



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 714 OF 2017

BETWEEN

PATRICK KIPLANGAT KIRUL.....CLAIMANT

VERSUS

ROADTAINERS [MSA] LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Oyugi Kitoo & Company Advocates for the Claimant

Sachdeva, Nabhan & Swaleh Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 5th September 2017. He states he was employed by the Respondent Company as an Assistant Manager from 27th April 2015 to 8th August 2017. He earned a monthly salary of Kshs. 75,000. He was dismissed on 8th August 2017 following the loss of bags of sugar. A Gate Clerk and Driver were arrested following the loss. The Workshop Manager Akbar Khan advised the Claimant to keep away from the workplace, until the Director Yusuf Pasta returned from South Africa. Pasta, upon return to Kenya, instructed the Claimant to keep away. The Claimant obliged, kept away but was never recalled. He considered his contract to have been unfairly terminated. He seeks Judgment against the Respondent for: -

- a. 1 month salary in lieu of notice at Kshs. 75,000.
- b. Salary for 8 days worked in August 2017 at Kshs. 20,000.
- c. Leave for 2017 at Kshs. 52,500.
- d. Overtime at Kshs. 449,280.
- e. Compensation for unfair termination at Kshs. 900,000.

Total... Kshs. 1,496,780.

- f. Certificate of Service to issue.
- g. Costs.
- h. Interest.
- i. Any other suitable relief.

2. The Respondent filed its Statement of Response on 4th October 2017. It is conceded that the Claimant was employed by the Respondent, as an Assistant Manager. His services were not terminated by the Respondent. He was suspended pending investigation of theft of company property. He filed the Claim before he received communication from the Respondent on the outcome of the process. The Claim is premature. He did not work excess hours, without compensation as alleged. The Respondent prays for dismissal of the Claim with costs.
3. The Claimant, and Respondent's General Manager Akbarkhan Gulab Khan Hajikhan, gave evidence on 4th February 2018 when hearing closed. The Cause was last mentioned on 11th March 2019, when Parties confirmed filing of their Closing Submissions.
4. The Claimant, in his oral evidence, restated his employment history, the particulars, terms and conditions of his employment with the Respondent, as outlined in his Pleadings and Witness Statement.
5. He added that he was not issued a letter of suspension. He was on duty from 8.00 a.m. to 7.00 p.m. The goods in question went missing at 11.00 p.m. The Claimant was not on duty. He reported the loss to his Employer. The Claimant had recommended that the Respondent uses private security firms, in transportation of Respondent's goods. The Respondent instead continued to employ casuals for provision of security. A Security Officer and Clerk were arrested and charged over the incident. The Respondent advised the Police to arrest the Claimant and charge him alongside others, 1 year after the others had been arraigned. The Claimant was not issued notice of termination and was not heard.
6. Cross-examined, the Claimant told the Court that he was responsible for transportation. He said in his incident report that he found the Truck empty. He alerted Management. The Truck was carrying sugar. He did not receive a letter of termination. He was suspended on 8th August 2017. He was told to leave, he would be recalled. 30 tons of sugar disappeared. It was a huge loss.
7. Hajikhan adopted the Pleadings and Witness Statement filed by the Respondent, in his evidence before the Court. The Respondent learnt of theft on 7th August 2017. Sugar worth Kshs. 3 million was stolen. The Claimant was in charge of transportation. Hajikhan sought explanation from the Claimant. The sugar was from the Port. 2 Persons were arrested by the Police. The Claimant was arrested afterwards. The Respondent did not terminate his contract.
8. Cross-examined, Hajikhan repeated that the Claimant was responsible for transportation. He wrote a report to cover himself. He was suspended. His contract was not terminated. The Respondent did not issue a letter of suspension. He was not paid salary for any month after 8th August 2017. Redirected Hajikhan told the Court that the Respondent discovered the incident on 7th August 2017. The Claimant wrote a report on 10th August 2017 after Respondent reported the incident to the Police.

