



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 155 OF 2016

BETWEEN

MOURICE WAFULA NAMAKWA.....CLAIMANT

VERSUS

KENYA BOATS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mwaure & Mwaure Wahiga Advocates for the Claimant

Mathew Nyabena & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 24th February 2016. He avers he was employed as a Night Guard by the Respondent, on 1st February 2012. He earned a salary of Kshs. 10,000 monthly. His contract was terminated by the Respondent on 23rd July 2015. This was done after the Respondent recruited another Employee to take up the Claimant's position. There was no valid reason or reasons for the decision. The Claimant had given long and exemplary service. The Claimant prays the Court to declare termination unfair, and order the Respondent to pay him:-

- a) 1 month salary in lieu of notice at Kshs. 10,000.
- b) Annual leave pay of 3 years at Kshs. 24,229.
- c) Public holiday pay of 3 years at Kshs. 11,538.
- d) Unfair termination [compensation?] at Kshs. 120,000.

Total...Kshs. 165,767

- e) Costs, Interest and any other suitable relief.

2. The Respondent filed its Statement of Response on 26th August 2016. It is not denied that the Claimant was employed by the Respondent on the date, terms and conditions of service indicated in the Claim. He was however, employed on annual contracts. The Claimant's last contract was terminated by the Respondent, after he was found to mislead Respondent's Client, one Marteen, about the status of the Client's car, which the Client had taken to the Respondent for repair. The Claimant was paid his dues of Kshs. 10,000 on termination. He does not merit any more payment. He was heard before termination. The decision was fair and fairly arrived at. The Respondent prays for dismissal of the Claim, with costs to the Respondent.

3. The Claimant testified, and closed his case, on 18th July 2017. Dahmen Heino, who was a Director of the Respondent at the time the dispute arose, gave evidence for the Respondent on 29th September 2017, when the hearing closed. The matter was last mentioned in Court on 18th December 2017, when Parties confirmed the filing of their Submissions.

4. Namakwa told the Court he was employed by the Respondent as stated in the Pleadings. His contract was terminated by the Respondent on 23rd July 2015.

5. A Client came to Respondent's garage to pick his car, which he had entrusted to the Respondent for repair. The Claimant told the Client not to pick the car without consulting the Mechanic, Emmanuel. The Client then told Claimant's boss, that the Claimant told the Client his car was not ready for collection. This resulted in termination of the Claimant's contract. The Claimant was not heard. He did not have prior warnings. He was not told that his contract had lapsed. He never went on annual leave and worked on public holidays. He was paid Kshs. 13,833 on termination.

6. Cross-examined, he stated he did not have his employment letter in Court. The contract offered him an indefinite period. He signed the last contract in 2013. He was a Night Guard. He did not have day duties. The Client, Marteen, came during the day. The Claimant lived within the workplace. The Client approached the Claimant, when the Claimant was going for his lunch. He talked with the Client. The Client told Claimant's boss that the Claimant told the Client, the Client's car was still faulty. The Claimant was a stranger to the Client. The Claimant's boss also lived within the workplace. Redirected, the claimant told the Court he was at the workplace during the day, because he lived there.

7. Dahmen Heino confirmed the Claimant was employed by the Respondent in 2012 and placed on annual contracts. The last contract commenced on 1st September 2013, expiring on 1st September 2014.

8. A client called Dahmen, and told him he was told by the Claimant, that the Client could not collect his car from the Respondent's garage, because the car had not yet been repaired. The Claimant was a Night Guard, and not allowed to deal with Clients. Dahmen enquired from the Claimant why he had misled the Client. There was no clear response. Dahmen consulted his Co-Director and terminated Claimant's contract.

