



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.802 A OF 2013

(Formerly HCCC NO. 189 of 2009)

ALEXANDER MUNGUTI.....PLAINTIFF

VERSUS

SALIM ALIBHAI.....1ST DEFENDANT

SADOLIN PAINTS E.A LTD.....2ND DEFENDANT

(Before Hon. Justice Byram Ongaya on Friday 2nd November, 2018)

JUDGMENT

The suit was initially commenced by the plaintiff filed on 07.04.2009 through Muttisya & Company Advocates. The defence was filed on 05.05.2009 through C.K. Chege & Company Advocates.

The amended plaintiff was filed on 19.05.2009 and the further amended memorandum of claim on 30.07.2013. The plaintiff prayed for judgment jointly and severally against the respondents for:

- a) General damages for libel and slander.
- b) Punitive and exemplary damages.
- c) Terminal dues amounting to Kshs.116, 428.00 (a month's pay in lieu of notice Kshs. 50,000.00; 16 days of leave Kshs.38, 095.00; 2 days worked in November Kshs.3, 333.00; gratuity Kshs 25, 000.00).
- d) Costs of the suit.
- e) Interest on a, b, c, and d above at Court rates.

The amended defence was filed on 02.06.2009 and the further amended defence on 06.10.2014. The respondents prayed that the plaintiff's suit be dismissed with costs.

The 2nd respondent employed the claimant on probationary service of 6 months per the letter dated 29.05.2007 in the position of sales representative. The probationary appointment was effective 04.06.2007 so that the 6 months were lapsing on or about 04.06.2007. The claimant's employment was terminated by the letter dated 03.11.2008 on the following account:

- a) That on various dates between 31.03.2008 and 08.05.2008 the claimant collected goods via invoice Nos. 1397963, 1398785 and 1401975 all amounting to Kshs.5, 162.90 purporting to be an order by the 2nd respondent's customer one Southern Hardware. The claimant delivered the goods to unknown destination but the invoices were on the customer's statement and the customer paid. The customer had later realised that the goods were not supplied or ordered for. The credit manager had questioned the claimant and later by the national sales manager in presence of the finance director on 07.07.2008; and the claimant had admitted the fake transaction and he refunded Kshs. 5, 140.00 to the account of the customer by receipt No. 36700.
- b) The car assigned to the claimant was involved in an accident on 05.10.2008 and instead of reporting the extensive damage to the car the claimant had secretly undertaken repairs as shown by the assessment carried out on the car by the insurance assessors.

Thus, the letter stated that the claimant's services would be terminated effective 03.11.2008. He was asked to return all respondent's property and to clear and thereafter be paid one day wage in lieu of notice, 2 days worked in November 2008 and 16 days accrued leave.

On 03.07.2018 the parties recorded a partial consent on the claims and prayers for pay in lieu of notice, 2 days salary, accrued annual leave and prayer on defamation was dropped.

The only pending issue for determination is whether the claimant is entitled to the residual prayers for damages for the period he has been unemployed, gratuity, and costs plus interest,

The Court has considered the material on record and makes findings as follows:

- a) The evidence is that the claimant was a member of NSSF and as submitted for the respondent, under section 35 of the Employment Act, 2007 the claimant is not entitled as prayed.
- b) The evidence is that the claimant paid Kshs. 5140.00 in cash and the respondent has established that on a balance of probability, the claimant was refunding the payment by the customer for goods otherwise not delivered to the customers. The Court returns that the respondent has established that as at the time of termination, there was a valid reason to terminate the claimant's employment as envisaged in section 43 of the Act. Whereas the respondent did not accord the claimant due notice as per section 41 of the Act, the Court returns that in view of the established reason for termination, the claimant contributed 100% to his termination. He will not be awarded any compensation under section 49 of the Act on account of the procedural unfairness.
- c) The Court returns that the respondent is entitled to deduct income tax from the final dues in the partial judgment by consent. Fuel account would not be deductible because the matter was not established by way of due process while the claimant was in the respondent's service. The SACCO loan would be recoverable from the dues as per the loan agreement. Thus the respondent will deduct and remit loan and tax accordingly.

In conclusion judgment is entered for the parties that subject to the partial judgment by consent of the parties and the enumerated deductions of tax and SACCO loan, the suit is hereby determined with orders each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 2nd November, 2018**.

BYRAM ONGAYA

JUDGE