The Court Finds: -

9. The Claimant was employed by the Respondent Company as an Assistant Manager on 27th April 2015. His salary was Kshs. 75,000 per month.
10. On 7th August 2017, the Respondent discovered that 30 tons of a Client's sugar, worth Kshs. 3 million, had been stolen while being transported by the Respondent's Truck, from the Port of Mombasa to a Warehouse.
11. A Security Officer and a Driver were arrested and arraigned in Court.
12. The Respondent suspended the Claimant by word of mouth, pending investigations. This was on 14th August 2017. The Claimant was not given a definitive date when he was to report back. Suspension was indefinite and verbal.
13. The Claimant states he did not receive further communication from the Respondent, which led him to conclude that his contract had been terminated by the Respondent.
14. The Respondent on its part holds it did not terminate the Claimant's contract. It only suspended him. He came to Court prematurely, before investigations were complete, and the outcome communicated to him. There was no letter of termination issued upon the Claimant.
15. This Claim was filed on the 5th of September 2017, less than a month after the Claimant was asked to go on indefinite suspension. On the face of it, the Claim was filed too soon after the Claimant was asked to go on suspension, and after theft of Respondent's Client's sugar.
16. The problem lies with the nature of suspension communicated to the Claimant by the Respondent. First, it was verbal, and second, indefinite. The Respondent has no reason to justify its position that the Claimant came to Court prematurely. He was not given a date, when his suspension would last. He was not told when to report back. He was not told of any specific date when investigations were expected to be complete, and outcome known. Without any communication on the date suspension would come to an end, the Claimant cannot be faulted for considering his contract to have been terminated, and of coming to Court so soon after the incident. If there was a specific suspension period given to the Claimant by the Respondent in writing, the Respondent would have some justification in alleging that the Claim was filed prematurely. Why did not the Respondent recall the Claimant even after he had filed the Claim, and clarified its position on suspension and termination to the Claimant?
17. The Court does not hesitate to conclude that termination of the Claimant's contract was at the instigation of the Respondent.
18. There was no valid reason shown, to justify termination. Other Employees were arrested and arraigned in Court over the incident. The Claimant was not arrested immediately, although the Respondent instigated his arrest and charging in Court, 1 year after others had been

charged. There was no disciplinary hearing at the workplace. None is recorded anywhere. There were no workplace charges placed before the Claimant at any time after he was asked to go home by the Respondent.

19. ***It is declared termination was unfair under Sections 41, 43 and 45 of the Employment Act.***

20. ***He is granted 1 month salary in lieu of notice at Kshs. 75,000.***

21. The Claimant had worked for 2 years and 4 months. His contract was term indefinite. It is not known from the evidence how old the Claimant was and how long he expected to go on working. He does not appear to have in any way contributed to the loss of sugar. He was paid nothing after suspension. Termination was faulty on fairness of procedure as well as substantive justification. ***He is allowed compensation equivalent of 7 months' salary at Kshs. 525,000.***

22. He worked for 8 months in the year 2017. ***He merits and is granted pro-rata leave of 14 days, at Kshs. 40,384.***

23. The Claimant left employment on 8th August 2017. He ought to have been paid salary for 8 days worked in the month of August 2017. ***He is allowed the prayer for 8 days' salary at Kshs. 23,076, based on a working month of 26 days.***

24. In his Closing Submissions, he makes it clear he no longer wishes to pursue the prayer for overtime. The prayer shall be treated as withdrawn.

25. ***Certificate of Service to issue.***

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 termination was instigated by the Respondent and was unfair.

b. The Respondent shall pay to the Claimant: 1 month salary in lieu of notice at Kshs. 75,000; equivalent of 7 months' salary in compensation for unfair termination at Kshs. 525,000; pro-rata leave at Kshs. 40,384; and salary for 8 days at Kshs. 23,076 – total Kshs. 663,640.

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 Mombasa this 13th day of June 2019.

James Rika

Judge