



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

CAUSE NUMBER 348 OF 2017

BETWEEN

JAIRUS MALIKA OKUTOYI.....CLAIMANT

VERSUS

INSPECTORATE [E.A] LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

C.O. Tolo & Company Advocates for the Claimant

Mulwa Nduya & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 3rd of May 2017. He states that he was employed by the Respondent as an Accountant, on 21st November 2011, on a monthly salary of Kshs. 50,700. He was suspended for 2 weeks in November 2016. On 21st November 2016, he reported to work. He was called to the Boardroom by the Human Resources and Administration Manager and the Finance Manager, and given a letter of the same date, informing him that his contract had been terminated. He was not given any reason for the decision. He asks the Court to find termination was unfair, and grant him the following orders:-

- a) 1 month salary in lieu of notice at Kshs. 50,700.
- b) Salary for 18 days worked in November 2016 from 4th November 2016 to 21st November 2016, at Kshs. 35,100.
- c) Annual leave pay over a period of 3 years at Kshs. 152,100.
- d) Salary for the un-expounded contract period between December 2016 and February 2018, at Kshs. 760,500.
- e) House allowance from 17th February 2016, to February 2018, at Kshs. 190,125.
- f) 12 months' salary in compensation for unfair termination, at Kshs. 608,400.

Total...Kshs. 1,796,925

- g) Any other suitable order.

2. The Respondent filed its Statement of Response on 26th July 2017. The Claimant was in a contractual engagement with the Respondent, from 21st November 2011 to November 2016. It is denied that the Claimant's contract was unfairly terminated. He received his terminal dues. His tenure was marked by high levels of inefficiency, absenteeism and inability to perform his tasks properly. He was suspended on 2nd November 2016 for these offences. He admitted the charge of absenteeism. He violated Respondent's code of conduct. He waived his right to pay in lieu of notice under his contract. His salary was consolidated. He utilized his annual leave. He was issued Certificate of Service. The

Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant testified, and rested his case, on 4th June 2018. Respondent's case was scheduled for hearing on 10th July 2018. The Respondent was not ready for hearing on 10th July 2018. The Court was told that the Respondent was not able to secure attendance of its Witness. Adjournment was allowed with costs to the Claimant, and hearing stood over to 1st October 2018. On this date the Court was informed once again that the Witness for the Respondent was unavailable. He was said to be 'out of town.' Adjournment was sought. The Court declined the application and ordered proceedings closed. Parties were directed to file their Closing Submissions within 28 days. The Claimant confirmed filing of his Submissions at the last mention in Court, on 23rd November 2018.

4. The Claimant, in his oral evidence repeated the contents of his Pleadings and Witness Statement. He was suspended, and summarily dismissed soon after. He was not advised to go to the Boardroom with a Colleague of his choice. He wrote to the Respondent asking for a hearing. There was no response. He had done well in all performance appraisals. It is not true that he was inefficient. On cross-examination, the Claimant testified that his contract had a termination clause. He could be summarily dismissed. He was called for a meeting before dismissal. He was called and asked to explain his position. The Respondent did not follow fair procedure.

The Court Finds:-

5. The Claimant was employed by the Respondent as an Accountant, effective 21st November 2011. His first contract is dated 15th November 2011.

6. His last salary is shown through his pay slip, to have been Kshs. 50,700.

7. He signed another contract dated 17th February 2016, which is indicated to have been for a period of 2 years. The contract commenced on 17th February 2016, to expire on 17th February 2018.

8. He was summarily dismissed on 21st November 2016. The Respondent states in the letter of summary dismissal, that the Claimant was found to have reported to work late on 29th October 2016, and under the influence of alcohol. It is stated that the Claimant admitted the offence, in a letter of apology. There is no letter of apology exhibited by the Respondent.

9. The Claimant wrote to the Respondent on 1st December 2016, appealing against decision to summarily dismiss him. He asked the Respondent to allow him to defend himself. He does not say anything in his Appeal about the allegations contained in the letter of summary dismissal. Instead, he laments about his inability to make ends meet, and hopes that the Respondent would treat him objectively, and grant him a favourable Judgment.

