



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MALINDI
CAUSE NUMBER 26 OF 2017

BETWEEN

MORRIS WACHIRA WANJOHICLAIMANT

VERSUS

GEOFFREY HOBBS t/a LIVING LIFE CONCEPTRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Wandai Matheka & Company Advocates for the Claimant

Mukite Musangi & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 13th July 2017. He states he was employed by the Respondent as an Accountant on 1st October 2014 on a monthly salary of Kshs. 100,000. This was later raised to Kshs. 155,000, the rate earned by the Claimant as of the date the Claimant left employment in February 2017. The raise in his salary was made as a result of Claimant's good performance. He was, owing to his good performance assigned additional responsibilities, and made Administrative Manager of Respondent's two other Companies, Canterbury Holdings Limited and Will Rise Enterprises. He was issued a backdated letter of termination on 26th February 2017. The letter is dated 21st February 2017, and would take effect on 28th February 2017.

2. No valid reasons were given to justify termination. Fair procedure was not followed. The Respondent purported to calculate and pay terminal dues to the Claimant. The Claimant was not involved in the calculation. He prays for Judgment against the Respondent in the following terms:-

a) House allowance at 15% of Kshs. 157,634 for 29 months at Kshs. 685,707.

b) 12 months' salary in compensation for unfair termination at Kshs. 1,891,608.

Total... Kshs. 2,577,315.

c) Declaration that termination was unfair.

d) Certificate of Service to issue.

e) Costs.

f) Interest.

g) Any other relief.

3. The Respondent filed its Statement of Response on 5th October 2017. It is conceded that the Claimant worked for the Respondent, at all material times, as an Accountant based at Vipingo. He willfully failed to audit books of account and to remit KRA, NHIF and NSSF dues. He was issued a month notice of termination, but elected to terminate his contract immediately. He was paid terminal benefits in full, as agreed between the Parties. He voluntarily resigned. It was not possible in the circumstances, to accord him a hearing. The Respondent prays that the Claim is dismissed with costs.

Claimant's evidence

4. Morris Wachira Wanjohi, gave evidence, and closed his case, on 13th March 2017. The Respondent did so on 16th July 2018. The matter was last mentioned in Court on 17th September 2018 when Parties confirmed the filing of their Submissions.

5. The Claimant adopted his Witness Statement and Documents on record as his evidence. He restated in oral evidence, his employment history and terms and conditions of service with the Respondent. He was told by the Respondent that he had unmet company expectations. There was no warning. He just received a letter of termination. He was paid terminal dues at Kshs. 805,998. Kshs. 488,665 was Claimant's provident contribution.

6. He was not given house allowance. He prepared schedules for statutory payments to be made by the Respondent. He did not resign. He did not come to Court after receiving terminal dues from the Respondent. The Respondent stated in an email on record, that he had given the Claimant a last chance to redeem himself by resigning. The Claimant worked for 3 Companies belonging to the Respondent.

7. Cross-examined, the Claimant told the Court that he was paid provident dues, 1 month salary in lieu of notice, and salary for days worked. He was never absent from work without valid reason. He disclosed to the Respondent, that he owned a supermarket at Mtwapa. He did not approach the Respondent and indicate he wished to resign. The Claimant e-mailed the Respondent on 7th February 2017, and recommended the Parties to have amicable separation. There were proposals and counterproposals. The Claimant received his terminal dues cheque after this. The Claimant was paid gross salary of Kshs. 157,000. His supermarket did not interfere with his accounting work. He had a Manager at the supermarket. Redirected, the Claimant told the Court that the e-mails exchanged between him and the Respondent did not constitute a hearing. The supermarket had 9 Employees and became operational in 2015.

Respondent's evidence

8. Geoffrey Hobbs told the Court he employed the Claimant as an Accountant. The Claimant did not discharge his duties as required. He was involved in absenteeism. The Respondent sent warning letters to the Claimant. The Claimant did not respond. The Claimant had a running business on the side. He lost concentration on his accounting work. As shown at page 45 of Respondent's documents, the Claimant proposed amicable settlement. He was paid and accepted terminal dues. The Parties parted ways mainly because of Claimant's personal business. Fair procedure was followed. Parties negotiated settlement. He was paid all terminal dues as agreed.

9. Cross-examined, the Respondent told the Court that the Claimant worked for 2 ½ years. He assisted 2 other Companies associated with the Respondent, in accounting. These were very small Companies. The Claimant did not meet deadlines. He was persistent in his absence. The Respondent did not provide evidence of this before the Court. The meeting between the Parties leading to their agreement was spontaneous. There were no minutes. The Respondent was frustrated. The Respondent is in the business of architecture, not supermarkets. The contract stated there would be no housing provided by the Respondent, to the Claimant. Redirected, the Respondent told the Court that the Claimant was the Administrator, and unlikely to record his own absenteeism. His salary included house allowance.

