



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 667 OF 2016
BETWEEN
CHRISPINE ONYANGO OCHIENG.....CLAIMANT
VERSUS
SYNERGY LUBRICANT SOLUTIONS LTD.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Matete Mwelese & Company Advocates for the Claimant

Oduor Simiyu & Company for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on the 14th September, 2016. He avers he was employed by the Respondent as a Driver/Sales Representative on 3rd January 2012, earning a salary of Kshs. 16,800 monthly. He was alleged to have been involved in theft of a Client's goods using Respondent's Motor Vehicle, KBU 687H, a Tata Pick-up. He was not given a hearing. He was not given notice of termination. He was denied terminal benefits. He prays for Judgment against the Respondent as follows:-

- a) Notice pay at Kshs. 16,800.
- b) 12 months' salary in compensation for unfair termination at Kshs. 201,600.
- c) Accrued annual leave of 4 years and 3 months at Kshs. 67,200.
- d) Overtime pay at Kshs. 403, 200

Total..... Kshs. 692,400

e) Costs

f) Certificate of Service

2. The Respondent filed its Statement of Response and Counter Claim, on 4th October 2016. It is admitted the Claimant was employed by the Respondent, but only as a Driver, earning a monthly salary of Kshs. 16,259. His contract was terminated fairly, in accordance with the Employment Act 2007, after he attempted to steal from Respondent's Client. He was fairly heard. His prayers are without merit. He had been entrusted with Respondent's goods, namely lubricants, for delivery to a Client. The goods were valued at Kshs. 30,480. Upon his dismissal, the Claimant vanished with the lubricants. The Respondent prays the Court to dismiss the Claim, and allow the Counter-Claim, with costs to the Respondent. The Claimant filed his Response to Counter-Claim on 18th October 2016. His position is that the Counter-Claim is a sham.

3. On 15th November 2017, Parties recorded consent on the mode of hearing and disposal as follows:-

- i. The Claim shall be considered and determined based on the record.
- ii. Parties' Witness Statements and Documents, are adopted as their evidence.
- iii. Issues agreed to be in dispute are whether termination was unfair; and remedies sought merited.
- iv. Claimant to file and serve his Submissions within 14 days.
- v. Respondent to do so within 14 days of service.
- vi. Mention on 12th February 2018.

4. On 12th February 2018, Parties confirmed filing of Submissions.

5. The Claimant submits that documents relied upon by the Respondent are inauthentic. The notification allegedly sent to the Labour Office by the Respondent, explaining circumstances of Claimant's dismissal was made in afterthought, 5 months after termination. The Claimant was not accorded fair hearing. He was never arrested or charged on the allegation of theft. The Claimant was not heard in accordance with Section 41 of the Employment Act 2007.

6. The Respondent submits there was clear and valid reason to justify its decision to dismiss the Claimant. He was shown to have visited Respondent's Client, and attempted to steal. He was heard by a Mr. Baraka before termination. The Claimant is not entitled to the remedies sought. He failed to return Respondent's goods, after dismissal.

The Court Finds:-

7. Once Parties have agreed to be heard under Rule 21 of the Employment and Labour Relations Court Rules, and have their respective documents admitted as their evidence, it is not proper that one Party turns around, and submits that the other Party's documents are inauthentic.

8. The record shows the Claimant was employed by the Respondent as a Driver/Sales Representative on 3rd January 2012. His contract was terminated by the Respondent through an Internal Memo, dated 11th March 2016. There is no pay slip on record showing his last salary was Kshs. 16,800 monthly. There are pay slips from previous years, the last one being pay slip for February 2015, showing a monthly of Kshs. 16,259. This is the rate advanced by the Respondent to have been Claimant's last rate. In the absence of other pay slips giving a different rate, the Court adopts the rate of Kshs. 16,259, as the last gross monthly salary payable to the Claimant.

