



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 200 OF 2015

BETWEEN

OBED RIOBA NYASINGA.....CLAIMANT

VERSUS

NETCO MANAGEMENT LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mburu Nyamboye & Company Advocates for the Claimant

V.N.Okata & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 9th April 2015. He filed an Amended version, on 15th December 2015. The Claimant states he was employed by the Respondent on 2nd May 2011 as a Station Supervisor and Manager, at Netco Ganjoni Total Service Station. His last salary was Kshs. 21,810 monthly. There was an incident of robbery with violence at the Station, around 13th August 2014. The Respondent lost some money. The Claimant was charged with an offence relating to the incident, in Mombasa Chief Magistrate's Court, Criminal Case Number 1483 of 2014. He was discharged on 16th December 2014. The Respondent terminated the Claimant's contract on 11th March 2015 alleging the Claimant was involved in criminal activities. The Claimant avers he was not given a hearing by the Respondent before termination. He states that termination was unfair. He prays for Judgment against the Respondent for:-

- a) A declaration that termination was unfair.
- b) Salary for the period September 2014 to March 2015, at Kshs. 152,675.
- c) Supervisor salary for the period January 2014 to August 2015 at Kshs. 16,984 monthly at Kshs. 118,888.
- d) 1 month salary in lieu of notice at Kshs. 21,810.
- e) Public holiday pay for 4 years at Kshs. 63,978.
- f) Salary for August 2014 at Kshs. 21,810.
- g) 12 months' salary in compensation for unfair termination at Kshs. 261,729.
- h) Fees for defending the criminal case at Kshs. 100,000.
- i) Annual leave pay at Kshs. 47,000.
- j) House allowance at Kshs. 132,550.

Total.... Kshs. 921,347

k) Costs, Interest and any other suitable orders.

2. The Respondent filed a Statement of Response of 9th June 2015. This was amended through a Statement of Response dated 21st January 2016. The Respondent agrees to have employed the Claimant. He was not a Supervisor and Manager from January 2014 as claimed. His salary included the housing element. He utilized annual leave and public holidays. He was summarily dismissed on 11th March 2015 for failing to account for Respondent's Kshs. 98,362 and Kshs. 72,357 respectively. This was unrelated to the robbery incident. The Respondent did not participate in the robbery investigations and prosecution of the Claimant. The Respondent carried an audit and found a deficit in the amounts of Kshs. 98,362 and Kshs. 72,357 respectively. The Claimant failed to account for this, leading to termination. He was retained in employment from the date of arrest, 16th December 2014, to the date of termination, 11th March 2015. The Respondent prays for dismissal of the Claim with costs to the Respondent.

3. The Claimant testified, and rested his case, on 2nd March 2017. Respondent's Employee, Relations Manager at the time of termination, Liliame Binagwaho Gakunju, testified for the Respondent on 12th June 2017. Charles Kuguru Mutungi, who worked as Respondent's acting Manager at the time of termination, also gave evidence for the Respondent on 12th June 2017, bringing the hearing to a close. Parties confirmed the filing of their Closing Submissions on 30th October 2017.

Claimant's Case

4. Nyasinga restated his employment history with the Respondent, as outlined in his Pleadings. There was a robbery incident at the workplace. Robbers confronted the Claimant while the station was closing. They ordered the Claimant to surrender the cash he had collected. 2 other Employees were present. The Claimant informed his Area Manager about the incident. The CID Officers arrested the Claimant; he recorded a statement; and was charged in Mombasa Chief Magistrate's Criminal Case Number 1483 of 2014 with offences relating to robbery. The case was withdrawn on the instructions of the DPP.

5. During the criminal trial, the Claimant was not allowed to go on working by the Respondent. He sought clarification on his employment status with the Respondent. He was advised to go and hand over. His services were terminated. He was not heard before termination. He was not convicted of any offence. His salary was withheld for the period of the trial. He was not paid for work done during public holidays. He was denied house allowance; annual leave; and the Respondent did not remit his N.S.S.F and N.H.I.F. contributions. He doubled up as Supervisor and Manager.