The Court Finds:-

10. The Claimant was initially employed by the Respondent, who runs an architecture business, as an Administrator. The Claimant later became an Accountant. He was employed in October 2014 and left in February 2017. His last salary was Kshs. 155,000 as pleaded at paragraph 3 of the Statement of Claim.

11. There were various allegations made by the Respondent against the Claimant, which seems to have created mistrust and lack of confidence between the Employer and the Employee.

12. Chief among these was a supermarket business the Claimant operated at Mtwapa. The Respondent testified that this business made the Claimant lose focus on his accounting role. Other allegations which worked against the employment relationship included Claimant's persistent absenteeism. This was perhaps related by the Respondent, to the existence of the Claimant's supermarket at Mtwapa. The Claimant was alleged to watch pornography in his accounts office. He, according to the Respondent, failed to prepare Respondent's books of account, and failed to remit statutory payments to KRA, NHIF, and NSSF.

13. There were warnings in form of e-mails sent to the Claimant on some of the allegations. There were nonetheless, no formal charges or letter to show cause, why disciplinary action against the Claimant should not be taken. There was no disciplinary hearing.

14. At page 45 and 46 of the Respondent's documents, the Claimant complains, in an e-mail to the Respondent, that he was made to work for other Companies associated with the Respondent, without additional pay. This had resulted in the Claimant being overworked. The e-mail is dated 3rd February 2017. He states:

'... as humans, we have sometime disagreed, misunderstood each other, had tough financial times, but the good thing is we overcame...it is on the basis of this, I believe, that since you made clear your intentions, (and since it has become difficult to find ground and basis to support the intentions) the best way forward would be for us to agree the way we can amicably forge a future, separate ways, but without leaving any party disgruntled...'

15. After this the Claimant was paid a total of Kshs. 806,000. Parties went their separate ways. The Claimant did not express any disgruntlement upon receiving his settlement cheque.

16. The Court is persuaded from the emails exchanged between the Parties that the Parties agreed the relationship was not working, and settled for the best amicable way out. It was not necessary in light of this agreement, to put the Claimant through a disciplinary hearing, for the raft of allegations made against him by the Respondent, summarized at paragraph 12 above. The Claimant was set free, to pursue his own business. There was an understanding that the Parties could not continue working together in trust and confidence. The Claimant's business, while not in direct competition with that of his Employer, was certainly a distraction which would not bolster trust and confidence between the Parties. Every time the Claimant was absent, the inference by the Respondent would be that the Claimant was away engrossed in his business at Mtwapa. It was not feasible to continue with the contract and Parties found an amicable way out.

17. The Claimant has not established to the Court that his contract was unfairly terminated by the Respondent, as required under Section 47 [5] of the Employment Act. The Respondent cannot be called upon to justify termination, while the Claimant has not discharged his primary obligation of demonstrating that unfair termination took place.

18. Compensation for unfair termination is not payable to the Claimant.

19. The Claimant's contract described his monthly salary as 'gross salary.' There was a clause stating 'no housing will be provided.' The initial salary of Kshs. 100,000 seems to have excluded health allowance of Kshs. 10,000, provided for in a separate clause. The amount of Kshs. 100,000 cannot therefore have been gross salary, which in the understanding of the Court would comprise basic salary and all allowances put together.

20. A pay slip for February 2015, gives a basic salary of Kshs. 135,725 and medical allowance of Kshs. 20,000, bringing the gross salary paid to the Claimant, at Kshs. 155,725. The slot for other allowances is indicated as nil.

21. It is logical to conclude that no house allowance was ever paid to the Claimant. The clause stating 'no housing will be provided' meant there would be no reasonable accommodation provided by the Respondent to the Claimant, at or near the place of business. Section 31 of the Employment Act makes it obligatory for Employers to provide their Employees, with reasonable housing accommodation. In the alternative, the Employer shall pay to the Employee sufficient sum in rent, in addition to the salary of the Employee, to enable the Employee obtain reasonable accommodation. The clause stating 'no housing will be provided' was illegal and cannot be upheld. The Claimant is entitled to arrears of house allowance.

22. His last basic salary was Kshs. 135,725. 15% of this, for a period of 29 months, translates to arrears of Kshs. 590,403. **He is granted arrears of house allowance at Kshs. 590,403.**

23. ***The Respondent shall release to the Claimant his Certificate of Service, as required under Section 51 of the Employment Act 2007.***

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

25. No order on the costs.

IN SUM, IT IS ORDERED:-

a) The Respondent shall pay to the Claimant arrears of house allowance at Kshs. 590,503.

b) Certificate of Service to issue.

c) Interest granted at 14% per annum from the date of Judgment until payment is made in full.

d) No order on the costs.

Dated and delivered at Malindi this 28th day of November 2018.

James Rika

Judge