



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

CAUSE NO. 706 OF 2017

BETWEEN

JOHN OMONDI OWINO.....CLAIMANT

VERSUS

JOMVU GAS STATION t/a

TOTAL NEW JOMVU.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Oyugi Kitoo & Company Advocates for the Claimant

Ayub M.A. Warissanga, Respondent's Station Manager

JUDGMENT

1. The Claimant filed his Statement of Claim on 30th August 2017. He avers he was employed by the Respondent as a Turn Boy, and later, a Pump Attendant. He worked between the year 2006 and 20th June 2017 when his contract was terminated by the Respondent. He earned a basic salary of Kshs. 17,000 monthly.

2. He was not paid his salary for the month of October 2016. Upon enquiry, the Claimant was advised by the Respondent, that the Respondent was investigating some shortfall in sales. He continued working without pay, until June 2017 when his contract was terminated. On 20th June 2017, the Claimant was asked to return his uniform and any property belonging to the Respondent, and go home. He was not given any reason justifying termination. He was paid nothing and no letter of termination issued. He was not heard on any accusation.

3. He prays for Judgment against the Respondent for:-

- a) Declaration that termination was unfair.
- b) 1 month salary in lieu of notice at Kshs. 17,000.
- c) Arrears of salary from October 2016 to June 2017, at Kshs. 153,000.
- d) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 204,000.

Total... Kshs. 374,000

- e) Certificate of Service to issue.

- f) Costs.
- g) Interest.
- h) Any other suitable order.

4. It is conceded, through the Statement of Response filed by the Respondent on 3rd October 2017, that, the Claimant was employed by the Respondent as stated in the Claim. He withheld Kshs. 28,332 on 29th October 2016 from his sales collection, and Kshs. 30,693, on 30th October 2016. There were other shortages attributable to the Claimant. He was supposed to hand over the money to the Respondent but failed to do so, justifying termination under Section 44[4][c] of the Employment Act 2007.

5. The stoppage of salary in October 2016 was meant to assist the Respondent in recovery of the huge shortfall in sales revenue, caused by the Claimant.

6. He was asked to account for the losses on 20th June 2017. He was not able to. He was asked to look for money to redress the shortfall. He bitterly argued with Management, necessitating termination.

7. The Respondent offered the Claimant terminal benefits, including service pay, although the Claimant was subscribed to the N.S.S.F. He was offered at total of Kshs. 298,718, which upon taxation and deduction of shortages, amounted to Kshs. 51,721. He declined this amount. The Respondent is ready to pay this amount to the Claimant.

8. He was supplied with a Certificate of Service, which has enabled him secure alternative employment.

9. The Claimant and Respondent's Supervisor Dhilloy Mwanga Ikusa, testified on 30th October 2018, when hearing closed. The Cause was last mentioned in Court on 4th December 2018 when Parties confirmed filing their Submissions. The Respondent's Submission, are in Kiswahili. The Respondent apologizes for using this language. The Court does not think any Party should apologize for communicating in our national language.

10. The Claimant reaffirmed the contents of his Pleadings and Witness Statement, in his testimony. He did not receive dismissal letter. The worksheet attached to the Response was not brought to Claimant's attention. Cross-examined, his testimony was that he carried out accounts work with other Employees. He would be corrected there and then, if there was shortage. His wife hawked uji, to sustain the Claimant's family, for the months the Claimant was not paid his salary. The Claimant did not refuse to take dismissal letter. He did not bitterly argue, or threaten anyone.

11. Dhilloy testified that the Claimant was under his supervision. There were shortages in sales from October 2016. These were in the sums of Kshs. 28,332 and Kshs. 30,693 respectively. The Claimant explained that shortages resulted from customer m-pesa transactions. The Respondent asked the Claimant to look for the money and redress the shortfall. The Claimant did not comply. His contract was terminated. He was offered terminal dues, which he rejected. Dhilloy confirmed that the Respondent did not pay Claimant's salary from October 2016 to June 2017. Dismissal letter does not disclose the reason for the decision. The Respondent enquired orally about the shortages from the Claimant. The worksheet was prepared by Senior Supervisor. It is not signed. Plain figures are inserted in it. The Claimant worked with 9 other Pump Attendants. They alternated their shifts at the various pumps.