6. Cross-examined, he told the Court he initially worked as Pump Attendant. He was confirmed Supervisor on 23rd May 2011. He became Manager in 2012. The first contract indicated the Claimant was paid basic salary and house allowance- totaled at Kshs. 13,042.

7. He did not receive any letter of termination after robbery. There was no job description. He was to consult Area Manager in everything. Muster roll indicated the Claimant was absent from work on certain occasions. It indicated he was paid for excess hours worked. It is not true that he was paid. Pay slips show he was paid for work done on public holidays and paid house allowance. These were not paid. He was only paid bonuses.

8. He was charged on 15th August 2014. He was released on bail, on 26th August 2014. He did not work during this period. He was arrested by the CID and charged. He has not sued the State for malicious prosecution. He was stopped by the Human Resources Manager, from accessing his workplace. The Claimant was not aware he could be charged afresh with the criminal offence, under the law which he was discharged. It was stated in his statement to the Police, that the Claimant failed to set off the alarm during robbery. He was not told Kshs. 98,000 was missing after the audit. He did not frustrate the handing over process. He was required to work even on public holidays. He could not direct that the Station closes on public holidays. In redirection, the Claimant told the Court he has not been charged with any offence after the first trial aborted. The Respondent did not demand for any money from the Claimant.

Respondent's Case

9. Binagwaho told the Court the Claimant last worked for the Respondent as Station Manager at Ganjoni Total Station. He was fully in charge of the Station and supposed to manage his time.

10. He called Binagwaho on 13th August 2014 saying the Station had been robbed. He had not deposited the cash in the specified safe for 3 days prior to the robbery. The Witness asked Territory Manager Caleb, to investigate. Binagwaho later learnt that the Claimant had been arrested. She enquired how the Claimant was arrested, as the Respondent had not made any complaint. She was informed Police decided the Claimant is arrested and charged.

11. The Claimant was released 10 days after arrest. He wrote e-mails to the Respondent asking for his salary. There was an Acting Manager assigned Claimant's role. The Claimant was asked by the Respondent to hand over after release. Beginning September 2014, the Accountant did an audit. It was found that Kshs. 98,000 could not be accounted for. The Claimant was called to account. He failed to present himself to the Respondent to account. In December 2014, the Respondent received demand letter from Claimant's Advocate. The Respondent replied urging the Claimant to hand over. He was advised by his Advocates to hand over. He presented himself in February 2015, but did not do a proper handover.

12. The Respondent retained the Claimant in employment up to March 2015. He had not worked for 6 months. The Respondent tabulated Claimant's salary up to March 2015. Deduction of PAYE tax and shortage of Kshs. 98,000 was made on his arrears of salary, leaving a total sum of Kshs. 47,903 available to the Claimant. The Respondent paid all statutory dues for its Employees. The Claimant was insubordinate. Termination was unrelated to the robbery incident; it was based on failure to account for Kshs. 98,000.

13. Questioned by the Advocate for the Claimant, Binagwaho testified the Respondent is owned by Total Tanzania and Total Uganda. A multinational cannot import fuel and run Stations. The Respondent runs Stations on behalf of Total.

14. The Claimant was employed in 2011. His last salary was about Kshs. 22,000. As a Manager, he was not entitled to house allowance. He was recognized for his good performance in 2012-2013. He was discharged in the criminal trial. He was summarily dismissed in March 2015 by the Respondent. He refused to receive his terminal dues of about Kshs. 47,000. The Respondent recovered money lost in the robbery from its insurers. The Witness told the Court on redirection that the Claimant would have been given a fair hearing, had he shown up at the workplace.

