



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**ELRC CAUSE NO. 36 OF 2016**

**JOSEPH MUKA KHABONEKHA.....CLAIMANT**

**VERSUS**

**TURACO LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant through Messers Ndeda and associates Advocates filed this claim vide a Memorandum of Claim dated 28<sup>th</sup> January, 2016 on the 8<sup>th</sup> February, 2016 alleging wrongful dismissal and unlawful termination from employment and non-payment of terminal dues. He seeks for the following reliefs; -

- a) That the termination be found to be unfair and therefore unlawful.**
- b) The claimant be paid one month pay in lieu of notice.**
- c) The claimant be paid underpayment of wages starting the year he was employed**
- d) The court declare the claimant was a salesman not a supervisor.**
- e) That the claimant be paid off duties.**
- f) The claimant be paid July and August 2015 commission**
- g) The claimant be paid for 3 days worked in September, 2015.**
- h) The claimant be paid compensation based on section 49(1)(c) of the Employment Act.**
- i) The Respondent to pay cost of the suit.**
- j) The Respondent to give the claimant a certificate of service in the meaning of section 51 of the Employment Act.**

2. The summary of the claimant's case was that he was employed by the respondent when their name was Pluto Holdings Limited on 1<sup>st</sup> December, 1989 as a supervisor. That the Respondent changed its name from Pluto Holding to Turaco Limited and issued him with a new appointment letter dated 1<sup>st</sup> August, 2007 under the same position but earning a salary of Kshs 11,000/- per month which was increased to Kshs. 16,000/- in June 2011.

3. On September, 2014, the claimant was paid his gratuity for the 7 years worked and subsequently issued with a new contract on 1<sup>st</sup> October, 2014 still in the same position of a supervisor but this time his pay was Kshs 20,000/-.

4. It is the claimant's contention that as much as the employment letter produced before this court indicated that he was a supervisor, his duties were mainly of a salesperson as he was forced to travel to other parts of Kenya e. g Kisumu, Eldoret, Kitale Bungoma Busia, Homabay and Kericho to sell the Respondent's wares. He thus saw himself as a salesperson not a supervisor as indicated in the appointment letters.

5. It is on that basis that the claimant stated that he was underpaid by the Respondent who paid him Kshs. 20,000/- being consolidated salary instead of Kshs 26,751.80 per the legal Notice number 117 of 1<sup>st</sup> May, 2015 payable to a salesperson.

6. The claimant was allegedly dismissed from employment on 3<sup>rd</sup> September, 2015 without Notice or due process thereof.
7. Prior to the claimant's termination, the claimant had sold some wares to a customer for Kshs.300,500/- which he received a cheque for payment, however on cashing the said cheques there was delay in banking computer system for 2 days before the said money reflected in the respondent's account. He stated that in the intervening period the respondent's Director kept on insulting him because of the said delay and later on dismissed him from employment.
8. The claimant reported the issue to the labour office which did not solve the issue between the claimant and the Respondent and the matter was therefore brought before this Court.
9. The Respondent entered Appearance on the 20<sup>th</sup> May, 2016 and filed a response to claim on the 22<sup>nd</sup> July, 2016. It denied that it employed the claimant in the year 1989 rather that it employed the claimant on 1<sup>st</sup> August, 2007 having been incorporated on 23<sup>rd</sup> October, 1997 while Pluto holding was incorporated on 8<sup>th</sup> February, 1993 as separate legal entity operating independent of each other.
10. The Respondent admitted that it offered the claimant various contracts however contends that it paid the claim Kshs. 53,550 in September, 2014 for the 7 years he worked for them.
11. The Respondent maintained that it employed the claimant as a supervisor whose duty was to supervise all staff as per the employment letter attached and the sales allegedly done by the Claimants was within his purview of employment.
12. The Respondent denied terminating the claimant's services and stated that the claimant reported to work as usual on 3<sup>rd</sup> September, 2015 and over lunch break took his break and never reported back. Also that the claimant sabotaged the Respondent's business by taking the Respondent's mobile phone that had all the contracts of the respondent salespersons and customers.
13. The respondent denied abusing the claimant on the 25<sup>th</sup> and 26<sup>th</sup> September, 2015, as the Respondent Director Mr. S. J. Shah was out of the county from 20<sup>th</sup> August, 2015 to 1<sup>st</sup> September, 2015.
14. The respondent denied terminating the service of the claimant and stated that the claimant deserted employment.
15. The Respondent stated that it received a letter from the labour offices dated 7<sup>th</sup> September, 2015 and responded on 10<sup>th</sup> September, 2015 however they were never called to any meeting.
16. The Respondent thus stated that the claimant's services were never terminated as alleged and prayed for the claim to be dismissed with costs.
17. The Claimant filed a reply to the Respondent's defence on the 23<sup>rd</sup> August, 2016 reiterating his claim and maintaining that he was a salesman and the Respondent use of the supervisor tag was a ploy by the Respondent to avoid paying him in accordance with the minimum wage order.

