



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**SUIT NO. 256 OF 2017**

**AMOS MATHENGE MUCHAI.....CLAIMANT**

**VERSUS**

**BRADSHAW OF MOUNT KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. This claim was filed by the Claimant seeking redress for the wrongful and unfair termination of the Claimant's services and failure by the Respondent to pay terminal dues. The Claimant averred that he was employed by the Respondent on 17<sup>th</sup> July 2011 and was wrongfully and unlawfully dismissed from employment on 10<sup>th</sup> June 2017. He sought salary arrears for the month of June (20 days) – Kshs. 18,334/-, general damage, emoluments/contingencies for unlawful dismissal basis salary Kshs. 330,000/-, 3 month's salary in lieu of notice Kshs. 82,500/-, unpaid salary for June 2017 Kshs. 27,500/-, service for 6 years completed, one month unpaid leave 2017 of Kshs. 27,500/-, 20% of interest be ordered on the award and costs of the suit. To the memorandum of claim, the Claimant attached three decisions of the Industrial Court, the letter of appointment dated 17<sup>th</sup> July 2011, a final warning letter dated 4<sup>th</sup> March 2017 from the Respondent to the Claimant, a letter of 12<sup>th</sup> June 2017 on the Respondent's letterhead from the Claimant confirming receipt of full and final payment to the Claimant, demand letter dated 3<sup>rd</sup> July 2017 from the Claimant's advocates and a copy of a payslip.

2. The Respondent filed a memorandum of defence and counterclaim. It was averred in the defence and counterclaim that the Claimant was employed as a machinist from 7<sup>th</sup> July 2011 at a salary of Kshs. 8,400/- a month inclusive of house allowance. The Respondent averred that the Claimant's employment was reviewed and a further letter of appointment dated 15<sup>th</sup> May 2017 issued. In the letter, the Claimant's salary was Kshs. 27,500/- consolidated, the salary the Claimant was earning at the time of exit. The Respondent averred that there were two former employees of the Respondent who abandoned their employment with the Respondent and established a rival firm in direct competition with the Respondent in the name and style of Mount Kenya Engineering. The Respondent averred that it engaged a decoy one Rapahel Kimata who visited the rival company and tested the effectiveness of the machines of the rival company. It was averred that the Claimant had on more than one occasion visited the premises of the said rival company and tested their machines including the lathe machine. It was averred that the Claimant was suspended alongside Joseph Kagai to allow for investigations but was recalled back to work. The Respondent averred that it established that most of the Respondent's customers had been seen at the rival business after which the Claimant's services were lawfully terminated. The Respondent averred that the Claimant was not coerced to receive the payment of Kshs. 10,000/- as settlement of the dues he was entitled to upon termination. The Respondent averred that the Claimant's claim for lost salary is without basis as the Claimant is to mitigate any losses by engaging in gainful employment. The Respondent by way of counterclaim averred that on 29<sup>th</sup> March 2017, the Claimant was granted an advance loan of Kshs. 50,000/- through a payment voucher dated the same day but has to date only refunded Kshs. 2,000/- leaving a balance of Kshs. 48,000/- which the Respondent herein claims. The Respondent thus sought the dismissal of the Claimant's case with costs and the entry of judgment for the Respondent against the Claimant on the counterclaim together with costs. The Respondent attached documents in support which were, the letter of appointment dated 17<sup>th</sup> July 2011, a letter of appointment dated 15<sup>th</sup> May 2017, a charge sheet and statement from the accused in Police File 755 of 2017, letter of suspension from the Respondent to the Claimant dated 4<sup>th</sup> March 2017, payment voucher for an advance of Kshs. 50,000/- to Amos Mathenge and a schedule of repayments from Amos Mathenge.

3. The Claimant filed a reply to defence and defence to counterclaim. In the reply to defence and defence to counterclaim, the Claimant averred that except what was expressly admitted, he denied each and every content of the Respondent's memorandum of defence and counterclaim. The claimant admitted that on 29<sup>th</sup> of March 2017 the respondent did advance to him alone of Kenya shillings 50,000 test would be repaid through deductions from his salary. The claimant was notching the position to be listed long after the respondent unlawfully terminated his employment he therefore prayed for judgement against the respondent as pleaded in his prayers in the memorandum of claim and then the respondent's memorandum of defence and counterclaim be dismissed with costs the claimant.

