



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MALINDI
CAUSE NUMBER 20 OF 2018

[Originally Cause Number 875 of 2016 at IC Mombasa]

BETWEEN

ENOCK N. MWONGERI.....CLAIMANT

VERSUS

RAJESH KAPOOR SHAH t/a 7 TO 7 COMPANY LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mogaka Bwongaki & Company Advocates for the Claimant

Chepkwony & Associates, Advocates for the Respondent

JUDGMENT

1. Through his Statement of Claim filed on 15th November 2016, the Claimant seeks the following Judgment against his former Employer, the Respondent herein:-

- a. 1 month salary in lieu of notice at Kshs. 19,950.
- b. Public holiday allowances for 4 years at Kshs. 49,808.
- c. Balance of public holiday for 4 years at Kshs. 32,208.
- d. Severance pay at Kshs. 408,000 less Kshs. 17,600 paid, at Kshs. 390,400.
- e. Annual leave of 4 years at Kshs. 26,036.
- f. Overtime pay at Kshs. 209,953.
- g. Legal fees for demand letter at Kshs. 209,000.

Total...Kshs. 725,954.

- h. Declaration that termination was unfair.

- i. General damages for breach of contract.
- j. Certificate of Service to issue.
- k. Costs.
- l. Interest.

2. He states that he was employed by the Respondent as a Line Attendant, at Respondent's supermarket in Malindi. He worked for 4 years between 1st July 2012 and 16th June 2016.
3. He gave evidence, and rested his case, on 28th November 2018. He called 1 Witness a fellow Employee named Andrew Juma Odhiambo. The Claimant mainly restated the contents of his Pleadings, in his oral evidence. This evidence was endorsed by Odhiambo. His contract was terminated by the Respondent through a letter dated 14th July 2016.
4. The reasons for the decision are given in the letter of termination. The Claimant was said to have answered a question on an order for beers, posed by his senior, without giving it thought. He argued with his senior. He was said to have been monitored closely by the Respondent, and found to have no interest in his role. He was fond of chatting with other merchandisers, while his department had become unclean and unhygienic. He had been warned, and failed to reform. The letter notified the Claimant that his contract would be terminated on 31st July 2016.
5. The Claimant was heard in the absence of the Respondent and was not therefore subjected to cross-examination.
6. An order for closure of proceedings had been made in the absence of the Respondent, on 28th November 2018, and Parties directed to file their Closing Submissions.
7. The Respondent filed an Application dated 29th November 2018, seeking to have the proceedings reopened, and Respondent allowed to testify.
8. On 13th December 2018, Parties consented to have proceedings reopened; pleadings, affidavits and witness statements by the Respondent admitted as Respondent's evidence; and Parties to attempt negotiation out of Court.
9. The matter was last mentioned on 26th February 2019 when it was confirmed that Parties had filed Closing Submissions, and by implication, confirmed that negotiation had stonewalled.
10. The Respondent filed its Statement of Response on 15th December 2016. Its position is that it employed the Claimant on a monthly salary of Kshs. 17,000. The Claimant absented himself from work on numerous occasions without the leave of the Respondent. He insulted Respondent's Customers on or about 26th November 2014, 16th March 2016, and April 2014. He also behaved in a manner that was insulting to Respondent's Manager at the material time. The Claimant neglected to perform his work carefully and properly. He had been issued warning letters. He was paid all terminal benefits and discharged the Respondent from future liability. The Respondent does not owe him anything. Termination was fair and valid. The Respondent urges the Court to dismiss the Claim with costs.

The Court Finds: -

11. The Claimant was employed by the Respondent as a General Worker. He states he was employed on 1st July 2012. The letter of termination on record shows his contract was terminated effective 31st July 2016.
12. The bulk of his Claim is made up of severance pay, overtime and legal fees for demand letter. These prayers are grossly overstated, and have no support in law and evidence. How does a litigant, whose last monthly salary was Kshs. 17,000, pray the Court to grant legal fees to the tune of Kshs. 209,000, not for the entire Claim, but for a demand letter? These prayers are rejected at the outset.
13. Multiple reasons are stated in the Statement of Response filed by the Respondent, in justifying termination. These reasons are not exactly the same reasons advanced in the letter of termination. So many are the reasons, that it would be difficult for any reasonable observer, let alone the concerned Employee, to know why the Claimant's contract was terminated.
14. Neither set of reasons, has been established, through evidence led by the Respondent. What is on record are just empty and widespread accusations against the Claimant, which are not founded on any evidence.
15. There was no benefit of a disciplinary hearing extended to the Claimant. No charges, either as stated in the Statement of Response or the letter of termination, are shown to have been placed before the Claimant. He was not asked to respond to any specific allegations. He was just notified that his contract would be terminated at the end of July 2016.
16. The Respondent did not carry out termination fairly, in accordance with the minimum standards of fairness, prescribed under Sections 41, 43 and 45 of the Employment Act. The Claimant merits compensation for unfair termination.
17. He had worked for 4 years. He was not shown to have in any way contributed to the circumstances leading to termination. The

Respondent alleges to have paid to the Claimant terminal benefits and obtained his discharge. The Court has not been shown evidence of payment and discharge.

18. The Claimant is granted equivalent of 7 months' salary in compensation for unfair termination at Kshs. 119,000.

19. The letter of termination issued on 14th July 2016. It notified the Claimant that termination would take effect on 31st July 2016. He had notice of 17 days. **He is entitled to the balance of 14 days of notice of termination, at Kshs. 9,153.**

20. The Respondent has not provided the Court with annual leave records to contradict the Claimant on his prayer for annual leave pay. He claims a total of 46 days in annual leave balance. The days have not been discounted by way of employment records by the Respondent. **Adopting a monthly salary of Kshs. 17,000, based on 26 working days in a month, the prayer for annual leave of 46 days is allowed at Kshs. 30,076.**

21. The Claimant seeks public holiday allowances at Kshs. 49,808. He has not established the nature of these allowances. He has not shown to the Court any contractual clause, wage instrument, legal provision or work policy, which granted him allowances on public holidays.

22. He additionally asks the Court to order he is paid balance of public holidays for 4 years. Again he fails to establish the foundation for this prayer. Balance from where? When was he paid the initial public holiday, so that in the end he claims balance of 4 years? Did he not work in aggregate for 4 years? The 2 items relating to public holidays, are unclear and not well- founded on fact and law.

23. The prayer for general damages for breach of contract, made on the heels of the prayer for statutory compensation for unfair termination, has no justification, and is rejected.

24. Certificate of Service to issue.

25. Costs to the Claimant.

26. 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 7 months' salary in compensation for unfair termination at Kshs. 119,000; balance of notice of 14 days at Kshs. 9,153; and 46 days of annual leave at Kshs. 30,076 – total Kshs. 158,229.

c. Certificate of Service to issue.

d. Costs to the Claimant.

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

Dated and delivered at Malindi, this 28th day of June 2019.

James Rika

Judge