15. Mutungi told the Court he was the Acting Manager of the Ganjoni Station, from August 2014. He was aware the Claimant preceded him in the role of Manager. The Claimant was required to hand over to Mutungi in August 2014; he only went to the Station in January 2015.

16. The Acting Manager, the Claimant, the Supervisor and the Regional Manager were to take stocks together. The Claimant did not cooperate. He told Mutungi he had come to the Station to retrieve his handbag. He did not hand over. The second time the Claimant presented himself; Mutungi opened the computer, and realized some money could not be accounted for. The Claimant became violent. He did not hand over. The handover report, shown at page 9 of the Claimant's documents filed on 15th March 2017 is not authentic. Mutungi did not sign it, and neither did the Territory Manager.

17. Lastly, Mutungi testified he met the Claimant in January 2015, robbery having occurred in August 2014. Handing over was necessary. The Claimant did not cooperate and was violent.

The Court Finds:-

18. The Claimant worked for the Respondent as Pump Attendant from 2nd May 2011. He was promoted to Station Manager, and assigned to oversee Ganjoni Total Station. He was Manager up to March 2015, when his contract was terminated. His last salary was Kshs. 21,810.

19. There was a robbery incident at the Station, around 13th August 2014. Kshs. 616,065 was stolen by the robbers. The Claimant was at work, and states he and 2 other Employees were confronted by the robbers.

20. He was subsequently arrested, charged at the Chief Magistrate's Court Mombasa, and discharged on the instructions of the DPP. He appears to hold that termination of his employment was based on the robbery incident.

21. The Respondent states termination was not based on the robbery incident, but on Claimant's failure to account for amounts due to the Respondent, which have variously been stated at Kshs. 98,362 and Kshs. 72,357.

22. Sections 43 and 45 of the Employment Act require the Employer to prove the reason, or reasons justifying termination. Did the Respondent prove the reason or reasons justifying termination?

23. The Respondent is categorical termination was not based on the robbery incident. It was based on the outcome of an audit carried out by the Respondent.

24. Details of the audit were sketchy. The exercise was carried out in the absence of the Claimant. It was internally driven. It was done by Respondent's Accountant, who was not presented before the Court to shed light on the findings.

25. The audit was said to have discovered there was Kshs. 72,357 '*unaccounted drawings by the Claimant,*' and Kshs. 98,362 '*unexplained drawings by the Claimant.*' In her evidence, Binagwaho said nothing about the sum of Kshs. 72,357.

26. Mutungi was supposed to replace the Claimant as Manager. His evidence was that he turned on the computer on handover, and noticed certain amounts of money were unaccounted for. It is not clear whether Mutungi himself did the accounting. He simply states, '*we opened the computer, and noticed there were sums unaccounted for...*' What kind of auditing is this, where, a freshly arrived Acting Manager, just opens a computer, and notices money is unaccounted for? In the absence of evidence from any other concerned Officer of the Respondent on the audit, the evidence from Mutungi is quite unhelpful in establishing any amount of money could not be accounted for, and that the responsibility in accounting for such money rested with the Claimant.

27. The Respondent alleged to recover the sum of Kshs. 98,362 from the arrears of salary owed the Claimant. There was no attempt to recover the sum of Kshs. 72,357. No amount has been counterclaimed by the Respondent in this Claim.

28. The Court is not persuaded that the Claimant was responsible for loss of Kshs. 98,362, Kshs. 72,357, or any other amount, belonging to the Respondent. The underlying reason, why the Respondent terminated Claimant's contract, appears to be that he was suspected of involvement in the robbery incident. In the face of his acquittal, the Respondent was hard-pressed to find an explicit valid termination reason. It resorted to unconvincing reasons to do with insubordination and accounting. The Claimant was arrested and charged over the robbery incident in August 2014. He was discharged in December 2014. His contract was terminated in March 2015. The Respondent had the option of taking disciplinary action against the Claimant for his acts or omissions revolving around the robbery incident. No action was taken during, or after the criminal trial. The decision by the Respondent, in the end, was shaped by the criminal trial. Other reasons given for termination were diversionary. The Respondent did not show valid reasons in terminating the Claimant's contract of employment.

