



**REPUBLIC OF KENYA**

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

**CAUSE NO. 418 OF 2014**

13. CW1 stated that Mr. Rono gave him copies of the documents he produced before court since he was not allowed to pick his documents at the office.

14. RW1 Mr. Kipsosion Kipkorir testified as RW1 that he recruited CW1 in 2008 to do the books of account for the business. That CW1 did part time until 2010 when he became full time.

15. CW1 was released by the accounting consultants to the Respondent. That CW1 worked for the Respondent until 14<sup>th</sup> /2/2014 when he failed to report to work. That RW1 telephoned him afterwards and he said he had issues.

16. On 24/2/2014 the Respondent was served with a demand letter from the Advocates of the Claimant. The matter then came to court. RW1 states that the Claimant was paid Kshs.19,790 per month and not Kshs.31,000 as CW1 alleges.

17. RW1 emphasized that the Respondent did not terminate the employment of the Claimant but he deserted work. RW1 also said the Respondent did not pay CW1 Kshs.1,000 per week for lunch. That CW1 was only provided with 10 O'clock tea daily.

18. RW1 under cross examination conceded that CW1 had no letter of appointment. RW1 stated that the Respondent was associated with CW1 since 2008 but he worked for Consultants called VATCON.

19. RW1 produced a pay slip which he purported to belong to the Claimant. CW1 however had denied that he was given any pay slip. RW1 could not produce any other pay slip. He said he had only one and it was computer generated.

20. RW1 stated that VATCON handled the accounts of the Respondent.

21. RW2 was James Cherono the Chief Accountant. RW2 testified that he knew the Claimant. That he worked as Assistant Accountant for the Respondent. That on 13/2/2014, the Claimant did not turn up for work. RW2 called him to find out his whereabouts. That Claimant said he would talk to RW1 later.

22. RW2 denied having given CW1 the documents he produced before court. RW2 stated that the Claimant kept those documents for the purpose of debt collection. RW2 stated that he was the immediate supervisor of the Claimant.

23. RW2 stated that the Respondent gave pay slips to employees but they were able to produce only one before court.

24. RW2 stated that he joined the Respondent on 4<sup>th</sup> /1/2010. That the Claimant worked occasionally then, about twice or thrice a week.

### **Determination**

25. The issues for determination are:-

(i) Whether the Claimant absconded from work or he was unduly dismissed from employment.

(ii) Whether the Claimant is entitled to the reliefs sought

### **Issue (i)**

26. There is no dispute that the Claimant was employed by the Respondent as an Accounts Assistant. However it is in dispute whether he started working for the Respondent on a full time basis in 2007 as he alleges or in January 2010 as the Respondent alleges.

27. There is also dispute whether the Claimant was paid Kshs.31,000 monthly as he alleges or was paid Kshs.19,790 as RW1 alleges.

28. It is also in dispute whether the Claimant deserted work on 24<sup>th</sup>/2/2014 as RW1 alleges or on 13/2/2014 as RW2 alleges or the Claimant was dismissed from work as he alleges on 14/2/14.

29. The testimony by RW1 and RW2 is conflicting as to the date when the Claimant absconded work. Whereas RW1 states that this occurred on 24/2/2014, RW2 stated that this occurred on 13/2/2014.

20. On the other hand the Claimant told the court that on 12<sup>th</sup> /2/2014, the office held the opening meeting of the year for departmental heads. That on 13/2/2014, the Claimant submitted the minutes of the meeting to RW1.

21. That the meeting had taken a long time but he had no issues with what was discussed. That the Claimant proceeded to his normal duties in the field.

22. That on 14/2/14, RW2 summoned the Claimant to the office. That the Claimant found RW1 and RW2 together. That RW1 asked the Claimant to vacate the office immediately and that they would write to inform the Claimant when to return.

23. That no letter was written to the Claimant. That the Claimant followed up the mater and when no letter to recall him was forthcoming he instructed his advocates to write a demand letter to the Respondent.