The Court Finds:-

12. The Claimant was employed by the Respondent as a Turn Boy, and later as a Pump Attendant. He worked from 2006 to June 2017. He was dismissed on 20th June 2017. The letter of dismissal does not disclose the reason, or reasons for dismissal.

13. In the Respondent's Statement of Response and evidence however, the Respondent alleges that decision was taken, after the Claimant occasioned the Respondent loss of sales revenue. It is alleged that as of October 2016, the Claimant could not account for the sums of Kshs. 28,332 and 30,693 respectively.

14. He was allowed to continue working nonetheless. He was required to look for a guarantor, as he arranged to pay the sum to his Employer. He does not seem to have supplied a guarantor, or paid the money to the Respondent.

15. Instead, he went on working without a salary from October 2016 up to June 2017. If the Respondent is to be believed, the Claimant went on stealing. By June 2017, the Respondent was demanding shortages of Kshs. 131,116 from the Claimant.

16. In the end, the Respondent terminated Claimant's contract, and offered him 1 month salary in lieu of notice at Kshs. 17,240; service pay of 11 years at Kshs. 88,970; arrears of salary for 9 months at Kshs. 156,780; salary for 20 days worked in June 2017 at Kshs 11,620; annual leave for 2016 at Kshs. 17,420; 2 rest days at Kshs. 1,162; and another arrears of salary at Kshs. 5,346. The total sum offered was Kshs. 298,718, which after deductions came to Kshs. 51,721. This last figure is what the Respondent is ready to pay to the Claimant.

17. There is no evidence to establish that the shortages in the amount of Kshs. 131,116 were attributable to the Claimant. The Claimant did not work alone at the Respondent's petrol business. He worked with other Pump Attendants at various pumps. The worksheets exhibited by the Respondent do not show that the Claimant was liable for the loss attributed to him by the Respondent. The worksheets contain bare figures, with no evidence on quantity of sales made by the Claimant. They do not show what was sold by the Claimant and what he was supposed to remit to the Respondent, and failed to remit.

18. It does not look likely, that even after finding out in October 2016 that the Claimant was stealing; after asking the Claimant to look for money to pay back to the Respondent; and after asking the Claimant to look for a guarantor, that the Claimant would be allowed to go on working, and go on stealing for the next 9 months.

19. The Respondent did not present any written charges to the Claimant, and required him to answer to those charges. There was no hearing under Section 41 of the Employment Act 2007. The allegations about shortages and absenteeism were never put to the Claimant. He was never asked in writing to respond to any accusations. The letter of dismissal as stated elsewhere, does not reveal any reason for the decision.

20. It is a dangerous assumption on the part of the Respondent, to hold that in the period the Claimant was not receiving his salary, he must have been surviving on money stolen from the Employer. Why would an Employer deny his Employee his hard-earned monthly salary, then allege that the Employee must have been stealing from the Employer, to survive?

21. Termination was procedurally flawed and without valid reason, or reasons. It did not meet the minimum statutory standards of fairness under Section 41,43 and 45 of the Employment Act 2007.

22. ***The Respondent shall pay to the Claimant equivalent of 6 months' salary in compensation for unfair termination at Kshs. 104,520.***

23. ***The prayer for notice pay is allowed, at the equivalent of 1 month salary, at the rate adopted by the Respondent, Kshs. 17,420.***

24. ***The prayer for arrears of salary is allowed for 9 months, at Kshs. 156,780.***

25. There is no evidence that the Claimant received a Certificate of Service from the Respondent. ***The Respondent shall release to the Claimant his Certificate of Service.***

26. ***Costs to the Claimant.***

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

IN SUM, IT IS ORDERED:-

a) It is declared that termination was unfair.

b) The Respondent shall pay to the Claimant: equivalent of 6 months' salary in compensation for unfair termination at Kshs. 104,520; notice pay at Kshs. 17,420; and arrears of salary at Kshs. 156,780- total Kshs. 278,720.

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