



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 370 OF 2014

BETWEEN

NICHOLAS ALEX OTIENO..... CLAIMANT

VERSUS

LUSTMAN & COMPANY (1990) LIMITED..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

A.I. Hayanga & Associates Advocates for the Claimant

Kennedy Ngaira & Associates Advocates for the Respondent

JUDGMENT

1. Judgment was initially delivered in favour of the Claimant, on 24th June 2016.

2. The Court ordered:-

a) Termination was unfair

b) The Respondent shall pay to the Claimant 10 months' salary in compensation for unfair termination at Kshs. 110,500; 1 month salary in lieu of notice at Kshs. 11,050; and service pay at Kshs. 167,450 – total Kshs. 167,450.

c) The full amount shall be paid within 30 days of the delivery of this Award.

d) Costs to the Claimant.

e) Interest granted at 14% per annum from the date of the delivery of this Award.

3. On 15th July 2016, the Respondent applied to have *ex parte* Judgment, which gave rise to the above orders, set aside. The Application was un-opposed when it came up for hearing on 14th September 2016. The Respondent was granted leave to present its case.

4. 3 Witnesses were lined-up to give evidence for the Respondent. 2 of them – Respondent's Branch Manager Silas Mwangi Wairimu, and a former Employee of the Respondent Michael Anyanzwa - testified on 6th February 2018.

5. Between 6th February 2018 and 17th July 2019, the Cause was variously fixed for hearing of Respondent's last Witness. The Respondent was unable to secure his attendance. The Court ordered closure of the hearing on 17th July 2019. The Cause was last mentioned on 20th September 2019, when Parties confirmed filing of their Submissions.

6. Mwangi restated the reasons given in the letter of termination, to justify termination. These include: Claimant was drunk and disorderly at work; he fought his Co-Employee; he had secured employment from another Employer, while still an Employee of the Respondent; and had been entrusting his duties with the Respondent, to 3rd Parties, at a fee. Cross-examined, Mwangi confirmed he did not write any letter of warning or notice to show cause, relating to any of the accusations. No Witness was available to confirm that the Claimant worked for other Employers. There was no evidence to show that the Claimant owed any money to the Respondent.

7. Michael Anyanzwa told the Court that he was told, the Claimant fought a Colleague named Warrakah. He delegated his duties to other persons. Anyanzwa never saw the Claimant come to work inebriated. Anyanzwa testified he, and the Claimant only took alcohol after work.

The Court Finds:-

8. The evidence given by Respondent's Witnesses above, is insufficient to affect the findings and conclusion reached by the Court, in the *ex parte* Judgment delivered on 24th June 2016.

9. There was no evidence that the Claimant was presented with specific charges; issued letters of warning or to show cause; invited to a disciplinary hearing; heard; and the allegations contained in the letter of termination established.

10. The Co-employee who was allegedly fought by Claimant, did not present evidence. He was lined-up as Respondent's 3rd Witness.

11. Anyanzwa did not witness the Claimant fight, or witness him attend to his duties while drunk and disorderly. Anyanzwa and the Claimant enjoyed their drink after work only. The Employer who allegedly engaged the services of the Claimant, while he was still an Employee of the Respondent, did not give evidence. 3rd Parties said to have been outsourced by the Claimant, to discharge his role at a fee, were not presented before the Court. No evidence was availed showing the Claimant owed any money to the Respondent.

12. In all, the Court affirms its original findings. Termination was not fair. ***Judgment is entered in favour of the Claimant, in terms given in the initial Judgment, as captured at paragraph 2 of this second Judgement.***

Dated and delivered at Mombasa this 4th day of October 2019.

James Rika

Judge