



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 263 OF 2016**

**(FORMERLY NAIROBI E & LRC CAUSE NO.1009 OF 2011)**

*(Before Hon. Justice Mathews N. Nduma)*

**IBRAHIM KONES.....CLAIMANT**

**VERSUS**

**CAR AND GENERAL (TRADING) LIMITED.....RESPONDENT**

**J U D G M E N T**

1. The suit was filed by a statement of claim on 24<sup>th</sup> June, 2011.

2. Amended statement of claim was subsequently filed on 27<sup>th</sup> January, 2012. The Claimant seeks general damages for unlawful and unfair dismissal and payment of terminal benefits set out in the amended statement of claim as follows:-

i. Payment in lieu of 49 days leave	Kshs.116,002.00
ii. Unpaid salary for the months of January and December 2008	Kshs.216,000.00
iii. Unpaid salary for the months of January and December 2009	Kshs.246,000
iv. One month salary in lieu of notice	Kshs.163,350
v. Severance pay for 5 ½ years	
	Kshs.54,450 per month
	Kshs.299,475
vi. Unpaid salary for the month of January 2011	Kshs. 54,450
v. Terminal Benefit 136,125 x 5 ½	Kshs.748,687.50
<b>Total</b>	<b>Kshs.1,843,965.00</b>

vi. Costs of the suit.

vii. Certificate of Service.

viii. Interest and costs.

3. The Respondent filed an amended statement of response on 26<sup>th</sup> November, 2012 in which the Respondent admits employing the Claimant by a letter dated 26<sup>th</sup> August, 2005. Employment commenced on 1<sup>st</sup> September, 2005 as a mechanic Grade VI. The Claimant was a member of the Union and terms of service set out in the Collective bargaining Agreement (CBA) between Motor Trade and Allied Industries

Employers Association and The Amalgamated Union of Kenya Metal Workers Union applied to him.

4. The Claimant was posted to Kisumu Branch on an initial salary of Kshs.16,199 and house allowance of Kshs.3,417.

5. The terms of service were severally revised and as set out in paragraph (f) of the statement of defence. As at November 2010, the Claimant earned a basic salary of Kshs.27,047. All the changes to the terms of service were in writing and as per Collective Bargaining Agreement negotiations in 2006, 2008 and 2010.

6. The Respondent denies that the Claimant was ever promoted to the position of Service Executive and states such a position was non-existent. The Claimant never became a management staff and he remained in the union until 24<sup>th</sup> January 2011, when he made his complaint to the union. As at 26<sup>th</sup> January 2011, the Claimant was not an employee of the Respondent having been dismissed for absconding duty on 24<sup>th</sup> January, 2011. He was accused of absenteeism from 15<sup>th</sup> January, 2011 to 24<sup>th</sup> January, 2011. The Respondent prays that the suit be dismissed with costs.

### **Determination**

7. The issues for determination are:-

(a) Whether the Claimant was locked out of employment or he absconded work.

(b) Whether the Claimant is entitled to the reliefs set out in the statement of claim.

### **Issue a**

8. The Claimant testified under oath in support of the particulars of claim. He was employed on 1<sup>st</sup> September, 2005 as a mechanic having graduated with diploma in auto motive engineering from Kenya Polytechnic in the year 2002 at a salary of Kshs.16,199.

9. That he served the Respondent diligently and satisfactorily in that position up to December 2006. The Respondent carried out a staff appraisal and the Human Resource Manager moved the Claimant to work in the position of a Service Executive and promised the Claimant a salary increment as set out and that the position would be properly created in the organisation structure. That the Claimant served in the new position from December 2006 to 1<sup>st</sup> February 2011 and the position was applied in the staff appraisal forms for 2008/2009. The Claimant's salary was not reviewed to reflect his new status. He was paid as a mechanic though he performed higher duties.

10. That in the year 2008, the Claimant was moved to management level and he forfeited all the privileges of a unionisable employee, but the Claimant was not issued a letter confirming his new terms and status.

11. That the Branch Manager Kisumu in July 2008 signed a power of Attorney in favour of the Claimant donating some of his powers to the Claimant to enable the Claimant perform his wide functions as a service executive including but not limited to executing documents and attending court for and on behalf of the Respondent.

12. The Claimant testified that he was continuously underpaid and discriminated upon. For example, as a manager he was entitled to a night allowance of Kshs.2,300 but he was paid Kshs.1,860, got fixed medical allowance of Kshs.7,500 and lunch allowance of Kshs.370.

