



REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR  
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 617 OF 2017

BETWEEN

JOHN MUSYOKI KYENGO.....CLAIMANT

VERSUS

BADAR HARDWARE LIMITED.....RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

*Oduor Siminyu & Company, Advocates for the Claimant*

*A.O. Hamza & Company, Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim on 3<sup>rd</sup> August 2017.
2. He avers, he was employed by the Respondent in January 2009, as a Tyre Attendant. He earned a monthly salary of Kshs. 30,000. He was summarily dismissed in March 2017 by the Respondent.
3. The Claimant avers he was not heard. He prays the Court to grant him Judgment against the Respondent for:-
  - a. Declaration that termination was unfair.
  - b. 12 months' salary in compensation for unfair termination at Kshs. 360,000.
  - c. Costs and Interest.
4. The Respondent filed its Statement of Response on 11<sup>th</sup> October 2017. It agrees to have employed the Claimant as a Tyre Attendant. His monthly salary was Kshs. 25,000. He made allegations against his Head of Department, saying he was soliciting for cash from Drivers, before he could issue the Drivers with new tyres. This was investigated and found to be false. The Claimant's contract was terminated for misconduct. He was heard during the investigation. He had opted to resign, but was sent on leave pending investigation. He was paid all terminal dues.
5. The Claimant gave evidence on 18<sup>th</sup> March 2019, and 17<sup>th</sup> July 2019 when he rested his case. Respondent's Human Resource Manager, Fredrick Makokha Ondaka gave evidence for the Respondent on 15<sup>th</sup> October 2019, bringing the hearing to a close.
6. The Claimant restated his employment history with the Respondent, and his terms and conditions of employment, in his oral evidence. He denied making any allegation against his Head of Department. He was not heard. His Head of Department was not questioned. The Claimant attributed the problem he had with the Respondent, to a Claim he filed for work injury compensation against the Respondent. He was involved in a traffic accident, while on duty, on 12<sup>th</sup> November 2016.

7. The Claimant was advised to take leave of 86 days while injured. He wrote a letter of resignation instead, which was rejected by the Respondent. It is not true that he opted to resign because the Respondent was investigating him. In his letter of resignation, he stated he resigned because of pressing family issues. He earned a total salary of Kshs. 30,000 monthly – paid at Kshs. 25,000 and Kshs. 5,000 respectively. Kshs. 5,000 was paid separately in ‘*bahasha ya kando*,’ (*Kiswahili for separate envelope*). There was no pay slip.

8. He had not exhausted his 86 days of leave, when his contract was terminated. He was not advised about the outcome of investigations. The unstated reason for termination was the claim for work injury.

9. Cross-examined, the Claimant told the Court he has not secured alternative job. The respondent was well-meaning, paid Claimant’s last salary, and issued Certificate of Service. He was given a notice of termination of 30 days. He accepted to go on leave, as investigations took place. Pay slip exhibited by the Respondent shows the Claimant earned Kshs. 25,000 monthly. He was not called to any disciplinary hearing. Redirected, he told the Court there is no record of any disciplinary hearing. Leave was to end on 30<sup>th</sup> March 2017. Termination came earlier on 2<sup>nd</sup> March 2017.

10. Fredrick confirmed, the Claimant was employed by the Respondent as its Tyre Attendant. He was a good, reliable Employee. The Respondent did not terminate his contract, because of his work injury claim. Employees were insured against work injury. He felt slighted because a Senior Employee, was appointed in his Section, by-passing him. He then made allegations of a serious nature against the particular Employee. The Respondent investigated and found the allegations made by the Claimant to have been manifestly false. Termination was on account of this misconduct, not anything else. He had previously been coercing his Colleagues to join a Trade Union. If the Respondent intended to sack him, it would have done so at the time. His monthly salary was Kshs. 25,000, paid twice monthly. He was invited to attend disciplinary hearing in the company of a Witness. He was issued notice, ending 1<sup>st</sup> April 2017. He made an application for resignation to sort out domestic problems. The Respondent advised him to take leave to sort his domestic problems out.

11. On cross-examination, the Human Resource Manager told the Court, the Claimant wanted more money on work injury compensation, and was not happy when this was not forthcoming. There was no written report on the investigation, relating to allegations made by the Claimant against his Senior. The Claimant attended disciplinary hearing un-accompanied. Proceedings were not recorded in written form. At some point, the Claimant opted to resign. His resignation was not accepted by the Respondent. It is not true that part of the Claimant’s salary was paid through voucher, the other through the bank. Redirected, Fredrick told the Court, the vouchers exhibited by the Claimant, do not show the amount of Kshs. 5,000.

**The Court Finds:-**

12. The Claimant gave a letter of resignation dated 19<sup>th</sup> December 2016. He stated resignation was with immediate effect.

13. He proposed to compensate the Respondent’s right to notice of termination, from his pending 86 days of annual leave.

14. Legally, the Respondent need not have accepted resignation, for it to become effective. The Employment Act allows either Party to terminate the contract, through notice, or payment of salary in lieu of notice. The Claimant exercised that right, and ended the contract, offering to pay notice from his 86 days of annual leave.

15. The Respondent needlessly ignored the Claimant’s resignation, instead advising him to take annual leave of 86 days, which was to end on 30<sup>th</sup> March 2017.

16. In the meantime, the Respondent continued to investigate allegations made by the Claimant against his Head of Department, to the effect that the latter was collecting bribes from Respondent’s Drivers, before he could issue them new tyres.

17. On 2<sup>nd</sup> March 2017, the Respondent issued the Claimant notice of termination of 30 days, to take effect, on 1<sup>st</sup> April 2017. In effect, the Claimant was not to return to work at the end of 86 days of annual leave, imposed on him by the Respondent.

18. This notice, in the view of the Court was superfluous, as was the alleged disciplinary process. The Claimant initiated termination of his contract through his notice of resignation. The relationship between the Parties ended on resignation. The Claimant was legally no longer in employment, when the Respondent alleged to issue its notice of termination.

19. It was not therefore necessary to take the Claimant through a disciplinary process, or give him notice of termination, after he had resigned in writing.

IT IS ORDERED:-

***a. The Claim is rejected in its totality.***

***b. No order on the cost.***

**Dated and delivered at Mombasa this 27<sup>th</sup> day of February 2020.**

**James Rika**

**Judge**