



**REPUBLIC OF KENYA**

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

**CAUSE NO 536 OF 2016**

**DAVID MAKAU.....CLAIMANT**

**VS**

**DEVSON INDUSTRIES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Statement of Claim dated 6<sup>th</sup> July 2016 and filed in court on 8<sup>th</sup> July 2016, the Claimant sued the Respondent for unlawful termination of employment. The Respondent filed a Memorandum of Defence on 26<sup>th</sup> July 2016.

2. At the trial, the Claimant testified on his own behalf and the Respondent called its Director, Birju B. Shah. The parties further filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent from October 2014 until May 2016, in the position of Accountant at a basic monthly salary of Kshs. 80,000.

4. The Claimant further states that on 31<sup>st</sup> May 2016, the Respondent terminated his employment without lawful cause and in violation of due procedure. He adds that he was not paid his terminal dues.

5. The Claimant contends that the termination of his employment was unlawful and unfair. He therefore claims the following:

- a. House allowance for entire period of service.....Kshs. 240,000.00
- b. Severance/gratuity @ 15 days' pay per year.....66,666.60
- c. Pending leave days.....106,666.70
- d. 12 months' salary in compensation.....960,000.00
- e. Costs plus interest

**The Respondent's Case**

6. In its Memorandum of Defence dated 21<sup>st</sup> July 2016 and filed in court on 26<sup>th</sup> July 2016, the Respondent admits having employed the Claimant from October 2014 until May 2016, in the position of Accountant at a monthly salary of Kshs. 80,000.

7. The Respondent states that the Claimant failed in his duty to transfer data from the cash register into the accounting programmes. The Respondent was therefore forced to employ another Accountant to complete the Claimant's work.

8. On 31<sup>st</sup> May 2016, the Respondent terminated the Claimant's employment and offered him 2 months' salary in lieu of notice as per the employment contract. The Claimant however failed to collect his dues from the Respondent's offices.

9. The Respondent states that it is a small company with 3 directors, operating only in Mombasa. The Respondent was therefore only in need

of one efficient Accountant. The Respondent accuses the Claimant of lethargy and negligence, which forced the Respondent to employ another Accountant.

10. The Respondent states that the Claimant's monthly salary was inclusive of house allowance and adds that the Claimant was a registered member of the National Social Security Fund (NSSF) and is therefore not entitled to service pay.

11. The Respondent avers that the Claimant was entitled to 15 leave days from 2015 and 8.5 days from 2016. The Respondent further avers that at the time of leaving employment, the Claimant had an outstanding loan balance of Kshs. 27,144.

12. In addition, the Respondent states that by disclosing the Respondent's financial information, the Claimant breached the confidentiality clause in his employment contract. The Respondent therefore counterclaims from the Claimant Kshs. 200,000 as general damages for breach of contract.

### **Findings and Determination**

13. There are three (3) issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Respondent has made out a proper counterclaim against the Claimant;
- c. Whether the Claimant is entitled to the remedies sought.

### **The Termination**

14. The Claimant's employment was terminated by letter dated 31<sup>st</sup> May 2016 stating as follows:

"Dear David

#### **Termination of Employment**

As you are aware in the financial year 2015/6 the company saw a significant decline in sales and recorded a substantial loss. The prevailing business environment in Kenya does not offer much hope for the company's financials in the coming years either. Due to these factors the directors of the company see a need to cut the company's expenses. One of the measures to be taken is a reduction in staff numbers.

Therefore I regret to inform you that directors of the company have decided to terminate your employment with the company with immediate effect. As per your employment contract, you will be paid all your dues including two (2) months salary in lieu of notice. It is hoped that this will provide you with sufficient resources and time to find employment elsewhere.

The directors thank you for your service with the company and wish you the best in your future endeavours.

Yours Sincerely

(Signed)

B.B. Shah,

Director"

15. From this letter it seems as if the reason for termination of the Claimant's employment was redundancy. However, in its Memorandum of Defence, the Respondent accuses the Claimant of poor performance. Both redundancy and poor performance are valid grounds for bringing an employment relationship to an end. This is however always subject to due process as set in the Employment Act, 2007.