4. The Claimant testified that he resided in Nanyuki and was an engineer and worked on welding machines among other equipment. He stated he was employed on 17<sup>th</sup> July 2011 as a machinist and that while in employment he worked as a machinist earning Kshs. 8,400/- and that he left on 13<sup>th</sup> June 2017, a Monday. His salary at the time was Kshs. 27,500/-. He stated that he recorded a statement on 12<sup>th</sup> July 2017 setting out the facts and that he was unlawfully terminated by Brian Bradshaw who had asked him to escort him to his office. At the office,

Brian told him that the Claimant had escorted the former accounts manager a former employee to Nyeri to buy a machine. He said he was not heard and that he had no knowledge of what was going to happen. He said he received his terminal dues as per the letter and Brian had written a letter and told him that they had used company money. He said that he was abused and Brian became violent. He stated that he was offered an advance of Kshs. 50,000/- in June. He testified that he was never given a hearing and that he was forced to sign the letter admitting he had received his final dues and told if he did not sign, he would regret his life. He sought redress through the lawyers demand letter and the Respondent did not respond. He denied that he assisted former employees to set up their business and stated he never worked with the rival company and did not disclose any matters to any person regarding his employment. He said he knew James as an accountant and Ephraim also a former accountant who had worked in the same business as his supervisors. He urged the court to order the payment of his six years benefits, three month's notice for dismissal without notice, leave for 21 days which was due in May 2017, 6 years benefits and the 20 days worked in June 2017. He also sought costs of the suit and compensation as the dismissal was unfair.

5. In cross-examination he stated that he had worked for the Respondent for six years as an engineer and that he was a machinist working on the lathe machine and milling machine. He said these machines are used for various work in locomotives and that he was a machinist at the time of leaving. He said he never visited the rival business since he would report to work in the morning, work all the days of the week except for Sunday when he would be off. He said he knew of Raphael Kimata who was a colleague in welding and that he never met Raphael. He stated that he said he did not know where the rival firm is located. He testified that he was given a letter of suspension and fourth of March 2017 and that he reported to work on 6 March 2017 and that he was not on suspension. He says he was called on Sunday and was asked to report to work on Monday. He testified that his NHIF and NSSF deductions were remitted. He stated that he was given an advance of Kshs. 50,000/- and that he had no knowledge of the criminal case.

6. In re-examination, he testified that he was not suspended and that was called in to transport work the next day. He said he is not a witness in the criminal case and that he was not arrested. He said the accused in that case and not his witnesses.

7. The Respondent called its witness Brian Jeremy Bradshaw and he testified that he was the owner of Bradshaw engineering and he was the managing director. He stated he had recorded a statement dated 21<sup>st</sup> August 2017 and wished to rely on it. He said the Claimant was his employee for several years that he had employed the Claimant as a trainee and later as a fully-fledged machinist. He said the Claimant worked for him for a few years and in January 2017, his accountant and accounts clerk left without notice and after checking his books found that there was some money missing. He testified that they started another company and that the Claimant helped them buy the machines and that he also later helped test the machines. He stated that he got this information from Raphael and another employee and that he had reason to believe the Claimant was working with his competitors about half a kilometre away. He stated that he issued employees with new contracts but that he suspended the Claimant but asked the Claimant to return before the end of the month. He said he terminated the services of the Claimant as he had and gone to the opponents and tested their machines. He testified these are clauses that bar workers from working with another employer while still in employment. There is also a clause on confidentiality. He stated the Claimant had requested for an advance of Kshs. 50,000/- which he was issued with. He testified that he had only received Kshs. 2,000/- and the rest was to have been deducted from the salary. He stated that he sought the balance being Kshs. 48,000/- from the Claimant. He said he had not asked for interest and that he had not asked for the suit to be dismissed.

8. In cross-examination, he testified that he gave the Claimant a hearing and a warning letter. He was referred to the letter he had written to the Claimant and stated that he had heard rumours and was warning the Claimant about going to the former employees to buy a machine for a company in competition. He testified that he had an employee spying on the rival business and that the report was that the Claimant went to test the machines. He said that he took the Claimant to his office in the presence of Joseph Kagai and that his secretary was present when the Claimant signed the letter. He admitted that he dismissed the Claimant mid-month and paid him Kshs. 10,000/- as he had completely forgotten that he had loaned him the money. He stated that the Claimant signed the document admitting payment in the presence of 2 witnesses and that the Claimant was dismissed lawfully.

9. In re-examination, he testified that he did not threaten the Claimant and that he had a right to dismiss lawfully. He stated that he had heard rumours and it was only after suspension that these were confirmed and he thus had reasonable grounds to suspect the Claimant was working for a rival. That marked the end of oral testimony.

10. The parties filed written submissions on 9<sup>th</sup> February 2018 and 12<sup>th</sup> March 2018. In his submissions, the Claimant submitted that the issues for determination were:

1. Was the termination of the Claimant's services fair?
2. Did the Claimant engage in any gross misconduct?
3. What remedies are available for the illegal termination of employment?

The Claimant submitted that the Respondent did not accord him a fair administrative action which is provided for in Article 47 of the Constitution of Kenya 2010 neither did the Respondent grant the Claimant fair hearing as required in order to respond to the issues contained in suspension letter. It was submitted that the Respondent did not produce any evidence which pointed to the Claimant having committed the alleged acts. The Claimant submitted that he was not involved in any gross misconduct that warranted him to be dismissed in the manner he was dismissed by the Respondent. The Claimant submitted he was not given an opportunity to be heard and therefore his dismissal was unfair. The Claimant relied on Section 41, 43, 45, and 49 of the Employment Act and sought salary for the month of June, 20 days worked Kshs. 18,334/-, general damages for wrongful dismissal which is 12 month salary Kshs. 330,000/-, three months salary in lieu of notice Kshs. 82,500/-, the unpaid salary for June 2017 Kshs. 27,500/-, service for six completed years Kshs. 82,500/- and one month unpaid leave for 2017 Kshs. 27,500/-. The Claimant relied on the case of **Dishon Kamau Muiruri v Kenya Revenue Authority Nyeri ELRC 117 of 2014** (unreported) in support of his claim and urged the honourable court to grant him the orders sought.

