



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1631 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 19th July, 2018)

JAMES MUIRURI MWANGI.....CLAIMANT

VERSUS

BERNARD MAREKA T/A LARI FRESH PRODUCE.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed his Memorandum of Claim on 16.9.2014 through the firm of Muturi S.K and Company Advocates contesting unlawful and unfair termination of employment and seeking payment of his terminal dues.

2. The Claimant's case is that he was an employee of the Respondent from October 2012 to April 2014 as a Salesman. He avers that he worked diligently and to the satisfaction of the Respondent until 30th April 2014, when he gave a 1 months' notice to terminate his employment and requested for a handing over to enable him access al his commissions and terminal dues.

3. He avers that his monthly salary was 35,000/= and commissions on sales and his unpaid commission over the years was as follows:-

a. Commissions over 2012 October,

November & December - Kshs.41,835/=

b. Commissions for 2013

April - Kshs.17,551

August - Kshs.13,533

December - Kshs.13,286

c. Commissions for 2014

January - Kshs.15,144

February - Kshs.19,136

March - Kshs.20,099

May - Kshs. 9,548

d. Holidays (October 2012 –May 2014

March 29 }

April 1	}	
Labour Day	}	
October 21	}	- Kshs.10,500
October 20	}	
December 12	}	
Swearing in of Present	}	

Total -Kshs.218,164

4. The Claimant avers that the Respondent refused to pay him the said commissions and other wages as listed;

Including salary for May 2014,

Leave for 1 year 8 months – 58,013,

Service pay (gratuity) for the period worked -39,583.30/=

And Airtime for 13 months at 1,000/= per Month = 13,000/=

Total = 363,760/=

5. The Claimant avers that he owed the Respondent other deductions totaling to 133,923 as enumerated under paragraph 7 (v) and vi) of the Memorandum of Claim and therefore what he is owed is Kshs.363,760 – less 133,923 = Kshs.229,837/=

6. This is the claim by the Claimant for which he seeks payment plus costs. He also seeks a non-explained compensatory damages of 6 months' salary totaling 210,000/= thus bring the total claim to Kshs.439,837 plus costs and interest.

7. The Respondent filed a Defence and Counterclaim on 17/10/2014 through the firm of Messrs S.M. Muhia & Company Advocates.

8. They admit that the Claimant was their employee upto 30th April 2014 when he gave them a one month's notice to terminate his employment with Respondent with effect from 30th May 2014.

9. They denied the calculations made by the Claimant demanding Kshs.229,923. They however aver that the Claimant owes them Kshs.24,309.67/=

10. The Respondent have therefore counterclaimed for the said Kshs.24,309.67 which they aver the Claimant owes them from moneys collected from customers and which Claimant failed to surrender.

11. The Respondent in evidence also stated that they were not remitting NSSF for the Claimant nor paying him airtime as alleged. They also aver that since the Claimant was not terminated, he cannot claim damages.

12. In cross-examination the RW1 indicated that the Claimant was paid commissions of 2% on sales after a 10,000/= sale. They also admit not paying him his leave. On overtime, the Respondent avers that they gave Claimant 100/= in airtime daily. They attached a Statement to the Defence to show how they calculated the commissions for Claimant.

13. The parties filed their respective submissions. The issue for determination is however, how much is entitled to the Claimant in terms of commissions and leave and as prayed. It is basically an issue of quantum. The issue of damages does not arise as the Claimant resigned rightfully.

14. In determining this claim, it is incumbent upon the party alleging to proof. The Claimant avers that he supplied goods and he is owed commissions. The only way this can be proved is through documentary evidence showing receipt of the goods and return of cash sold.

15. The Claimant indicated he was owed commissions from 2012 to 2014. The details of these commissions though pleaded are not supported by any documents.

16. The Respondent on their part denied these commissions, laid down their own counter-claim without any documentary proof as well.

17. It is therefore my finding that on the issue of commissions, the Claimant has not discharged his burden. The Respondent also failed to discharge their burden on the counterclaim.

18. What remains of this claim is the leave pay for 1 year and 8 months and service pay and salary for May 2014. I therefore find for Claimant only in terms of:-

1. 1 months salary for May 2014 = 35,000/=

2. Unpaid leave due for 1 year and 8 months = 58,013

3. Service pay for 1 ½ years = ½ x 35,000 of 18 months = 28,166

Total = 121,179/=

4. Plus costs of this suit and interest with effect from the date of this judgment.

Dated and delivered in open Court this 19th day of July, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mwangi for Respondent – Present

Claimant – Absent