



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1211 OF 2015

VINCENT OCHEING' ONYANGO.....CLAIMANT

-VERSUS-

LUCKY DISTRIBUTORS LIMITED.....1st RESPONDENT

LUCKY IRON MONGERS LIMITED.....2nd RESPONDENT

JUDGEMENT

1. The claimant brought this suit on 21.6.2016 seeking the following reliefs:-

- i) A declaration and or finding that the respondents dismissal of the claimant was unprocedural, wrongful, illegal and amounted to “wrongful dismissal.”
- ii) A declaration that the claimants right to fair administrative action, access to information, and right to fair hearing was violated, transgressed on and or trampled upon by the respondent, an order for compensation for general damages for breach of Article 47 of the Constitution of Kenya, 2010.
- iii) A declaration that claimant’s fundamental rights to fair labour practice were violated and an order for compensation for general damages be awarded for breach of Article 41 (1) of the Constitution of Kenya, 2010.
- iv) The claimant be paid his terminal benefits as set in paragraph 3.1 of the claim.
- v) An order for payment of outstanding monthly N.S.S.F and N.H.I.F remittances covering the period between 1997 to October, 2015 amounting to Kshs. 117,200/- together with interest accrued therein.
- vi) An order for compensation to the claimant to the maximum of twelve (12) month’s salary on the gross monthly salary at the time of dismissal as stipulated under Section 49 of the Employment Act, 2007 as compensation for wrongful dismissal and loss of employment..
- vii) An order for payment of costs of this claim.
- viii) Interest on IV,V and VI at court’s rates from the date of filing claim till payment in full; and
- ix) That this court do make further orders that it deems fit to meet the ends of justice.

2. The Respondents did not enter appearance and as such the suit proceeded by formal proof.

3. The facts of the case are that the claimant was employed by the 1st Respondent in 1997 as a shop attendant. In 2012 the company changed name to the 2nd respondent and the Directors remained the same.

4. In October 2015, the claimant was accused of theft by Mr. Ramesh Shah, one of the 2nd respondent’s Directors and was assaulted by the Director and other employees. Thereafter the Directors verbally dismissed him for the alleged theft. He contended that the alleged theft was untrue and instantiated.

5. He contended that the dismissal was unfair and wrongful because the reason was not true and he was not accorded a hearing. He further

averred that at the time of dismissal his salary was Kshs. 17,000/- per month.

6. He further contended that during his entire service, he was deducted NSSF and NHIF contributions, every month but they were not remitted to the agencies. She therefore prayed for refund of the unremitted statutory deductions in addition to the other reliefs set out herein above.

7. The issues for determination arising from the pleadings, evidence and submissions herein are:

- (a) Whether the dismissal of the claimant was wrongful and unfair.
- (b) Whether the claimant's fundamental right to fair labour practises were violated.
- (c) Whether the claimant is entitled to the reliefs sought.

Unfair/wrongful termination

8. Under section 45(2) of the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reason, and that a fair procedure was followed. In this case, the respondent did not enter appearance and as such, the facts of the case as set out by the claimant in his pleadings and evidence were not controverted. I therefore, return that the claimant has proved on a balance of probability that he was wrongfully and unfairly dismissed contrary to section 45 of the Employment Act.

Reliefs

9. The Respondent has failed to prove that the dismissal of the claimant was grounded on valid and fair reason and that a fair procedure was followed. Consequently, I make declaration that the dismissal was unfair and wrongful as prayed. Flowing from the foregoing declaration, I find that the claimant is entitled to salary in lieu of notice and compensation under section 49 (1) of the Employment Act. I award him one month salary in lieu of notice plus 12 months salary compensation considering his long service of 18 years without any disciplinary issues.

10. The prayer for declaration that the claimants fundamental right to fair labour practice and fair administrative action under Article 41 and 47 of the Constitution is declined because the said violation was not pleaded with precision as required by constitutional references.

11. The claim for refund for unremitted NSSF and NHIF is declined because no evidence was adduced to prove that the alleged deductions were made for the unremitted months. The claim for service pay is dismissed because, the employer paid NSSF contributions for the claimant except for the four months shown in the NSSF statement. The claimant did not produce statements for 1997 to 2008 and as such the court was denied information of what happened then.

12. The claim for unpaid salary is declined because there is no evidence of how many days he worked in October, 2015 before the dismissal. He admitted that he was paid Kshs. 6,700.00 instead of Kshs. 17,000.00 and the court will not award anymore money without evidence of how many days he worked in the last month.

13. In conclusion I enter judgment for the claimant against the respondents jointly and severally as follow:

- (a) Notice**Kshs. 17,000.00**
- (b) Compensation.....**Kshs. 204,000.00**

- Total Kshs. 221,000.00**

The award is subject to statutory declarations but in addition to costs and interest at court rates from the date hereof.

Dated, signed and delivered in open court this 2nd day of July, 2020.

ONESMUS N. MAKAU

JUDGE