



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MALINDI
CAUSE NUMBER 29 OF 2018

[Formerly Mombasa Cause Number 625 of 2016]

BETWEEN

CHIKOKOPHA TSUMAS RUWA.....CLAIMANT

VERSUS

SMOKY HILL LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Lewa & Associates, Advocates for the Claimant

Marende Necheza & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement on 24th August 2016. He states he was employed by the Respondent as a Machine Operator, in May 2005. Initially, he was paid a daily wage. From May 2010, he was paid monthly. He failed to go to work on 23rd February 2015 due to illness. He availed to the Respondent medical records on return. The Respondent terminated Claimant's contract on 2nd March 2015. The Claimant was advised that someone else had taken over his job. By the time of termination, he earned a monthly salary of Kshs. 14,000. He only went on annual leave, in December 2013. He prays the Court to find termination was unfair and unlawful, and grant him Judgment against the Respondent, in the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 14,000.
- b) 12 months' salary in compensation for unfair termination at Kshs. 168,000.
- c) Annual leave for the period 2010- 2015 at Kshs. 70,000.

Total...Kshs. 252,000.

- d) Declaration that termination was unfair and unlawful.
- e) Certificate of Service to issue.
- f) Costs.

g) Interest.

h) Any other suitable relief.

2. The Respondent filed its Statement of Response on 3rd November 2016. Its position is that the Claimant was employed by the Respondent as a General Casual Worker, on 27th October 2007. He had a habit of persistent absenteeism. He was severally warned by the Respondent. He absented himself on 23rd February 2015. He earned a consolidated salary of Kshs. 14,000. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant gave evidence, and rested his case, on 6th December 2017. General Manager Tom Mboya Awolo gave evidence for the Respondent on 17th July 2018, bringing the hearing to a close. The Cause was last mentioned on 5th October 2018, when Parties confirmed the filing of their Closing Submissions.

4. The Claimant adopted his Pleadings, Documents and Witness Statement on record, as his evidence. He added that the Respondent is involved in the business of cutting stones from the quarry. He was unwell and on return, was told his job had been taken over by another Employee. He took annual leave once, in 2013. He was not heard before termination. There was no notice. He reported the dispute to the Labour Office, before coming to Court. Parties were invited for conciliation. The Respondent ignored the process. The Claimant was not a persistent absentee.

5. Cross-examined he told the Court he was employed in January 2015 as Machine Operator. He was issued a letter of appointment. The letter issued generally to all Employees. He was paid weekly from 1st week of May 2005, not 2010. He was sick on 2nd March 2013. Redirected, the Claimant told the Court he could not recall relevant dates well.

6. Tom Mboya Awolo told the Court that the Respondent recruited Casual Labourers in 2007. The Claimant was among them. He was enlisted for general duties on 27th September 2007. The records do not support his position that he was employed in 2005. He became a permanent Employee in 2010, earning a monthly salary of Kshs. 10,800. He was frequently absent. He was warned severally. Salary for days, when the Claimant was absent, was deducted from his monthly salary. He was absent throughout September 2013. In 2015 he disappeared suddenly. He returned, and when the Respondent attempted to issue him a warning letter, he declined the letter, and walked away. Awolo did not terminate Claimant's contract. He walked away.

7. Awolo told the Court on cross-examination that he did not have documents showing he had authority to appear in Court, and to fire and hire Employees. He had worked for the Respondent as General Manager for 24 years. The Claimant became permanent in 2010. There was no document to show the Claimant was employed as a General Labourer and not a Machine Operator. He disappeared and went back to work. He refused to take warning letter and walked away. There was no document to show the Claimant was paid in lieu of leave. He was not issued letter to show cause, why his contract should not be terminated.

The Court Finds:-

8. Parties agree the Claimant was employed by the Respondent. They do not agree when he was employed, and in what capacity. They do not agree on how the Claimant left employment.

9. The Claimant states he was employed in the year 2005, as a Casual Employee, and became permanent in 2010. The Respondent states the Claimant was employed in the year 2007 as a Casual General Labourer, and became permanent in 2010.

10. The Court does not think the date when the Claimant was employed, seen against the remedies sought in the Claim, is material. There is no time-based remedy sought. By this the Court means there is no prayer based on the date of employment in 2005, or 2007. The Claimant does not pray for service pay, or severance pay. The number of years served is irrelevant. Similarly it is not relevant in resolving the dispute, whether the Claimant was a General Labourer or a Machine Operator, at any one time. There is no prayer based on job-grouping, such as underpayment of salary. There are no time-based or capacity-based remedies sought, in this Claim. It is agreed the Claimant became permanent in 2010, and earned an undisputed gross salary of Kshs. 14,000 a month.

11. The issues in dispute, as understood by the Court are:-

§ Whether termination was unfair.

§ Whether the Claimant is entitled to notice pay; compensation for unfair termination; annual leave pay; declaration that termination was unfair; certificate of service; costs; and interest.

12. The Claimant states he was unwell on 23rd February 2015, and failed to report for duty. He alleges he went back and furnished the Respondent with medical evidence in justifying his absence. He does not state why he did not seek the leave of the Respondent, before going for treatment. He could have written to, or called the Respondent before seeking medical advice. Taking medical papers to the Respondent, after the event, was of little help in mitigating indiscipline. Was he in a medical emergency, preventing him from communicating with his Employer, before or during treatment? The record does not suggest so. His unauthorized absence convinces the Court that he was an Employee given to abdicating duty, and reporting back as and when he wished. There are many letters of warning exhibited by the Respondent, all about absenteeism. It is possible that the Respondent became exasperated by Claimant's attitude, and sought replacement for the Claimant.

13. Having reported back, the Respondent should however, have formally called upon the Claimant to show cause, why he should not be

dismissed for his offence. There is no such letter on record. All the Respondent has exhibited is a collection of warning letters issued on various dates, all on absenteeism. The Respondent did not take the Claimant through a disciplinary process. Termination was not fair on account of procedure. It failed to satisfy the standards of fairness created under Sections 41 and 45 of the Employment Act 2007. **It is declared termination was unfair. The Claimant is granted equivalent of 6 ½ months' gross salary in compensation for unfair termination at Kshs. 91,000.** He was shown to absent himself without the leave of the Respondent. He went away on 23rd February 2015, without leave. The prayer for notice pay, for an Employee given to such liberties, cannot be sustained.

14. The Respondent testified that the Claimant always sold his annual leave days to the Respondent. The Claimant seeks annual leave pay from 2010 to 2015. There are no records availed to the Court by the Respondent, showing that the Claimant was paid in lieu of leave. Such payment should have reflected in his monthly Pay Advice. The Claimant has not established that he was entitled to 30 days of annual leave. He took leave in 2013, and is therefore entitled to annual leave over a period of 4 years. **He is granted the statutory minimum of 21 days over a period of 4 years at Kshs. 45,230 in annual leave pay.**

15. **Certificate of Service shall be released to the Claimant under Section 51 of the Employment Act 2007.**

16. **Costs to the Claimant.**

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

IN SUM, IT IS ORDERED:-

a) **It is declared termination was unfair.**

b) **The Respondent shall pay to the Claimant: equivalent of 6 ½ months' gross salary in compensation for unfair termination at Kshs. 91,000 and annual leave pay at Kshs. 45,230 – total Kshs. 136,230.**

c) **Certificate of Service to issue.**

d) **Costs to the Claimant.**

e) **Interest granted at 14% per annum from the date of Judgment till payment is made in full.**

Dated and delivered at Malindi this 29th day of November 2018.

James Rika

Judge