13. The Claimant was told by the Branch Manager to wait until January, 2011 for the Human Resource Manager to issue him a letter of promotion with effect for 1<sup>st</sup> January 2009. The Claimant waited patiently. On or about 26<sup>th</sup> January 2011, when the Claimant attended Kericho Magistrates' court for and on behalf of the Respondent in case no. 176 of 2006 between the Respondent and Express ins. Co. Limited, the Claimant was surprised to find that his salary for the month of January had not been credited in his equity bank account. Other employees had been paid by then. On 31<sup>st</sup> January, 2011 Claimant noted that his salary was not provided in the payroll. The payroll master Mr. Nyagah informed the Claimant that he had instructions from the Branch Manager to remove the Claimant from the payroll.

14. The Claimant reported to work on 2<sup>nd</sup> February, 2011 and G4S security officer stationed at the gate refused the Claimant entry into the Respondent's premises. He was informed that these were instructions from the Branch Manager. The Branch Manager declined to pick the Claimant's phone call. The Claimant reported the matter to the Area Union Officer. On 18<sup>th</sup> February, 2011 when the Claimant visited the Branch Manager over the issue, upon an appointment obtained by the Union Officer, the Claimant was given the letter of summary dismissal dated 24<sup>th</sup> January, 2011.

15. The Claimant denies that he absconded work from 15<sup>th</sup> January, 2011 to 24<sup>th</sup> day, 2011. That these allegations are false, malicious and calculated to unlawfully dismiss the Claimant from employment without any valid reason and without following a fair dismissal procedure.

16. The Claimant states that on 18<sup>th</sup> January, 2011 he sought leave from the Branch Manager by sending him a short SMS message from his cell phone as instructed by the Branch Manager. That the Claimant sent one Victor Owuor, a staff in the workshop department to pick leave forms for the Claimant from the Branch Manager for him to fill as his mother was sick. The Branch Manager declined to issue the leave form. That on 19<sup>th</sup> January, 2011, he was at work with named staff and attended Kisumu Central Police to record statements regarding theft of money at the Respondent's premises on 15<sup>th</sup> January, 2011.

17. That on 26<sup>th</sup> January, 2011 he was at work and held a meeting together with the Branch Manager of the office of Kennedy Kowio & Co.

Advocates. They were preparing for a court case involving the Respondent and the Claimant was a key witness.

18. The Claimant states that he signed attendance register until he was prevented from attending office by the Respondent.

19. The Claimant's advocate wrote a letter of demand that was not heeded. He prays the suit be granted as prayed.

20. RW 1 Maxmila Mutuku the former Branch Manager of the Respondent at Kisumu and now General Manager Nakuru Branch testified for the Respondents. He testified that the Claimant worked under him in 2011. RW 1 denied locking the Claimant out of the premise. He testified that the Claimant left employment on 15<sup>th</sup> January, 2011 and did not come back. The Claimant was not on leave and he had no permission to go. He was neither on medical off. On 20<sup>th</sup> January, 2011 a notice to show cause was written to the Claimant to explain why he was absent. The letter was from head-office Nairobi. Respondent was unable to serve the letter. They could not reach him. On 24<sup>th</sup> January, 2011 a letter of dismissal was written to the Claimant. RW 1 denied that the G4S, security John Ochieng denied the Claimant entry to work. RW 1 denied having given the Claimant power of attorney to attend court proceedings on RW1's behalf. RW 1 stated he had no such authority. RW 1 denied having sent the Claimant to Kericho. RW 1 stated that the Claimant was unionsable and was not entitled to management salary. In any event there was no management and union salary. Some union members earn more than management staff. It depends on the job. He contributed union dues up to the time he absconded work.

21. RW 1 recommended salary increase for the Claimant. The Claimant was not underpaid. RW 1 said he had no reason at all to deny the Claimant access to work.

22. RW 1 was subjected to intense cross examination by Mr. P. D. Onyango for the Claimant. He insisted that the Claimant did not pick telephone calls while he was away and he did not collect notice to show cause. On 24<sup>th</sup> January, 2011, Head Office sent letter of dismissal to Kisumu Branch. On 26<sup>th</sup> April, 2011 RW 1 wrote back to Nairobi returning the uncollected letters.

23. RW 1 stated that the Claimant was a good employee until he left and was paid correctly.

24. RW 2 was Caroline Omanjo. She testified that she was Human Resource Manager of the Respondent. She stated that the Claimant absconded from work for more than 7 days and was dismissed in terms of clause 27 of the Collective bargaining Agreement.

25. The Claimant never came back to clear and RW 2 stated she did not see any correspondence from Claimant claiming unpaid leave days. She added that section 44 of Employment Act, permitted summary dismissal for unauthorised absenteeism. That Claimant was not underpaid and was not management staff. That Claimant remained in the union until he left.