11. The Respondent submitted that the Claimant actively aided the rogue employees who had left them to the respondent and set up a rival business. The respondent submitted the claimant did not convincingly deny having visited the premises of the rival business and tested their

machines including the leaf machine which was in material breach of the contract of employment by the claimant. The respondent submitted the claimant's services were fairly terminated. The respondent submitted the claimant's termination was because of a breach of the claimant over term of his contract of service. The respondent relied on the case of **Edwin Jembe Mwamuye v Mombasa Canvas Limited [2017] eKLR**. The Respondent submitted the Claimant was summarily dismissed on account of his misconduct and that he was informed of the reasons for his dismissal. The Respondent submitted the Claimant was lawfully terminated from duty and that he collected his terminal benefits and Kshs. 10,000/- which he voluntarily received without any form of coercion. The Respondent submitted the allegations of violence alleged by the Claimant were scandalous and that the Claimant did not report these allegations of violence to the police or any other authority. The Respondent thus sought the dismissal of the suit as the Claimant had failed to prove his claim. The Respondent submitted the prayer for three months salary in lieu of notice has no contractual or statutory basis and that it ought to be dismissed as is the claim for service. The Claimant was a member of the National Social Security Fund (NSSF) and that he is thus not entitled to service pay by dint of section 35(6)(d) of the Employment Act 2007. The Respondent submitted that it had loaned the Claimant Kshs. 50,000/- and collected deductions from his salary of Kshs. 2,000/- leaving a balance of Kshs. 48,000/-. The Respondent submits that the balance of 48,000 is not disputed. The Respondent therefore sought judgement be entered against the Claimant in the sum of Kshs. 48,000/- being the outstanding loan in addition to the costs and interest on the suit. The Respondent submitted Claimant was dismissed after due process and fair procedure as enshrined in the Section 41 and 45 of the Employment Act 2007. It was submitted that the Claimant had collected his terminal dues on the date of dismissal being the wages in respect of the 12 days worked in June 2017.

12. The dismissal of the Claimant was alleged to have been unfair. The grounds were that the Claimant was chased away by the Respondent after a threat of violence. The Claimant sought damages for the unlawful dismissal and the salary for the days worked and the leave due. He also sought service pay. The Respondent on its part sought the payment of Kshs. 48,000/- being payment of the sums outstanding on a loan the Claimant had obtained from the Respondent. In employment matters, where an employee is a member of the NSSF, service pay is not payable as the employee is a contributory to the NSSF scheme thus disentitled to the relief. The Claimant therefore is not entitled to the payment of service. The Claimant sought 3 months salary for dismissal without notice. His contract did not make such a provision and the 3 months sought are not payable. The dismissal was abrupt and despite the allegations of the Respondent that the Claimant was engaged in subterfuge and dealings with a rival, no evidence was placed before court. The Claimant ought to have been accorded a hearing under Section 41 of the Employment Act which is the procedural fairness encompassed in Article 47. Whereas there were perhaps grounds for dismissal, the dismissal meted out was unfair and unlawful because the Claimant was not accorded the safeguards in the law. The Claimant is therefore entitled to recover compensation for the dismissal. The court would grant him 3 month's salary as compensation. The Claimant did not prove he did not go for his annual leave or that leave days were pending. He did not indicate how many actual days were owed and thus did not prove his claim on unpaid leave. It was mid 2017 when he was dismissed and there was no proof that he had earned the leave due for that year. The Claimant sought interest at 20% on his claim. The court is unable to grant the interest sought as no grounds were led as to why he is entitled to the application of a higher interest as opposed to the interest at court rates. The Respondent had loaned a sum of Kshs. 50,000/- out of which the Claimant had only repaid Kshs. 2,000/- at the time of dismissal. The Claimant was to repay the balance through the salary and he did not contest owing the money. He is liable to the Respondent for the sum. The parties have been successful to some degree in their respective suits and therefore an order for each party to bear their own costs would suffice.

13. The court therefore enters judgment for the Claimant against the Respondent for:

- i. Kshs. 82,500/-
- ii. Certificate of Service

14. The court also enters judgment for the Respondent against the Claimant for:

- i. Kshs. 48,000/-

The sum due to the Claimant shall be offset against the sum due to the Respondent and the Claimant therefore shall receive the sum of Kshs. 34,500/-.

It is so ordered.

**Dated and delivered at Nyeri this 23<sup>rd</sup> day of April 2018**

**Nzioki wa Makau**

**JUDGE**