10. There was no response to this Appeal, perhaps because the Appeal did not raise any substantive grounds.

11. The Respondent makes various allegations against the Claimant at paragraph 4 and 5 of the Statement of Response, some of which are not contained in the letter of summary dismissal. Conversely, the letter of summary dismissal gives reasons for the decision made against the Claimant, which are not in the Statement of Response. The letter refers to the offence of reporting to work late. This is not in the Statement of Response. It also refers to alcoholism, which similarly, is not captured in the Statement of Response.

12. The allegations in the Statement of Response, and those in the letter of summary dismissal, are at a variance.

13. It has not been shown by the Respondent, that the Respondent had valid reason, or reasons, to justify termination as required under Section 43 and 45 of the Employment Act 2007.

14. The Respondent alleges to have investigated the allegations against the Claimant, and accorded him an opportunity to defend himself. He concedes he was called to the Boardroom, and held a meeting with the Human Resources Manager, and the Finance Manager, before he was handed the letter of summary dismissal.

15. It has not been shown that this meeting was a disciplinary hearing, under Section 41 and 45 of the Employment Act 2007. There is no record of a letter asking the Claimant to show cause why, he should not be disciplined. The Respondent has not exhibited before the Court record of specific charges, put to the Claimant, calling upon the Claimant to respond. As discussed above, the Respondent has pleaded a medley of inconsistent reasons, justifying summary dismissal. None, either as pleaded in the Statement of Response, or contained in the letter of summary dismissal, was specifically put to the Claimant in writing, and response sought from the Claimant on the specific allegation. The Claimant was not accompanied to the meeting by a Representative of his choice. There is no record of the proceedings of the meeting in form of minutes. It is not possible to know what the nature of the meeting was.

16. Termination was unfair under Sections 41, 43 and 45 of the Employment Act.

17. ***The Respondent shall pay to the Claimant, equivalent of 5½ months' salary in compensation for unfair termination, at Kshs. 278,850.***

18. ***The prayer for notice pay equivalent of 1 month salary in granted at Kshs. 50,700.***

19. ***The prayer for salary for 18 days worked in November 2016 is allowed at Kshs. 35,100.***

20. The prayer for annual leave pay is not supported by the 2 contracts on record. The 1st contract gave to the Claimant 22 days of annual

leave, while the 2nd reduced annual leave to the statutory minimum of 21 days. The Claimant seeks leave at the rate of 30 days per annum. The contracts did not entitle him to 30 days of annual leave. He worked for 5 years. He does not say in which 3 years he did not utilize his annual leave. The prayer is rejected.

21. His pay slip describes his salary as consolidated. He in his evidence withdrew the prayer for house allowance. The prayer shall be treated as withdrawn.

22. In granting him compensation for unfair termination, the Court has considered the number of years the Claimant expected he would have gone on working, under the last contract. The contract was for 2 years. Termination was in November 2016, approximately 1 year and 3 months, before the expected date of termination. The contract was terminable through notice or notice pay. There was no guarantee that the Claimant would have served the remainder of his contract. Parties were free to opt out, before the date of expiry. The Claimant did not render any work, up to February 2018. An order has been made in his favour for compensation. It is not proper in the circumstances, to grant him anticipatory salary. The prayer for salary for the remainder of the contract is declined.

23. *Costs to the Claimant.*

24. *Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.*

IN SUM, IT IS ORDERED:-

[a] Termination was unfair.

[b] The Respondent shall pay to the Claimant: equivalent of 5.5 months' salary at Kshs. 278,850, in compensation for unfair termination; notice pay at Kshs. 50,700; and salary for 18 days worked in November 2016 at Kshs. 35,100- total Kshs. 364,650.

[c] Costs to the Claimant.

[d] Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.

Dated and delivered at Mombasa this 22nd day of February 2019.

James Rika

Judge