26. RW 2 prays that the Claimant's suit be dismissed with costs.

27. Upon a careful analysis of the testimony by the Claimant vis a vis that by RW 1 and RW 2, it is apparent that, the Respondent was able to rebut effectively the testimony by the Claimant that he was locked out of employment. The Claimant was unable to prove on a balance of probabilities why RW 1 would have ordered for the claimant to be locked out yet he was a good employee.

28. It would appear that the Claimant was disgruntled because he had expected a salary raise for a considerable period and same had not been given.

29. The Claimant for some reason not clear to court due to lack of any documentation to that effect, imagined he had been promoted to management position and that the Respondent had unfairly failed to remunerate him for this alleged promotion.

30. The court is satisfied that the Claimant absconded work due to this dissatisfaction with his personal circumstances. The Claimant did not produce any power of attorney which he alleged had granted him authority to represent RW 1 in courts.

31. The court is satisfied that the Respondent had no reason at all to allege the Claimant had absconded work if indeed he had obtained leave from RW 1. The Claimant was unable to produce any leave forms duly authorised by RW 1 to allow the Claimant to be away from 15<sup>th</sup> January, 2011 to 24<sup>th</sup> January, 2011.

32. Accordingly, the Claimant was summarily dismissed from Respondent's employment for a valid reason. The Claimant did not avail himself opportunity to be subjected to a proper disciplinary hearing. He simply absconded and did not collect nor answer the notice to show cause. The court cannot fault the Respondent for failure to convene a disciplinary hearing in the circumstances of the case. The court is however satisfied from the testimony of RW 1 that the Claimant had served the Respondent for a considerable period loyally and diligently. RW 1 told court, the Claimant was indeed a good employee. In the court's view this is a proper case to commute the summary dismissal to a normal termination of employment.

### **Issue (b)**

33. The second issue is whether the Claimant is entitled to the reliefs sought. The Claimant is not entitled to an award of damages since the summary dismissal was lawful and fair in the circumstances of the case. However with regard to the various terminal benefits, the court finds as follows:-

#### **i. Leave Days**

The court is satisfied that RW 2 was unable to rebut the claim by the Claimant for payment in lieu of 49 untaken leave days. The court awards the Claimant Kshs.47, 363.40 in lieu of 40 leave days not taken.

**ii. Notice**

The court has commuted the summary dismissal to a normal termination and awards the Claimant one month salary in lieu of notice in the sum of Kshs.29,000.

**iii. Underpayments**

The Claimant was unable to prove that he had been promoted and was entitled to a salary raise from 2009. This claim fails in its entirety and is dismissed.

**iv. Severance Pay**

The Claimant absconded work. He was not retrenched and is not entitled to severance pay.

**v. Salary for 15 Days Worked in January, 2011**

The Claimant is satisfied that the Claimant worked for 15 days in the month of January 2011 and is awarded Kshs.14,500 in respect of the days worked.

**vi. Service Gratuity for 5 ½ Years Served**

The claim for payment of terminal benefits or service gratuity for the 5 ½ years served was not rebutted by RW 1 and RW 2. Indeed the two confirmed that the Claimant was covered by the Collective Bargaining Agreement and therefore was entitled to terminal benefits provided in the Collective Bargaining Agreement. The only adjustment is with respect to the salary earned by the Claimant at the time of termination. Both parties however did not provide, the full text of the applicable Collective Bargaining Agreement indicating gratuity payable to a unionsable employee upon a normal termination. Accordingly, the court awards the Claimant service gratuity applicable to a unionsable employee upon a normal termination. The award is to be calculated on the applicable rate for the 5 ½ years of service multiplied by the monthly salary earned by the Claimant at the time of termination in the sum of Kshs.29,000. In this regard, the Claimant is to compute the amount payable, file and serve the Respondent within 14 days. The Respondent is then to make any response within 14 days of service.

The court to confirm thereafter gratuity payable to the Claimant on this head of claim.

34. In the final analysis, judgment is entered in favour of the Claimant as against the Respondent as follows:-

(a) The summary dismissal is commuted to normal termination.

(b) Kshs.29,000 in lieu of one month notice.

(c) Kshs.47,363.40 in lieu of 49 days leave.

(d) Kshs.14,500 in lieu of 15 days salary for January, 2011.

(e) Service gratuity for the 5 ½ years served calculated on the last salary earned by the Claimant at the rate applicable in the Collective bargaining Agreement in respect of unionisable employees. Claimant to compute the sum payable within 14 days, file and serve the Respondent. Respondent to respond within 14 days. Matter to be mentioned in court after 30 days for the court to confirm gratuity payable.

(f) Award is payable with interest at court rates from date of filing suit till payment in full.

(g) Respondent to pay costs of the suit.

**Dated, Delivered and Signed in Kisumu this 20th day of December, 2018**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. P. D. Onyango for Claimant

Mr. Kabiru for Respondent