24. The contents of the demand letter dated 24<sup>th</sup>/2/2014 is consistent with the testimony of the Claimant. RW1 and RW2 adduced conflicting evidence as to the date when the claimant left the organization and they did not offer any reason why the Claimant absconded duty as they alleged.
25. The conduct by the Claimant of immediately instructing his advocates to write to the Respondent as to the happenings of 14<sup>th</sup> /2/2014, leads credence to his testimony that he was unceremoniously called from the field by RW1 and told to vacate his office until he is informed otherwise.
26. The Respondents did not respond to the demand letter in which the Claimant stated that he was entitled to Kshs.31,000 in lieu of notice and that his dismissal was unlawful and unfair and that he be paid service pay for the 7 years worked.
27. The Respondents did not write any letter to the Claimant regarding the alleged desertion of work.
28. The court believes the testimony by the Claimant that he was unceremoniously dismissed from employment by RW1 without notice, notice to show cause and/or any disciplinary hearing. That no valid reason was given by the Respondent for the summary dismissal of the Claimant.
29. The court finds that the Respondent violated Sections 36, 41, 43 and 45 of the Employment Act of 2007. The summary dismissal was unlawful and unfair.
30. The Claimant is entitled to at least one month salary in lieu of notice in terms of Section 36 of the Employment Act, and compensation in terms of Section 49 (1) (C) and (4) of the Act.
31. In this respect, the Respondent was obligated under Section 2 of the Employment Act, to provide a written letter of appointment to the Claimant. The Respondent admitted that it had failed to do so.
32. The Act, provides that an adverse presumption shall be made by the court where the parties adduce conflicting evidence on issues that the law obligates the employer to provide in writing. In this respect, whereas the Claimant has testified that he served the Respondent for a period of 7 years and that he earned Kshs.31,000 per month, the Respondent has adduced contrary evidence that the Claimant served for about 4 years and earned Kshs.19,790 per month.
33. The Respondent however failed to produce Letter of Appointment as it was obligated to do by law.
34. Accordingly, the court makes an adverse presumption against the Respondent that had it produced the letter of appointment the contents of the letter would have been adverse to the Respondent.
35. Accordingly, the court finds that the Claimant served the Respondent from 2007 up to 14/2/14 and earned Kshs.31,000 per month at the time he left the employment of the Respondent.
36. That the Claimant did not abscond work but was summarily dismissed without notice, notice to show cause or any reason attributed to the dismissal. The Claimant loss good career prospects as he was only 45 years at the time.
37. The Claimant had no time to time to absorb the loss of job and income suddenly and suffered loss and damage, the Claimant did not contribute to the unlawful job loss.
38. The Claimant was not paid any terminal benefits nor was he paid any compensation for the unlawful termination.
39. The court has considered the case of **Standard Group Limited V Jerry Luesby (2018) ekLR** which set out the principles of assessing compensation.
40. The Claimant was not placed on NHIF and NSSF for a period of 3 years between 2007 and 2010.
41. Considering all the above, the Claimant is entitled and is awarded the equivalent of six (6) months salary in compensation for the unlawful dismissal in the sum of Kshs. (31,000 x 6) 186,000.

#### **Terminal benefits**

42. The court further awards the Claimant

- (i) Kshs.31,000 in lieu of one month notice
- (ii) Kshs.124,000 in lieu of four (4) years untaken leave which fact has been proved by the Claimant
- (iii) Unpaid salary to 14<sup>th</sup> /2/2014 in the sum of Kshs.15,500

(iv) Service pay for 3 years, the Claimant was not under NSSF

between 2007 and 2010 calculated at 15 days salary for the three (3) years in the sum of Kshs.49,500

**Total award Kshs.282, 000**

(v) Interest at court rates from date of judgment in respect of compensation and from date of filing suit in respect of terminal benefits till payment in full.

(vi) Costs of the suit.

**Judgment Dated, Signed and delivered this 22<sup>nd</sup> day of January, 2020**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Mose Nyageba for the Claimant

Mr. Omboga for the Respondent

Chrispo – Court Clerk