



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 809 OF 2016

FRANCIS OKUMU OKETHO.....CLAIMANT

VS

BUZEKI ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Francis Okumu Oketho, the Claimant in this case worked for Buzeki Enterprises Limited in the position of Mechanic. He brought his claim by way of a Statement of Claim filed in court on 12th October 2016. He seeks compensation for unlawful termination and payment of terminal dues.

The Respondent filed a Statement of Response on 27th January 2017.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Macreen Omondi. Both parties further filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 1st May 2007, as a Mechanic. He was later promoted to the position of Chief Mechanic. At the time of leaving employment, the Claimant earned a monthly salary of Kshs. 75,600.

4. On 23rd March 2016, the Claimant was suspended indefinitely without pay and on 27th June 2016, his employment was terminated. The Claimant terms both the suspension and termination unlawful and unfair. He therefore claims the following:

- a. One month's salary in lieu of notice.....Kshs. 75,600.00
- b. 12 months' salary in compensation.....907,200.00
- c. Salary for March, April, May and June 2016.....302,400.00
- d. 21 days' leave pay.....61,061.50
- e. Severance pay.....392,538.50
- f. Costs plus interest

The Respondent's Case

5. In its Statement of Response dated 27th January 2017 and filed in court on even date, the Respondent admits that the Claimant was in its employment from 1st November 2007 until termination on 27th June 2016. The Respondent states that the Claimant was terminated following his involvement in theft of motor vehicle spare parts, among other items.

6. The Respondent states that prior to termination, the Claimant and his colleagues were put on suspension sometime in March 2016. The Respondent also reported the theft to the police.

7. The Respondent further states that the Claimant was informed and was well aware of the reasons for suspension and subsequent termination. The Respondent also adds that upon termination, the Claimant was paid all his terminal dues.

Findings and Determination

8. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

9. The Claimant's employment was terminated by letter dated 27th June 2016 stating as follows:

"Dear Sir,

RE: TERMINATION OF EMPLOYMENT

Following your indefinite suspension as a result of loss of vehicle parts from Mariakani Workshop in unclear circumstances under your supervision with details well within your knowledge. The management after deliberation has come to a conclusion of terminate (sic) your services effective 30th June 2016.

You will be entitled to the following:-

- *One month pay in lieu of notice*
- *Payment for leave days not taken*
- *15 days severance pay for each completed year*
- *23 days worked in March 2016*

The accounts and Human Resources department are advised to calculate your salary for the days worked less statutory deductions including any monies owed to the Company.

We wish you all the best in your endeavors.

Yours Truly

(Signed)

Diana Bundotich

Group Finance Director"

10. Prior to the termination, the Claimant had been suspended indefinitely without pay by letter dated 23rd March 2016. The Respondent's Human Resource Manager, Macreen Omondi testified that before the suspension, the Claimant had absconded duty for more than two weeks.

11. Omondi further testified that the Claimant did not present himself to the police for purposes of recording a statement and that he failed to honour a bond to attend court as a witness in a criminal case on the theft in issue. These averments were however not supported by independent evidence and the Court did not attach any probative value to them.

12. At any rate, neither the charge of theft nor failure to cooperate in police investigations or prosecution was put to the Claimant for his response prior to suspension and subsequent termination. Further, the Court found no basis for the Respondent's decision to suspend the Claimant indefinitely without pay.

13. Ordinarily, suspension is a neutral action aimed at achieving unfettered investigations into allegations against an employee; it is not a disciplinary action. This means that an employee on suspension is entitled to full salary unless withholding of salary is sanctioned by a statute or internal disciplinary rules (see *Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers v Timber Treatment International [2013] eKLR*).

14. Moreover, as held by this Court in *Paul Mwaura Mbugua v Kagwe Tea Factory Ltd & another [2012] eKLR* an employee on suspension has a legitimate expectation that they will be afforded an opportunity to respond to any adverse findings arising from investigations conducted during suspension. In other words, there is no room for a seamless transition from suspension to termination because an employee on suspension is entitled to due process.

15. In the instant case, the Respondent broke every rule in the book; first, the Claimant was sent on suspension without pay; second, he was

not allowed to defend himself prior to termination. It seems to me that the Respondent used suspension as a disciplinary measure against the Claimant.

16. Overall, the Court finds and holds that the Respondent failed to establish a valid reason for terminating the Claimant's employment as required under Section 43 the Employment Act, 2007 and also violated the mandatory procedural fairness requirements set out under Section 41 of the Act. The Claimant is therefore entitled to compensation.

Remedies

17. In light of the foregoing findings, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service coupled with the Respondent's conduct in handling the Claimant's case. In light of the finding that the Claimant's suspension was unlawful, I allow the claim for salary during the suspension.

18. From the evidence on record, the Claimant was paid one (1) month's salary in lieu of notice, severance and leave pay. The claims thereon are therefore without basis and are dismissed.

19. In the ultimate, I enter judgment in favour of the Claimant as follows:

a. 10 months' salary in compensation.....Kshs. 756,000

b. Salary for March, April, May and June 2016.....302,400

Total.....1,058,400

20. This amount will attract interest at court rates from the date of judgment until payment in full.

21. The Claimant is also entitled to a certificate of service plus costs of the case.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH 2019

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JUDGE

Appearance:

Mr.Odera for the Claimant

Miss Samba for the Respondent