29. There was an admission by Respondent's Witnesses that the Claimant was not heard on any charge at the workplace. As soon as he was charged in Court, the Respondent brought in an Acting Manager from Molo. The Claimant was not invited to a disciplinary hearing for his role in the robbery, or failure to account. He was merely asked to hand over. Binagwaho stated the Claimant would have been given a fair

hearing, if he had showed up. Mutungi testified the Claimant went to the workplace at least on 2 occasions. Why was he, not required to submit to a disciplinary process, yet he was available? The Respondent did not write to the Claimant any letter to show cause, why he should not be disciplined. There were no charges communicated to the Claimant. There was no invitation to a disciplinary hearing. The Respondent considered the relationship ended, the minute the Claimant was arrested over the robbery incident.

30. Termination was unfair. There was no valid reason to justify termination as required under Section 43 and 45 of the Employment Act 2007. Procedure was in disregard of the minimum standards of fairness set out under Section 41 of the Employment Act. **The Claimant is granted the equivalent of 7½ months' salary in compensation for unfair termination at Kshs. 163,575.**

31. **He is allowed the prayer for notice pay at Kshs. 21,810.** It is noted this prayer is conceded in Respondent's Submissions.

32. The Claimant was taken to Court on 15th August 2014. He was discharged in December 2014, and his contract terminated on 11th March 2015. He remained an Employee of the Respondent until the date of termination. The Respondent did not have reason not to pay Claimant's salary for the period between arrest and termination. **He is granted salary from August 2014 to February 2015 and for 11 days in March 2015, added up at Kshs. 140,087.** The prayer is similarly conceded in the Submissions filed by the Respondent.

33. The Claimant did not convince the Court that he is entitled to additional pay for discharging the role of Supervisor and Manager. He did not demonstrate what task he performed in one position, which was exclusive to the other position. As Manager he was overall in charge of the Station and supervision of those under him. The prayer for additional salary for discharging a combined role is declined.

34. The prayer for holiday pay, considering that the Claimant did not render any services to the Respondent after arrest, and has been allowed the prayer for salary in arrears over this period of forced indolence, is unreasonable. He claims he worked for about 44 public holidays. He did not work for almost 8 months after arrest, and has received salary arrears for this period. He rested for 8 months. It is unreasonable to expect public holiday pay in the circumstances.

35. There is no evidence of legal fees incurred in defending the criminal trial, quoted at Kshs. 100,000. The proceedings in the criminal trial show very limited participation of Counsel, with a two-day-attendance on 22nd August 2014 and 30th October 2014, for mention. The trial was terminated swiftly. It is not likely that an amount of Kshs 100,000 was paid by the Claimant to his Advocates as legal fees. The prayer is declined.

36. The Respondent concedes to the prayer for annual leave pay at Kshs. 47,904. **Annual leave pay is granted at Kshs. 47,904.**

37. The initial contract of employment concluded between the Parties indicated the salary paid to the claimant included basic pay and house allowance. There is nothing to suggest that the sum of Kshs. 21,810 lastly paid to the Claimant did not include the housing element. This rate was an improvement of the salary given in the original contract, and must have taken into account, all the compensatory factors present in the original contract. The prayer for arrears of house allowance has no merit.

38. Parties to shoulder their costs of the Claim.

39. **Interest granted 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 unfair.

b. The Respondent shall pay to the Claimant compensation the equivalent of 7 ½ months' salary at Kshs. 163,575; notice pay at Kshs. 21,810; arrears of salary at Kshs. 140,087; and annual leave pay at Kshs. 47,904- total Kshs. 373,376.

c. Parties to cater for their costs.

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

Dated and delivered at Mombasa this 9th day of February, 2018

James Rika

Judge