



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NUMBER 314 OF 2014**

**BETWEEN**

**ROBERT WANYAMA SOITA .....CLAIMANT**

**VERSUS**

**YOGI SUPPLIES .....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Okemwa & Company Advocates for the Claimant*

*Mucheru Law LLP Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 4<sup>th</sup> March 2014. He avers he was employed by the Respondent Company as a General Labourer on or about 1<sup>st</sup> March 1998. The Respondent is in the business of trading in building materials. The Claimant initially earned a daily wage of Kshs. 150. By the time he left employment in 2013, he was a Motorcycle Rider, earning a monthly salary of Kshs. 14,500. He states he was denied weekly resting days, public holidays and annual leave for the years 1998, 1999 and 2000. He avers he fell ill and was treated at Kenyatta National Hospital. The Doctor advised he should be given alternative work as he was suffering from asthma. The Respondent alleged not to have alternative work, and therefore, terminated Claimant's contract. The Claimant asks the Court to find termination was unfair, and grant him Judgment against the Respondent, in the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 14,500.
- b) Accrued annual leave for 1998 [10 months] at Kshs. 9,759.
- c) Annual leave for 1999 and 2000 of 42 days at Kshs. 23,423.
- d) 33 Public Holidays between March 1998 and 1<sup>st</sup> December 2000 at Kshs. 15,520.
- e) Weekly resting days for 1998, 1999, and 2000 [136 days] at Kshs. 65,960.
- f) 12 months' salary in compensation for unfair termination at Kshs. 174,000.

Total....Kshs. 303,162

- g) Certificate of Service to issue.
- h) Costs.
- i) Interest.
- j) Any other suitable relief.

2. The Respondent filed its Statement of Response on 10<sup>th</sup> April 2014. Its position is that it employed the Claimant in January 2001, not in 1998. This is shown in Claimant's National Social Security Fund records, exhibited in the Statement of Response. The Claimant absented himself on consecutive days without permission from the Respondent, beginning the month of April 2013. He was absent for a whole week without permission. The Respondent was lenient and allowed the Claimant to go on working, without the Claimant having given a satisfactory explanation for his absence. He worked for only 7 days in July 2013. In August of the same year, he did not work a single day. He made a technical appearance on or about 28<sup>th</sup> August 2013, presenting a Doctor's report, alleged to be from Kenyatta National Hospital, recommending sick off of 1 week, and that the Claimant is placed on light duties upon resumption. The Claimant at the same time stated he was no longer willing to work for the Respondent from September 2013. The Respondent decided to pay to the Claimant salary for August 2013 notwithstanding Claimant's absence from work during that month. The Respondent paid to the Claimant 1 month salary in lieu of notice, in addition to the August salary. He was paid final dues, as shown in the voucher marked as annexure 4, Respondent's Documents. The Respondent takes the position that the Claimant opted to cease working. Even if he did not make that choice, the Respondent would have been entitled to terminate his contract on the ground that the Claimant was absent from work for long, without leave or lawful cause. The Respondent prays the Court to dismiss the Claim with costs to the Respondent.

3. The Claimant gave evidence and rested his case on 20<sup>th</sup> April 2018, during the Court's Service Week at Nairobi. The Respondent did not give evidence. The file was received by the undersigned Judge at Mombasa for Judgment writing, on 23<sup>rd</sup> July 2018.

4. The Claimant told the Court he is presently farming at his rural Kakamega home. He was employed by the Respondent on 1<sup>st</sup> March 1998. He did not have a written contract. He last earned a salary of Kshs. 14,500 monthly. He was a General Worker, working 6 days in a week. He worked even during Public Holidays. He was sick, June-August 2013. The Doctor advised he is assigned light duty on resumption. On presenting the Doctor's advice to the Respondent, the Respondent told him there was no more work. He was paid his salary for August 2013. He was not given the reason for termination. His family suffered. He did not go on leave on the days shown in 1998, 1999, and 2000.

5. Cross-examined, the Claimant told the Court he did not have a letter of employment. He was employed in 1998. His salary was paid through vouchers. He did not have these vouchers in Court. He did not absent himself from work in July 2013. There were dates he was shown to be absent, in the attendance register annexed to the Statement of Response. He was absent on certain dates in April, June and July 2013. He was sick in July 2013 but still reported to work. He was told to take sick off by word of mouth. He gave the Doctor's letter recommending light duty, to the Chief Accountant Mwaniki on 13<sup>th</sup> August 2013. Mwaniki told the Claimant to go home and return on 26<sup>th</sup> August 2013. Redirected the Claimant told the Court he would pass by his workplace on his way to hospital, and ask for sick off. Sick off was given to him by word of mouth.