9. The letter of termination dated 11th March 2016 states the Claimant was assigned work by his Supervisor on 7th April 2016. The letter to the County Labour Office, from the Respondent, dated 25th August 2016, restates that the Claimant was assigned work by the Respondent on 7th April 2016. He was to collect a cheque from Slapper Shoes Company in Changamwe. He is alleged to have detoured to China Civil Engineering and Construction Company (CCECC), a Client of the Respondent. While there, he assisted an Employee of CCECC in attempting to steal CCECC's lubricants. The lubricants were loaded on Respondent's Pick-up, and off-loaded after Security Guards noticed the activities of the 2 Employees.

10. CCECC wrote to the Respondent, and threatened to blacklist the Respondent for stealing CCECC's products. The Respondent confirmed Claimant's involvement. The Claimant had no authority to drive to CCECC.

11. From the evidence on record, the Court is satisfied the Respondent proved it had valid reason, justifying termination. The Claimant detoured, and engaged the Respondent's vehicle, in an illegal activity. He occasioned the Respondent reputational damage. The Respondent risked losing its Client due to the act of its Driver/Salesman. Termination was based on valid reason, and justified under Section 43, 44 and 45 of the Employment Act 2007.

12. The Court is equally satisfied that termination was on 11th April 2016, not 11th March 2016. CCECC Occurrence Book, confirms the incident took place on 7th April 2016. The Witness Statement of Respondent's Regional Manager Peter Mugambi states the Claimant was sent to deliver lubricants to Respondent's Client on 7th April 2016. Mugambi's email of 11th April 2016 confirms also, that the incident took place on 7th April 2016. It is not likely that termination would be on a date prior to the occurrence of the incident which triggered termination.

13. There is no evidence that the Claimant was taken through a disciplinary process satisfying the minimum standards of fairness, under Section 41 and 45 of the Employment Act.

14. The letter of termination alludes to conversation between the Claimant and a Mr. Baraka. This conversation cannot by any stretch of imagination, amount to a fair disciplinary hearing. There were no charges presented to the Claimant; he was not asked to show cause why disciplinary action should not be taken against him; and was not heard in the presence of a trade union representative or a workmate, of his choice.

15. Termination was unfair on account of procedure.

16. **The Respondent shall pay to the Claimant, equivalent of 6 months' salary in compensation for unfair termination at Kshs. 97,554.**

17. **The Respondent shall pay to the Claimant, 1 month salary in lieu of notice, at Kshs. 16,259.**

18. The Respondent submits its policy is that its Employees, take 21 days of annual leave. The Claimant has not shown he did not utilize annual leave throughout. The Claimant submits he did not take annual leave, and the Respondent failed to supply the Court with any employment records, showing the Claimant took annual leave.

19. The Respondent ought to have supplied the Court with records of Claimant's annual leave, to discount his oral evidence, that he did not go on leave, and was not paid in lieu thereof. **In the absence of such records, the Court is inclined to allow the prayer for annual leave at Kshs. 69,100.**

20. The Claimant stated nothing about overtime work, in his Witness Statement. He does not say when he worked excess hours, whether this work was necessary and authorized. He does not explain the prayer for overtime pay, in his Statement of Claim either. He merely gives figures under the paragraph titled 'Facts of the Claim,' and in the succeeding paragraph beginning with 'Reasons wherefore.....' There is no support for the prayer on overtime pay. The item is rejected.

21. Certificate of Service to issue.

22. Costs to the Claimant.

IN SUM, IT IS ORDERED:-

a) Termination was unfair on account procedure.

b) Respondent shall pay to the Claimant: equivalent of 6 months' salary in compensation for unfair termination at Kshs. 97,554; 1 month salary in lieu of notice at Kshs. 16,259 and annual leave pay at Kshs. 69,100 – total Kshs. 182,913.

c) Certificate of service to issue.

d) Costs to the Claimant.

Dated and delivered at Mombasa this 9th day of March 2018.

James Rika

Judge