



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1074 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 3rd December, 2019)

MUTHAMA MAITHYA.....CLAIMANT

VERSUS

A.O BASID LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed this cause to challenge the termination of his employment and to seek compensatory damages, payment of terminal dues and overtime. In particular, he seeks the following:-

a. A declaration that the Respondent's termination of the Claimant's employment was illegal, unlawful, unfair and inhumane and that the Claimant be paid his terminal benefits and damages which are tabulated as follows:-

i. One-month salary in lieu of notice of KShs. 35,000.00.

ii. Unpaid January 2014 salary of KShs. 35,000.00.

iii. Overtime worked and not paid. Weekdays (From 8:00 am – 10pm) 5 hours overtime. 5 hours x 5 days x 50 weeks x 6.41 years = 8012.50. $35,000 / (30 \times 8) \times 8012.5 \times 1.5 = \text{KShs. } 1,752,734.40.$

Saturdays (From 8:00am – 8:00pm) 4 hours overtime

4 hours x 50 weeks x 6.41 = 1282 hours

$35,000 / (30 \times 8) \times 1282 \times 2 = \text{KShs. } 373,908.12.$

Sundays (his off day) (9:00am – 5:00 pm) 8 hours

8 hours x 50 weeks x 6.41 years = 2564

$35,000 / (30 \times 8) \times 2564 \times 2 = \text{KShs. } 747,816.42.$

iv. Leave pay not paid at KShs. 35,000.00 per year.

$35,000 \times 6.41 \text{ years} = \text{KShs. } 224,350.00.$

v. Untaken leave days at 21 days per year.

$21 \times 6.41 = 134.61 \text{ days.}$

$134.61 / 30 \times 35,000 = \text{KShs. } 157,045.00.$

vi. Unfair termination/dismissal.

$\text{KShs. } 35,000 \times 12 \text{ months} = \text{KShs. } 420,000.00.$

b. An order for the Respondent to pay the Claimant terminal dues and compensatory damages as pleaded in paragraph 9 herein.

c. An order for the Respondent to give the Claimant a Certificate of Service for the period served.

2. The Claimant states that he commenced his employment with the Respondent on 1st August 2007 where he diligently worked for over 6 years. It is his case that he was employed on a permanent basis. He further states that he was summarily dismissed on 25th January 2014. At the time of termination, he was earning a salary of KShs. 35,000.00.

3. The Claimant avers that during the subsistence of his employment, he was never issued with a warning letter or a show cause letter. He further avers that he was never issued with a notice before he was summarily dismissed or afforded a fair hearing, hence his termination was unfair and unlawful. It is his case that he was never paid his terminal benefits or the damages due to him.

4. In his witness statement filed on 28th August 2018, the Claimant averred that he was an auto electrician who repaired motor vehicles. He avers that his work involved travelling but concedes that he was never issued with documents to sign whenever he was required to travel. Nevertheless, he would be issued with a gate pass to travel to do the repair works.

5. It was his averment that his summary dismissal was as a result of his absence from work on 25th January 2014. However, it is his case that his absence was because he fell ill, sought medical attention and was given permission to remain on bed rest and report on duty the following day. He stated that he informed his supervisor of the same.

6. The Respondent filed a response on 25th March 2015. They contend that the Claimant was an electrician and not an engineer as alleged. They further contend that the Claimant repeatedly absconded duty without any lawful excuse and blatantly ignored the warning letters issued to him on 2nd October 2013 and 1st November 2013, regarding the same hence the reason for his summary dismissal.

7. The Respondent avers that the Claimant's contract was terminable by either party at the end of 28 days or through payment of 1-month wages in lieu notice.

8. In response to the reliefs sought, the Respondent contends that the Claimant is not entitled to payment in lieu of notice or compensation for unlawful termination as he was summary dismissed pursuant to section 44 (3) of the Employment Act.

9. The Respondent contends that the Claimant was paid his salary for the month of January 2014 and that he never worked on holidays outside the prescribed working hours. The Respondent avers that the Claimant took his leave days and was compensated for the same.

10. The Respondent filed the witness statement of Abdi Omar Basid where he admitted there are instances where the Claimant would work on Saturday.

11. He further testified that where the Claimant worked overtime, he was always compensated and was at liberty to work less hours the next day. Further, the company had a rotational working policy where an employee could be replaced the next day succeeding the day they had worked extra hours.

12. The Respondent testified that the Claimant was issued with a last chance in December 2013. However, the Claimant absconded duty in January for 22 days. He was sent on 2 weeks suspension but has never been seen since. Mr. Basid stated that he called the Claimant and asked him to report to work but the Claimant refused.

Submissions by the Parties

13. The Claimant filed his submissions on 22nd August 2019 wherein he submitted that the termination of his employment was violated, contrary to the provisions of article 47 of the Constitution. He relies on the case of **Kenya Human Right Commission & Another vs. Non-Governmental Organizations Board & Another [2018] eKLR.**

14. It is his further submissions that his summary dismissal violated the provisions of section 41, 44 and 45 as the reasons for termination were never communicated to him and neither was he given a chance to interrogate the allegations against him. He relies on the case of **Daniel Kiplagat Kikeibut vs. SMEP Deposit Taking Micro Finance and Walter Ogal Anuro vs. Teacher Service [2015] eKLR.**

15. The Claimant submits that he is entitled to the reliefs sought as he has proved his case.

16. In their submissions filed on 19th September 2019, the Respondent submits that the reason for terminating the Claimant's employment was reasonable as required under Section 45 of the Employment Act since the Claimant absconded duty on several occasions. They rely on the case of **Banking, Insurance Finance Union (Kenya) vs. Barclays Bank of Kenya Limited [2004] eKLR.**

17. The Respondent also submitted that the Claimant is not entitled to the reliefs sought since the Respondent had a justified reason for summarily dismissing his employment.

18. I have examined all evidence and submissions of both Parties. From the evidence of the defence, the Claimant was summary dismissed because he absconded duty.

19. The Claimant on the other hand avers that he only failed to attend work on 25th and this was because he was unwell and went to see a

doctor.

20. The Respondents did not produce any muster roll to show how the Claimant attended work. This leaves their assertion that Claimant was a habitual absentee not proved.

21. Other than this absenteeism, the Respondent averred that the Claimant had previously been warned of the absenteeism severally which the Claimant denies. The Claimant denied receipt of the warning letters annexed by the Respondent, which are also not signed by the Claimant. This also leaves this Court to conclude that the letters were never issued at all.

22. The Respondent averred that the Claimant absconded duty. There is no indication that they issued Claimant with any show cause letter to explain why he should not be dismissed for absconding duty. No disciplinary hearing was ever carried out before the dismissal too.

23. My conclusion therefore is that the Claimant's dismissal was unfair and unjustified as envisaged under Section 45(2) of Employment Act 2007.

24. Having found the dismissal unfair and unjustified, I find for Claimant and in terms of remedies award him as follows:-

1. *1 months' salary in lieu of notice = 35,000/=*

2. *Unpaid January 2014 salary = 35,000/=*

3. *10 months' salary as damages for unfair and unjustified dismissal*

= $35,000 \times 10 = \underline{350,000/=}$

TOTAL = 420,000/=

Less statutory deductions

4. *The Respondent will pay costs of this suit.*

Dated and delivered in open Court this 3rd day of December, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Munечи holding brief Musugu for Respondent – Present

Claimant – Absent