9. On cross-examination, the Witness testified that after September 2014, the Claimant served under an oral contract to the date of termination. There were other contracts before September 2013. These were not exhibited in Court. The Claimant had been given verbal warnings. Other Employees witnessed the Claimant engage Marteen. They were not presented before the Court to give evidence. Termination took effect on the same date of the incident. There was no letter to show cause, issued upon the Claimant. He was not asked to bring a Colleague with him to any disciplinary hearing. There is no record of disciplinary meeting. It is possible the Claimant worked over public holidays. He did not work without break. Redirected, Dahmen told the Court he did not have other contract documents in Court. The Claimant was asked by Dahmen by word of mouth, to show cause why, he should not face disciplinary action.

The Court Finds:-

10. There is no doubt the Claimant was employed by the Respondent as a Night Guard, on 1st February 2012. He earned a monthly salary of Kshs. 10,000. His contract was terminated by the Respondent by word of mouth, on 23rd July 2015. Termination was on account of the Claimant's alleged misinformation to a Client, one Marteen, that the Client's car, which the Client had entrusted to the Respondent for repair, was not ready for the Client's collection.

11. The Court is persuaded that the Claimant's involvement with Marteen was improper. He was employed as a Night Guard. He was not to attend to Respondent's Clients during the day. He does not appear to have had the competence to attend to Clients and advise them on mechanical issues, at any time, whether during the night or the day. His role was to guard the premises during the night. Perhaps because he lived within the compound, and was quite familiar with his surroundings, the Claimant felt he was in a position to assist any Client at the workplace, regardless of the nature of assistance needed. He may not have acted in bad faith, but seems to the Court to have overstepped his job description. His advice to Marteen, on a subject the Claimant was not equipped to give advice about, may have resulted in reputational damage to the Respondent. It is understandable that Dahmen and his Co-Director were angered into taking the decision they took against the Claimant. The Court finds there was valid reason in terminating the Claimant's contract, as required under Section 43 and 45 of the Employment Act 2007.

12. In his anger however, Dahmen did not consider the procedural protections afforded to Employees in the process of termination, under Section 41 and 45 of the Employment Act 2007.

13. He did not present the Claimant with any letter to show cause why, the Claimant should not be disciplined; there were no charges drawn against, and read, to the Claimant; the Claimant was not called to a disciplinary hearing and given a chance to defend himself, in the company of a trade union representative, or workmate of his choice; there was no record of any disciplinary meeting made; and termination was made by word of mouth, in the heat of the moment, on the same date of the incident. Termination was not carried out fairly. It was unfair on account of flawed procedure.

14. ***The Claimant is granted the equivalent of 6 months' salary in compensation for unfair termination at Kshs. 60,000.***

15. ***He is allowed the prayer for 1 month salary in lieu of notice at Kshs. 10,000.***

16. Dahmen testified quite honestly, that the Claimant probably worked during public holidays. The computation of public holiday pay at Kshs. 11,538 appears to the Court reasonable and not contested in the evidence of the Respondent. ***The prayer for public holiday pay is allowed, at Kshs. 11,538 as prayed.***

17. Similarly the Court does not find significant evidence by the Respondent, disputing the prayer for annual leave pay. There are no annual leave records provided to the Court by the custodian of employment records, the Respondent herein, to contradict the Claimant's assertion that he did not go on annual leave throughout. ***The Claim for annual leave pay is allowed at Kshs. 10,000 divide by 26 working days = Kshs. 384.60 x 21 annual leave days = Kshs. 8,076.90 x 3 years = Kshs. 24,230.***

18. *Costs to the Claimant.*

19. *Interest allowed at 14% per annum from the date of Judgment till payment is made in full.*

IN SUM, IT IS ORDERED:-

[a] Termination was flawed in procedure and to that extent, unfair.

[b] The Respondent shall pay to the Claimant: equivalent of 6 months' salary in compensation for unfair termination at Kshs. 60,000; 1 month salary in lieu of notice at Kshs. 10,000; public holiday pay at Kshs. 11,538; and annual leave pay at Kshs. 24,230, less 13,833 already paid the Claimant- total Kshs. 91,935.

[c] Costs to the Claimant.

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

Dated and delivered at Mombasa this 8th day of March 2018.

James Rika

Judge