### **Hearing**

18. During hearing the claimant testified that he worked for the Respondent since 1989 when it was still referred to as Pluto Holding and maintained that the directors of Pluto Holding are the same as the director of the Respondent. He contended that he was unfairly terminated from employment and prayed for his claim to be allowed as prayed. He then Produced the document in the list of documents.
19. On cross examination he testified that he worked for Pluto holding before it was renamed to Turaco Limited. He contends that he does not have any issue with Pluto Holdings as he was paid all his dues. It was his testimony that he did not apply to join Turaco Limited as the Respondent director issued him with an employment letter. He affirmed that he was employed as a supervisor as per his employment letter. He admitted also that he was issued with a Nokia Phone which he used at work to contact Respondent's customer and did not hand the same over upon his dismissal. He also admitted that the director was not in the country between 25<sup>th</sup> and 26<sup>th</sup> of September when he was allegedly insulted by Mr. Shah. He testified further that he worked on public holidays till evening and the Respondent forced him to sign that he worked half a day.
20. The Respondent called two witnesses, the first witness **Sammy Mauti (RW-1)** testified that he is the assistant supervisor at the Respondent who worked with the claimant at all material times. It was his testimony that he was employed by Pluto Holding which was dealing with selling of clothes shoes, mattresses etc. to join the Respondent who were dealing with selling of Bicycles, motor cycles, generators and construction materials. He testified that the directors of the Respondent and Pluto Holding were different. He stated that the claimant was the general supervisor while he assisted him. He testified that they reported to work at 8:30 am and left at 5:30 pm. He stated that on 3<sup>rd</sup> September, 2015 the claimant took his lunchbreak and never came back taking with him the office mobile phone. He also stated that Mr. Shah was out of the county in the month of August, 2015.
21. On cross examination, he testified that he started working for Turaco Limited 7 years ago. He stated that turaco was previously referred to as Pluto whose director was Shajey Shah. It was his testimony that the claimant was a supervisor whose duties are as per his letter of appointment. He testified also that the claimant was not sacked but absconded duty.
22. The Respondent called another witness, **Sanjay Tajatilala Shah, (RW-2)** who testified that he is the director of Turaco Limited. He stated that the claimant was not terminated from employment. He told the court that he received a letter from the claimant dated 3<sup>rd</sup>

September, 2015 protesting an allegation that he had insulted him on 25<sup>th</sup> and 26<sup>th</sup> August, 2015 when he was out of the Country and produced his passport showing he was out of the county on 20<sup>th</sup> August, 2015 and came back on 1<sup>st</sup> September, 2015. He stated that on 3<sup>rd</sup> September, 2015 the Claimant reported to work in the morning worked till 1pm and left for lunch with the office mobile phone and never came back. He also stated that the claimant was employed as a supervisor and not a salesman as alleged.

23. On cross examination, he reiterated that he employed the claimant on 1<sup>st</sup> August, 2007, and contends that the Respondent was not in existence in the year 1989 therefore the letter of employment indicating the claimant was employment on 1<sup>st</sup> December, 1989 is a forgery. He stated further that the claimant was a supervisor whose duties are indicated in his employment letter at page 2 and was never a salesperson. He affirmed that the claimant absconded duty and was never terminated as stated in the claim.

### **Submissions.**

24. The claimant submitted that he was summoned by the Respondent director on 3<sup>rd</sup> September, 2015 to brief him on the progress of the company while he was away. After the brief he was sent home and that was how he was terminated. He argued that the termination was unfair in the sense that the claimant was not informed the reasons for his termination, neither was he accorded any hearing or paid terminal dues.

25. The Claimant maintained that he was a salesperson at the Respondent as per the day to day duties that he undertook. He argued that the supervisor position was merely on paper but on the ground he worked as a salesperson that was underpaid as per the minimum wage Order and urged this court to find for him and allow the claim as prayed.