#### **The Court Finds:-**

6. There is consensus that the Claimant was employed by the Respondent as a General Worker. The Claimant suggests he later became a Motorcyclist. This is not denied by the Respondent. There is no dispute that the Claimant left employment in August 2013. Parties do not agree on the date the Claimant was employed, the circumstances of termination of employment, and whether the Claimant is owed any dues and compensation by the Respondent.

7. The Claimant states he was employed on 1<sup>st</sup> March 1998. He did not have any document to support this date of employment. He was not on a written contract. But he was paid through salary vouchers. He did not present any such voucher showing he worked from 1998.

8. The Respondent exhibited N.S.S.F Return Forms for the years 2000 and 2001. The Form for the year 2000 does not have the name of the Claimant. His name first appears in the Form dated 19<sup>th</sup> January 2001. The Respondent states it employed the Claimant in January 2001.

9. The Respondent has satisfied the Court by these documents, under Section 10 [7] of the Employment Act 2007, that the Claimant was employed in January 2001. The oral evidence, given by the Claimant, that he was employed in 1998, cannot outweigh the probative value of the documents exhibited by the Respondent. The Claimant did not even make any attempt to explain why his name was not on the N.S.S.F records prior to January 2001. If he was paid salary through voucher, why did he not supply the Court with just one voucher predating 2001?

10. Having made this finding on the date of employment, it follows that the prayers relating to the period before January 2001 must be rejected. Prayer [b] in the Statement of Claim for accrued leave of 10 months in 1998; Prayer [c] for 1999 and 2000 annual leave of 42 days; Prayer [d] for public holidays' pay from March 1998 to 1<sup>st</sup> December 2000; and prayer [e] for weekly resting days for 1998, 1999 and 2000, are declined in their entirety.

11. The remaining prayers relate to notice pay and compensation for unfair termination.

12. In the salary voucher dated 28<sup>th</sup> August 2013, it is shown the Claimant was paid Kshs. 14,500, representing 1 month salary in lieu of notice. He cannot be paid notice twice. The prayer for notice pay is declined.

13. Was termination unfair, warranting payment of compensation?

14. The Claimant has shown through his oral evidence and documents on record that he was unwell for some time in the year 2013. He presented a letter from Kenyatta National Hospital indicating he had been diagnosed with asthma. This letter is part of Respondent's bundle of documents. He was allowed sick off of 1 week with effect from 13<sup>th</sup> August 2013. It was recommended that due to his asthmatic condition, the Claimant should be put off motorcycling and allocated lighter, preferably, office work.

15. The Respondent states, that the Claimant expressed his unwillingness to continue working, come September 2013. The Respondent at the same time would have justification in dismissing the Claimant for repeated unauthorized absence. The Respondent opted to pay the Claimant

his salary for August 2013, and notice pay equivalent of 1 month salary. According to the Claimant, he was told there was no more work, upon presenting his Doctor's recommendation to the Respondent.

16. The Court finds the Claimant's evidence on the circumstances of termination persuasive. He presented the Doctor's recommendation, and was told there was no more work. The Respondent did not have the kind of office work the Doctor thought a Motorcyclist should perform. The Claimant was therefore surplus to his Employer's business. The Respondent decided to terminate the contract by notice. It is not persuasive that the Claimant opted not to continue working. He was told there was no more work. The Respondent did not consider reverting the Claimant to general duties which the Claimant performed, at the beginning in 2001.

17. The Respondent did not accord the Claimant reasonable accommodation. His persistent absence from work due to sickness appears to have informed the decision to terminate Claimant's contract. The Respondent ought to have engaged the Claimant more constructively, extend to him a hand of reasonable accommodation, and not take a rash decision to terminate the Claimant's contract. ***The Court finds termination was unfair and grants the Claimant equivalent of 4½ months' gross salary at Kshs. 62,500, in compensation for unfair termination.***

18. ***Costs to the Claimant.***

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

20. ***Certificate of Service to issue.***

IN SUM, IT IS ORDERED:-

***[a] Termination was unfair.***

***[b] The Respondent shall pay to the Claimant equivalent of 4 ½ months' salary in compensation for unfair termination at Kshs. 62,500.***

***[c] Costs to the Claimant.***

***[d] Interest allowed at 14% per annum from the date of Judgment till payment in full.***

***[e] Certificate of Service shall be released to the Claimant by the Respondent forthwith.***

**Dated and signed at Mombasa this 19<sup>th</sup> day of September 2018.**

**James Rika**

**Judge**

**Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of September 2018.**

**Jorum Abuodha**

**Judge**