16. With regard to cases of redundancy, Section 40 of the Employment Act sets out conditions on notice, selection criteria and statutory payments. Section 41 of the Act sets out the procedure for handling cases of poor performance.

17. From the evidence on record, the Respondent did not observe any of the processes set out under the Employment Act. The ensuing termination was therefore substantively and procedurally unfair.

### **The Respondent's Counterclaim**

18. In its counterclaim against the Claimant, the Respondent seeks the sum of Kshs. 200,000 in damages for breach of the confidentiality clause in the employment contract. Clause 8 of the subject contract provides as follows:

8.1 You shall not disclose to any third party any confidential Information obtained during your course of employment unless

expressly authorised by the Company.

8.2 Confidential information for the purposes of this contract includes and is not limited to trade secrets, business plans, strategies, financial information and any other information that will affect the Company's competitive position.

8.3 Your obligations to maintain confidentiality and secrecy shall apply after your employment until such time that the information is no longer confidential or has been made public by the Company.

8.4 You shall not without prior written consent of the Company destroy, make copies, duplicate or reproduce in any form the Company's confidential information

19. In support of his case, the Claimant produced extracts from the Respondent's payroll showing salaries of the Respondent's employees. The Claimant told the Court that he did not seek the Respondent's permission to use this information. He however maintained that the information was not confidential and that he had only filed it for the benefit of the Court.

20. In the final submissions filed on behalf of the Respondent on 26<sup>th</sup> October 2016, reference was made to the decision in **Baseline Architects Limited & 2 others v National Hospital Insurance Fund Board Management [2008] eKLR** where **Warsame J** (as he then was) stated the following:

**"...justice is administered in civil disputes on the principles that you cannot use an advantage obtained improperly or illegally in a manner prejudicial and/or detrimental to the interest of the opposite party. That principle is based and/or founded on fair play and there can never be justice without fair play. And....there cannot be fair play if we allow parties to steal a match by relying on documents improperly obtained from the other side."**

21. In **SBI International Holdings Ag (Kenya) v Amos Hadar [2015] eKLR** this Court held as follows:

**"In the normal course of employment, the employee will get to learn their employer's confidential information and as long as the information is proprietary in nature and is revealed in confidence, then the employee has a common law duty not to reveal the information. This duty applies irrespective of whether there exists a confidentiality agreement or clause in the employee's employment contract and generally extends beyond the life of the employment relationship."**

22. The Claimant worked as an Accountant and he gained access to information on salaries of the Respondent's employees in the course of his employment. If indeed, he required this information to advance his case, what he should have done was to serve a production notice on the Respondent.

23. Instead, what did the Claimant do? He decided to help himself literally and in the process disclosed salaries of the Respondent's employees who were not party to the present suit. The information disclosed was of financial nature and the Claimant was clearly in breach of Clause 8 of his employment contract.

## **Remedies**

24. Flowing from the finding that the termination of the Claimant's employment was unfair, the Claimant would have been entitled to compensation. However, on account of the further finding that the Claimant breached the confidentiality clause of his employment contract, the Court declines to make any award for compensation in his favour.

25. Clause 2.1 of the Claimant's employment contract reveals that the Claimant earned a gross monthly salary. The claim for house allowance is therefore without basis and is dismissed.

26. Regarding the counterclaim, the Respondent did not lead any evidence of loss suffered as a result of the Claimant's disclosure of the financial information in issue. The counterclaim was therefore not proved and is dismissed.

27. The Respondent admits the claim for severance pay which is therefore due and payable. The claim for leave pay is also admitted and is payable.

28. Save for the admitted claims, the Claimant's claim fails and is dismissed. The Respondent's counterclaim also fails and is dismissed.

29. The sum of Kshs. 27,144 being outstanding loan balance will be deducted from the amount payable to the Claimant.

30. Each party will bear their own costs.

31. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 14<sup>TH</sup> DAY OF MARCH 2019**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Magiya for the Claimant

Mr. Mooraj for the Respondent