



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1964 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 25th September, 2018)

JOSEPH MUTUKU MUSEE.....CLAIMANT

VERSUS

KENYA VEHICLE MANUFACTURES.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit on 28th September 2012 through a Memorandum of Claim which he later amended on 23rd November 2015 through the firm of Macharia Kahonge & Company Advocates. He seeks damages for unfair and wrongful termination of employment; failure to pay terminal benefits; unpaid commissions and other benefits.
2. He avers that he was employed by the Respondent and the two entered into a contract evidenced by a letter of appointment dated 22nd July 2010. He was appointed as a Sales and Marketing Executive and the Respondent gave targets to be met in sales in a letter dated 18-01-2011 which he satisfied with excellence as evidenced in the record for January 2011 to February 2012 that he was leading the entire team.
3. He avers that he did acquire a personal car loan through KVM car loan scheme, which he took from KCB as guaranteed by the Respondent who was to remit the loan deducted from his dues on monthly basis and issue him his statement of accounts.
4. He avers that following his dismissal, the Respondent has been harassing him about the car, calling it company property, whereas the Respondent knows or ought to know that the arrangement entered into for purchase of the car vested all property rights to him. He states that he identified the car and entered into a sale agreement and upon securing a loan, bought the car whose transfer documents were executed in his favour.
5. He further avers that he was entitled to commission on sales being 2.5% of the profit realized on each sale. He made sales during his period of employment for which he has never been paid. In breach of the contract between the parties, the Respondent totally failed to facilitate his work by refusing/neglecting or ignoring to pay fuel, mileage, credit, entertainment and parking charges claims for the whole or part of the period beginning of his employment.
6. He avers that his efforts were continuously frustrated as no commissions whatsoever were paid to alternate the constraints he was going through and efforts made to address the issue were met with hostility by the Administrative Manager Joseph O. Otieno.
7. He states that no dues on the unlawful termination have been paid to him. He avers that he was entitled to March salary, payments in lieu of notice, pension as per the scheme and unpaid leave for 48 days.
8. The Respondent filed their Memorandum of Defence where they denied each and every allegations and averments in the Claimant's Statement of Claim. They state that that he was to be paid 15% commission on the profit realized on each sale he made.
9. They aver that his probation period of 3 months was extended by 2 months due to his underperformance and that he absconded duty on 2nd March 2012 after being advised to improve his performance. They also state that there was no prior authorization given to the Claimant to use his personal car for their business to entitle him mileage claim.
10. They further aver that the Claimant was consistently underperforming in his position as a Sales Executive as evidenced by the email dated 29th February 2012. He had also committed acts of gross negligence by absenting himself from his place of work without permission as evidenced by his supervisor's email.

11. They also deny that they terminated the Claimant's employment on 2nd March 2012 and state that they only issued a cautionary letter to him appealing to him to improve his performance within one month or have his contract terminated for under performance.

12. They deny the allegations that any efforts by the Claimant to reach them were met by hostility and state that all the demand letters made to them were received and replied. They state that upon absconding duty, the Claimant has never reported back to their premises for purposes of clearing and hand over, the Claimant terminated his employment by desertion.

13. The Claimant filed Reply to Defence where he reiterates that he never absconded duty but was forcefully evicted from the premises for having raised his concerns to the management and in particular the Administrative Manager. He also maintained that the car loan was not facilitation but a requirement to get a personal car in exchange for the company car previously used with a view of minimizing the Respondent's costs on vehicle maintenance.

14. He avers that targets were met and surpassed and that emails displayed refer to the time when the same were being set or clarified. He denies the accusation of gross negligence and state that he did not abscond duty but rather he was terminated.

Submissions

15. The Claimant filed his submissions where he submits that the Respondent failed to comply with the terms of the employment contract by underpaying his salary, failing to register him into the company's retirement benefits scheme of which he was eligible for admission after his probation period referred as (RBS) as read in the appointment letter and failing to issue him with certificate of service as per Section 51 and 41 of the Employment Act.

16. He avers that his employment was illegally, unfairly, wrongfully, maliciously and unlawfully terminated without explanation and all his benefits denied to him. He states that the Respondent failed to effect his payments necessitating the bank to list him with the Credit Reference Bureau. He further avers that the Counterclaim lacks cogent evidence and is unsupported by documentary evidence and should be set aside by this Honourable Court.

