



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1337 OF 2013

SIMON WARINGA NAMAKHABWA.....CLAIMANT

v

MR. AJANIA (CHAIRMAN) AND SAMANANI

AZAM t/a HOGGERS LIMITED.....RESPONDENT

JUDGMENT

1. Simon Waringa Namakhabwa (Claimant) while acting in person instituted legal proceedings against Ajania and Samanani Azam t/a Hoggers Ltd (Respondent) on 20 August 2013 and he stated the Issues in Dispute as

1. The violation of right of Mr. Simon Waringa Namakhabwa as a person (bill of right)
2. Unlawful termination of services of Mr. Simon W. Namakhabwa.

2. On 16 September 2013, the firm of Wangari Ndirangu & Co. Advocates came on record for the Claimant.

3. When the Respondent(s) filed a Memorandum of Defence on 30 September 2013, no offence was taken on the capacity and description of the Respondent(s).

4. The Claimant filed a Reply to Defence on 13 November 2015 and another one on 16 June 2017, and the Cause was heard on 3 May 2018 when the Claimant and Respondent's Security Manager testified and hearing was closed.

5. The Claimant filed his submissions on 29 May 2018 while the Respondent filed its submissions on 11 June 2018.

6. The Court has considered the pleadings, evidence and submissions and identified the Issues arising for determination as, *whether the termination of the Claimant's employment was unfair, whether there was breach of contract and appropriate remedies.*

7. To put the case in perspective, it is necessary to note that the Claimant was a motorbike rider making food deliveries to the Respondent's customers. He would collect monies for the deliveries and give the customer a receipt in exchange.

Unfair termination of contract

Procedural fairness

8. The Claimant was suspended from work through a letter dated 3 April 2013 (the letter in an inconsistency which was not explained also informed the Claimant that it had been decided to terminate his contract).

9. The letter set out some 3 allegations which the Claimant was informed he could request for a hearing on within 3 days unless he decided otherwise.

10. Although testifying that no hearing as contemplated by the law was held, the Claimant admitted that he appeared before the Human Resources Manager on 6 April 2013 where he was asked to explain himself in regard to the incident of 18 March 2013 when he had been found with receipts and extra cash.

11. Despite maintaining that there was no hearing, the Claimant made written representation through a letter dated 8 March 2013.

12. The Respondent's witness however maintained that a hearing was held and he produced notes of the meeting.

13. The Claimant was notified that the termination of his employment was being considered through the suspension letter. The letter set out the allegations.

14. The Claimant appeared for a disciplinary hearing on 6 April 2013 but did not cooperate with the disciplinary panel. He tore up evidence.

15. Although denying that an oral hearing was conducted, the Court is satisfied on the basis of the minutes produced that a hearing was conducted but the Claimant frustrated it.

16. In the view of the Court, the Respondent complied substantially with the procedural fairness requirements under section 41 of the Employment Act, 2007.

Substantive fairness

17. Sections 43 and 45 of the Employment Act, 2007 have placed upon employers the obligation to prove the reasons for a dismissal and that those reasons are valid and fair.

18. The allegations against the Claimant were that he had been found with extra cash which he had not declared while reporting to work, keeping sales receipts which were supposed to be left with customers upon delivery and tearing the receipts at the office of the Human Resources Manager.

19. The Claimant did not deny having extra cash at the point a spot check inspection was carried out on him by the Operations and Security Managers. His explanation in Court was that the money was meant to pay school fees.

20. However, he was eerily silent as to whether there was a requirement to declare such monies at the time of reporting to work or why he did not declare such monies.

21. On the second allegation that he was found with receipts which were meant to be retained by customers upon deliveries of food, the Claimant did not tender any explanation.

22. All in all, the Court is satisfied that the Respondent discharged the burden of demonstrating that it had valid and fair reasons to terminate the employment of the Claimant as he had breached the policies on declaration of monies at time of reporting to work and retaining receipts meant for customers.

Breach of contract

Wages during suspension

23. Suspension without pay amounts to breach of contract unless it is expressly provided for (see *McKenzie v Smith* (1976) IRLR 345).

24. In this regard, the Court finds that the Respondent was in breach of contract.

March 2013 salary

25. An employee is entitled as of right to earned wages and therefore by not paying the Claimant salary for March 2013, the Respondent was in breach of contract.

26. The Claimant's testimony that he was not paid the wages was not rebutted by production of pay records.

Accrued leave

27. An employee is entitled to at least 21 days annual leave after every 12 months consecutive service. The Claimant's case was that he had 40 days leave pending by time of separation.

28. The terminal dues schedule produced by the Respondent show that the Claimant had 60 days leave for which he was paid Kshs 30,000/-.

29. The Court finds no breach in respect to this head of claim.

Overtime

30. Although an employee would not in the ordinary course of work keep overtime or attendance records, the employee should at the very minimum lay an evidential basis as to the actual working hours, the contractually agreed working hours and the prescribed minimum working hours beyond which overtime pay would be payable.

31. Apart from stating that he used to report at about 10.00am and leave at about 10.00pm, the Claimant did not draw the attention of the

Court to the *Regulation of Wages Order* which applied to the Respondent.

32. However, the Respondent filed overtime records to show that overtime work was remunerated accordingly.

33. This head of claim was not proved.

Appropriate remedies

Pay in lieu of notice

34. With the conclusion that the termination of employment was fair, pay in lieu of notice is not available to the Claimant.

Wages for March 2013

35. The Claimant is entitled to the wages for March 2013 of Kshs 15,000/-. The dues paid to the Claimant through the cheque dated 30 April 2013 did not include the earned wages.

Accrued leave

36. The Claimant was paid Kshs 30,000/- on account of 60 days leave, more than for the 40 days he sought.

Overtime

37. The head of claim was not proved.

Severance pay

38. This was not a case of redundancy, and therefore severance pay is not applicable. If by severance pay the Claimant meant service pay, he would not be eligible for the payment because the pay slip produced in Court show that he was contributing towards the National Social Security Fund.

Compensation

39. Considering the conclusion that the separation was fair, compensation, a discretionary remedy is not available to the Claimant.

Refund of Kshs 2,900/-

40. Because the Respondent did not demonstrate any legitimate or legal right to the extra cash which was found upon the Claimant, he is entitled to the same.

Certificate of Service

41. A certificate of service is a statutory right and the Respondent should issue one to the Claimant forthwith.

Conclusion and Orders

42. The Court finds and holds that although the termination of the Claimant's employment was fair, there was breach of contract and he is entitled to and is awarded

(a) March 2013 salary	Kshs 15,000/-
(b) Monies confiscated	Kshs 2,900/-
TOTAL	Kshs 17,900/-

43. Claimant filed submissions long after agreed time. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 18th day of June 2018.

Radido Stephen

Judge

Appearances

For Claimant	Ms. Wangari instructed by Wangari Ndirangu & Co. Advocates
For Respondent	Mr. Kiunga instructed by Michuki & Michuki Associates
Court Assistant	Lindsey