the Respondent used extremely abusive language while dismissing him on the spot.
7. The Claimant's case is that the termination of his employment was substantively and procedurally unfair. The Claimant states that he was not paid any terminal dues.
8. The Claimant tabulates his claim as follows:

- a) Salary in lieu of notice.....Kshs. 7,000
- b) Leave pay for 10 years.....49,000
- c) Service pay for 10 years.....35,000
- d) 12 months' salary in compensation.....84,000
- e) Underpayment.....176,304
- f) Costs plus interest

The Respondent's Case

9. In his Statement of Response dated 21st May 2018 and filed in court on 22nd May 2018, the Respondent admits having employed the Claimant as a general factotum/house help at a monthly salary of Kshs. 7,000. The Respondent however denies that the Claimant was employed between 22nd November 2006 and 7th March 2016.

10. The Respondent further denies that the Claimant's employment was unfairly terminated.

11. Regarding the issue of the phone, the Respondent states that in the course of the day, his mother noticed that her phone was missing.

12. The Respondent further states that the Claimant was called upon and accorded a fair hearing as to the whereabouts of the missing phone.

13. The Respondent's case is that the Claimant's employment was never terminated; rather, the Claimant himself, without leave or reason, absconded his duties.

14. The Respondent avers that the Claimant was paid all the benefits that were due to him.

Findings and Determination

15. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

16. The Claimant states that the Respondent terminated his employment on 7th March 2016, on allegations of failure to prevent theft of a phone.

17. In denying the Claimant's claim, the Respondent states that the Claimant himself absconded duty. While this is a valid ground for termination of employment, it must be proved.

18. It is now well settled in case law that an employer cannot simply state that an employee has absconded duty; such an employer must show that efforts have been made to reach out to the employee. At the very least, an employer alleging that an employee has absconded duty, is required to show that efforts have been made to notify the employee that termination on this ground is being considered (see *Godfrey Anjere v Unique Suppliers Limited [2015] eKLR*).

19. In this case, the Court did not see any such efforts on the part of the Respondent.

20. The Court therefore rejects the Respondent's line of defence and adopts the Claimant's testimony that his employment was terminated by the Respondent, without justifiable cause, and in violation of due procedure.

Remedies

21. As a result, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have considered the Claimant's long service with the Respondent as well as the Respondent's unlawful conduct in terminating the employment.

22. I further award the Claimant one (1) month's salary in lieu of notice.

23. The Respondent did not adduce any documentary evidence to show that he remitted the Claimant's National Social Security Fund (NSSF) dues. I therefore allow the claim for service pay.

24. The Claimant claims leave pay for his entire period of service. However, reckoning the date of termination as 7th March 2016, this claim, which falls within the category of continuing injury within the meaning of Section 90 of the Employment Act, ought to have been brought within one year, that is to say, by 6th March 2017. From the record, the Claimant filed his claim on 21st March 2018 and the claim for leave pay is therefore statute barred.

25. At the trial, the Claimant did not lead any evidence to support the claim for underpayment. This claim was therefore not proved. In reaching this verdict, the Court rejects the Claimant's Counsel's attempt to adduce evidence in final submissions.

26. Finally, I enter judgment in favour of the Claimant as follows:

- a) 10 months' salary in compensation.....Kshs. 70,000

b) 1 month's salary in lieu of notice.....7,000
c) Service pay for 9 years (7,000/30*15*9).....31,500
Total.....108,500

27. This amount will attract interest at court rates from the date of judgment until payment in full.

28. The Claimant will have the costs of the case.

29. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF APRIL 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyongesa for the Claimant

No appearance for the Respondent