17. He further states that the termination was contrary to Section 45 (2) (c) 45(5) (a) (b)(c)(d) and (e). Additionally he states that he was not provided any opportunity to explain himself why he should not be summarily dismissed thus making his termination wrongful and in breach of employment contract. He relied on the case of **Mr. Muthoka Kimotho Vs KCB bank Limited.**

18. He states that there was no proper handover made and he left behind his crucial important personal and official documents in the custody of the Respondent. He avers that there was continuous frustrations and complaints due to delay in delivering of the customers' buses on time as agreed on the contract and specifications sheets and as evidenced on the list of additional documents. There was also continuous frustration by the Respondent as no commission and mileage compensation-allowance were forth coming or paid to alleviate his constrains which he was going through.

19. The Respondents have not filed their submissions.

20. I have examined all the evidence and submissions filed by the Claimant. The issue for determination by this Court are as follows:-

1. *Whether the Claimant was dismissed or he absconded duty.*
2. *If Claimant was dismissed, whether there were valid reasons.*
3. *If Claimant was dismissed, whether due process was followed.*
4. *What remedies to grant in the circumstances.*

21. Concerning issue No 1 above, the Claimant contends that he was orally summarily dismissed. The Respondent aver that the Claimant absconded duty. Appendix 9 of the Claimant's documents is a letter giving notice to the Claimant to terminate his service dated 2.3.2012 but received by the Claimant on 5/4/2012. The Claimant was informed that he had 1 month within which to improve his performance or be terminated. This was not a termination letter.

22. The Claimant had told Court that he was verbally dismissed on 2/3/2012 and no letter of dismissal was issued to him. He avers that the letter dated 2.3.2012 and delivered to him on 5/4/2012 crafted, as a warning letter was an afterthought and totally false as the warning letter could not be 1 month after the termination.

23. The Claimant was employed and issued with an appointment letter on 22.7.2010. There is no indication that the Claimant was issued with a dismissal letter. However, it is not also clear why the Respondent served a cautionary letter dated February upon the Claimant 2 months later.

24. In May 2012, the Claimant Advocate wrote to the Respondent a demand notice alleging unlawful termination of employment. The Respondent responded on 8.6.2012 and they still averred that the Claimant had absconded from duty on 2.3.2012. This does not however explain why the Respondents knowing that the Claimant had absconded duty never sought him despite having his contact.

25. The issue of abscondment was only raised when the Claimant served Respondent with a demand notice. It is therefore my finding that the issue of abscondment cannot arise as it is the Respondent who were to issue a dismissal letter on account of absconding which they did

not and so the most probable position is that the Claimant was verbally dismissed.

26. Having found as above, the issue of reasons for dismissal follow. The Respondent never issued the Claimant with any dismissal letter. Issue of non-performance had been raised by the Respondent before.

27. That notwithstanding, the Claimant was entitled to be informed of the reasons for dismissal whether it was for non-performance or for abscondment. The Claimant was never served with any such letter. This leads to the conclusion that there was no valid reasons to warrant Claimant's dismissal as envisaged under Section 43 of Employment Act.

28. Due process was also never followed. This is as envisaged under Section 41 of Employment Act. It is therefore my finding that the Claimant's dismissal was unfair and unjustified.

29. In terms of remedies, the employment contract of the Claimant and Respondent provided for how the Claimant was to be remunerated. The Claimant was to be paid 15% commission of the profit realized on each sale made. He was also to be paid:-“net pay of Kshs.40,000/= ... which will be recovered cumulatively when sales are realized. This will reduce to 20,000/= after 6 months and down to 0 after 12 months, by which time you will have a fully fledged customers base. This will be paid to your bank account in Kenya”.

30. My understanding is that the Claimant was to be paid on commission basis only and within the initial 12 months, he would be paid some 40,000/= reducing to 20,000/= monthly after 6 months which was recoverable from the commissions payable. The Claimant was also entitled to a medical cover and the limit was 30,000/= plus other benefits.