26. The Respondent on the other hand submitted that the claimant was not terminated from employment but t on his own volition having reported to work on 3<sup>rd</sup> September, 2015 and left on a lunch break never to go back. the Respondent argued that the claimant contradicted himself when it testified in court that he was ordered by the Respondents director to go home while in the letter of 3<sup>rd</sup> September, 2015 the claimant's concerns was on allegation of abusive language used by the director which he termed as indirect termination and the basis of him quitting. He also argued that the Claimant had indicated in his pleadings at paragraph 18 that he was questioned by the Respondent Director Mr. Shah on the delay of the money reflecting on the customer's account and later insulted by the Respondent, which narrative was changed in the submission to indicate that the insults emanated from the director's wife thus contradicting himself.

27. On the issue of underpayment, the Respondent submitted that it employed the claimant on 1<sup>st</sup> August, 2007 as a supervisor with its duties spelt out in the letter of appointment and on 24<sup>th</sup> September, 2014 he was paid gratuity for the 7 years worked and the claimant signed a new appointment letter dated 1<sup>st</sup> October, 2014 which he was also employed as a supervisor with his duties spelt out in the appointment letter. The Respondent maintained that the claimant was at all material times a supervisor and the writing of delivery notes as the one produced in Court was one of his duties as a supervisor, therefore the allegation of underpayment under salesman job bracket is unwarranted.

28. On the issue of unpaid off days, the Respondent contends that particulars of the said off days are not pleaded by the claimant in his claim. It was argued that the claimant reported to work on weekdays from 8:30am to 5:30 pm and on Saturday from 8:30 am to 1:30 pm with rest days on Sundays and all public holidays a fact that was corroborated by the Respondent witnesses.

29. On whether the claimant was paid pro-rata leave, it was submitted that the claimant only prayed for the said leave for 7 months but did not indicate which months the said leave applied to for the Respondent to respond appropriately, the Respondent thus prayed for the same to be rejected.

30. The Respondent concluded that the claimant has failed to prove his case on balance of probability and prayed that the claim be dismissed in its entirety.

31. I have examined the averments of the parties herein. From the evidence submitted by the claimant, he was indeed employed by Plutos Holdings on 1/12/89 as a supervisor.

32. The letter of employment was signed by one S. J. Shah. On 1/8/2007 the claimant was now appointed by Turaco Ltd. Of cause the claimant has indicated that he has no claim against Plutos Holdings because he was paid his gratuity under the previous contract served.

33. On 1/10/2014, he was issued with another contract by Turaco Ltd as a supervisor at a salary of kshs.20,000/=. The claimant has contended that he was terminated on 3/9/2015.

34. The claimant contends that he was terminated verbally on this day by respondents director Sanjey Shah.

35. The respondents on the other hand contend that the claimant absconded duty this day after he went for his lunch break and never came back.

36. In his submissions however, the claimant has indicated that he received insults from Mr. Sanjey's wife and on 3/9/2015 he met Mr. Sanjey and informed him of the insults. The director Mr. Sanjey however told the claimant to go home and they meet at the Labour Office.

37. Whether the claimant was terminated by respondent or he absconded duty however can be discerned from the letter the claimant wrote to the respondent on 3/9/2015 complaining about abuses meted against him and copied to the Nakuru Labour office. On 7/9/2015 the Labour officer summoned the respondents to his office on the complaint lodged by the claimant averring that he was terminated on 3/9/2015.

38. Indeed if the claimant had absconded duty he would not have reported to the Labour Office on the same day.

39. If it is also true that if the respondents allege that the claimant had absconded duty, they would have summoned him for a disciplinary hearing because he was within reach even reporting to the labour office.

40. The claim that the claimant absconded duty therefore does not hold much water. It is my finding that the claimant was terminated as alleged by the respondent and without any disciplinary hearing.

41. I therefore find that the claimant was unlawfully and unfairly terminated by the respondent as provided under Section 45 (2) of the Employment Act 2007 which 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”.**

42. In terms of remedies, I find for the claimant and I award him as follows;

**1. 1 month’s salary in lieu of notice = 20,000/=**

**2. 3 days worked in September 2015**

**=  $3/30 \times 20,000 = 2,000/=$**

**3. Prorata leave for 7 months**

**= 10,378/=**

**4. 10 months’ salary as compensation for the unlawful & unfair termination =  $20,000 \times 10 = 200,000/=$**

**TOTAL = 232,378/=**

**Less statutory deductions**

**5. The claimant be issued with a Certificate of Service**

**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 VIRTUALLY THIS 19TH DAY OF OCTOBER, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Awuor for claimant – present

Respondents – absent

Court Assistant - Fred