



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2372 OF 2012

SAMUEL OCHIENG LANGO.....CLAIMANT

-VERSUS-

MAYA DUTY FREE LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th November, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 23.11.2012 through Ochanda Onguru & Company Advocates. The claimant prayed for:

- a) Unpaid wages, damages and such terminal dues as shall be found due to the claimant under the contract or under the provisions of the Regulation of Wages and Conditions of Employment Act.
- b) Cost of the suit.
- c) Interest on (a) and (b) above.

The claimant filed the amended memorandum of claim on 25.01.2017 and added prayers for:

- a) General damages for unfair and unlawful termination of employment.
- b) Unpaid leave allowance for 8 years commencing the year 2003.
- c) Underpayment of wages at the rate of Kshs.20, 000.00 per month from the year 2003 to 2011.
- d) Six months' salary in lieu of Kshs.120, 000.00.

The response to the memorandum of claim was filed on 08.02.2017 through Onyoni Opini & Gachuba Advocates. The respondent prayed that the suit be dismissed with costs.

The parties did not call witnesses and the suit proceeded to determination on the basis of the pleadings, documents and final submissions filed for the parties.

To answer the **1st issue** for determination the Court returns that there is no dispute that the respondent employed the claimant as a salesman at the respondent's shop at Jomo Kenyatta International Airport (JKIA).

To answer the **2nd issue** for determination the Court returns that the respondent has established that the reason for termination was genuine and fair as per section 43 and 45 of the Employment Act, 2007. The material on record show that a customer by the name Shah Kamal Kumar came and shopped at the respondent's shop and thereafter forgot her pouch which had money including USD 2100, Indian Rupees 400, and Zambian Kwach 750. That was on 07.03.2011. The CCTV camera confirmed that indeed the customer had forgotten the pouch and the claimant shared the contents with his colleague one Duncan. The claimant was confronted and he admitted the misconduct. In particular, the claimant wrote his statement on 09.04.2011 confirming that he shared the money with Duncan on the evening the pouch had been forgotten because nobody had come to complain about the forgotten pouch. He confirmed that he took USD500 and had already used USD300 so that he was returning USD200 as at the time he wrote the admission. In view of that admission the Court returns that the claimant was culpable of the misconduct and the dismissal was valid as was not unfair. The claimant is also precluded from alleging that he

was not given a notice and a hearing per section 41 of the Employment Act, 2007 because he was heard and he admitted the misconduct. The procedure adopted by the respondent in the case cannot be described as unfair. The claimant is therefore not entitled to compensation for the alleged unfair and unlawful dismissal as was claimed and prayed for. In any event, the claimant's record of service was not clean as it was marred with several warnings and such amounts to a further factor under section 49 of the Act that mitigates in favour of the respondent for denial of the compensation.

The **3rd issue** is whether the claimant is entitled to the other remedies as prayed for. The dismissal was sometimes in March 2011 as pleaded for the claimant. The claim was filed on 23.11.2012. The claimant claims and prays for underpayment and leave pay for the 8 years served. The Court finds that the two claims are in the nature of a continuing injury which ceased in March 2011. Under section 90 of the Employment Act, 2007 the cause of action in that regard was time barred because the 12 months from the date of the alleged continuing injuries had lapsed as at the time the suit was filed. The claims and prayers will fail. Similarly no evidence and submissions were made to justify the 6 months' salary in lieu of notice. In any event the claimant engaged in gross misconduct and the respondent was entitled to summarily dismiss him with a lesser notice than the contractual one.

In conclusion judgment is hereby entered for dismissal of the claimant's memorandum of claim as amended and with costs in favour of the respondent.

Signed, dated and delivered in court at **Nairobi** this **Friday, 29th November, 2019**.

BYRAM ONGAYA

JUDGE