31. Based on the above understanding, the Claimant worked July 7 2010 to 2.3.2012. The only entitlement then for Claimant during the 1st 12 months as per the employment contract was =

$$40,000 \times 6 = 240,000 +$$

$$20,000 \times 6 = 80,000/=$$

$$\text{Total} = 320,000/=$$

but which was recoverable from his commissions.

32. The Claimant has sought in his prayers payment of his March 2012 salary, which in my view is not payable. He also seeks 1 month salary in lieu of notice. Based on the contract, the Claimant was entitled to this upon termination. I will put this at 40,000/=.

33. On commission, the Claimant aver that he is owed commission on sales made as listed out in his claim. The commission payable was however paid on profit on sales. The Claimant has tabulated what was payable on sales alone. The Claimant made a list of 92 vehicles he apparently sold while working for the Respondent.

34. The Claimant produced Appendix 2(b), the sales report which shows that Claimant had sold 27 vehicles at the time in one year. Appendix 3(b) shows the Claimant was involved in examination of a motor vehicle Station Wagon Toyota Wish ZNE10(794 CC) AUTO, Appendix 3 (c) shows he was also involved in valuation of motor vehicle KBN 194G Toyota Wish ZNE10 which is the same vehicle in 3(b) above and 4(a) and 4(b) and 4(c) and the vehicle was finally paid up in 4(d).

35. More evidence of sales by Claimant is evidence from his Appendix 8 which show quotations for Claimant was for 5 vehicles.

36. There is proof that Claimant did handle certain sales on behalf of the Respondent. The exact amounts on sales realized and profits made must be tabulated to enable commissions tabulated. When cross-examined, the Claimant told Court that he was to be paid 15% on profit made and he was not clearly given profits made by the Respondent. He indicated he calculated his commission on total invoices generated by him.

37. On this item on commission, it is apparent that the figures submitted by the Claimant are based on total invoices made as opposed to profits made. In this case, it would be a disservice for this Court to attempt and put a final figure payable on commission if at all. I therefore would reserve any finding on this prayer until the parties resubmit the proper figures of accounts on the item.

38. On leave, I note that the Claimant was entitled to 24 working days leave over a period of 12 months. He worked from July 2010 to March 2012. This was a period of 18 months. The leave due during this period will therefore be for 18 months which on prorata basis is for 40 days. This is equivalent to Kshs.57,333/=.

39. The Claimant also sought to be paid mileage. According to the company policy, this was payable only if the Claimant was using a designated company vehicle. It is not clear whether any vehicle was designated for this purpose. This was to be authorized by the Managing Director.

40. On 9/12/2010, the Managing Director indeed approved mileage claim for Claimant at 35/= per km covered using the Claimant's designated vehicle (Appendix 6(b)). The Claimant prays he be paid 1,360,835/= under this figure. He has not however demonstrated how this amount came to be. This item is therefore not proved.

41. On pension, I note from Appendix 12(c) of Claimant's documents which is his payslip, that there were contributions made to the pension

fund. The claim for payment made to the pension fund are therefore valid and I order that all contributions made to this fund be released to the Claimant.

42. Prayer for fuel, parking, airtime and entertainment are also payable as per the contract. On fuel, the Claimant was allowed to fuel from the company reservoir. Therefore, the claim for fuel is not tenable. On parking, this was also payable but Claimant has not tabulated what the exact amounts are. This also goes for airtime and entertainment. The Court is unable to decipher what the exact payable amounts are in the circumstances.

43. The Counterclaim by the Respondent is subject to proof that all commissions payable were paid. In the circumstances, I will also reserve any award on this item until the parties resubmit the commissions payable based on profits made and what was already paid. I will reserve this determination to a later stage.

44. In the interim, I order for Claimant as follows:-

1. 1 month salary in lieu of notice = 40,000/=.

2. 40 days leave payable = 57,333/=.

3. Pension dues.

4. 8 months' salary for unlawful termination of employment = 8 x 40,000 = 320,000/=.

TOTAL = 417,333/=

5. Plus costs and interest

6. What remains pending is a determination on commission payable vis a vis the counter claim made.

Dated and delivered in open Court this 25th day of September, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant in person – Present

Respondent – Absent