



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

CAUSE NUMBER 902 OF 2015

BETWEEN

ONDUSO OMBASO.....CLAIMANT

VERSUS

WHITE ROSE DRYCLEANERS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Gichana Bw'Omwando & Company Advocates, for the Claimant

Beatrice Opolo Advocate, instructed by the Federation of Kenya

Employers [F.K.E.] for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 30th November 2015. He states he was employed by the Respondent Drycleaner, as a Cashier from 8th September 1995 to 17th September 2015. He states that he was supposed to be paid by the Respondent, basic salary of Kshs. 31,481, house allowance of Kshs. 6,647 and annual leave of Kshs. 31,481- total Kshs. 69,609. He avers he was grossly underpaid. He did not have notice of termination, and no reason for the decision was given to him. He prays for Judgment against the Respondent for:-

a) 12 months' salary in compensation for unfair termination at Kshs. 377,772.

b) Gratuity for 20 years worked at Kshs. 461,721.

c) Unpaid annual leave allowance for 20 years at Kshs. 629,620.

d) 1 month salary in lieu of notice at Kshs. 31,481.

e) Unpaid salary for 17 days worked in September 2015 at Kshs. 17,839.

Total...Kshs. 1,518,413.

f) Punitive damages.

g) Any further entitlement and/or order that this Honourable Court may deem fit to grant.

2. The Respondent filed its Statement of Response on 10th March 2016. It is admitted that the Respondent employed the Claimant, on the date and position stated in the Claim. The Claimant went for appraisal exercise at the Respondent's Head Office in Nairobi, on 2nd September 2015. He failed to report back for duty on 3rd September 2015. He was issued notice to show cause letter for absconding. He did not reply, and failed to attend disciplinary hearing. He showed up on 17th September 2015. He was informed by his Supervisor he should

report to the Head Office at Nairobi for disciplinary processing. He became agitated and caused disturbance, forcing Security to eject him from the reception area. On 25th September 2015, the Respondent received a letter from the Labour Office Mombasa, stating that the Claimant had lodged a complaint about unfair termination, with the Labour Office. The Respondent replied, explaining that the Respondent did not terminate Claimant's contract. Parties appeared before the Labour Office on 12th October 2015. The Claimant was given 7 days to come with evidence to support his Claim. He has not done so to-date. The Respondent prays that the Claim is dismissed with costs to the Respondent.

3. The Claimant gave evidence on 14th November 2016. Respondent's Human Resource Manager, Jack Shiundu, gave evidence on 21st June 2016, and on 23rd July 2018, when hearing closed. The matter was last mentioned in Court on 26th September 2018, when Parties confirmed the filing of their Closing Submissions.

Claimant's evidence

4. The Claimant confirmed in his oral evidence, his employment history with the Respondent, and his terms and conditions of service, as contained in his Pleadings and Witness Statement on record.

5. He earned basic salary of Kshs. 31,481 and house allowance of Kshs. 6,647 monthly. He took annual leave on 21st April 2015 for 4 months. He returned on 1st September 2015. He was advised to report to the Head Office on the following day, at 8.00 a.m. He was given Kshs. 5,400 as travel allowance. He was unhappy because there was no formal invitation to travel to Nairobi from his base in Mombasa.

6. At Nairobi he met Jack Shiundu, the Human Resource Manager. Shiundu asked the Claimant about a conversation the Claimant had in the past with his former Supervisor, one Rama. Rama had embezzled Respondent's money. It was alleged that the Claimant had communicated with Rama, making it difficult for Police to arrest the fugitive Rama. The Claimant was asked to resign and would be paid his terminal dues. He declined. Operations Director, Abdallah, alleged that the Claimant and Rama, washed customer's clothes without issuing receipts.

7. The Claimant was issued a letter of termination after he declined resignation. He lodged a complaint with the Labour Office Nairobi, on 3rd September 2015. He was in Nairobi up to 16th September 2015.

8. He returned to Mombasa on 17th September 2015. He was asked by the Supervisor to leave. He declined and demanded he is issued termination letter. He was forcibly removed from Office by Security Guards.

9. Parties met at the Labour Office in Mombasa. They were not able to settle the dispute. The Respondent insisted the Claimant absconded. The Claimant insisted he was at the Head Office on the invitation of the Respondent.

10. Cross-examined, he told the Court nothing happened between him and Rama. Rama had stolen from the Respondent. The Claimant was called to Nairobi to clarify the incident. He did not allege anywhere in his Witness Statement, that he was forced to resign. He was in Nairobi from 3rd September 2015, to 17th September 2015, consulting the Human Resource Section. He was employed in 1995, not 1996. He never received the letter of termination. He went on annual leave. He merits salary for 17 days worked in September 2015 as he was at the Head Office in Nairobi. He emphasized on redirection that he was in Nairobi for 17 days in September 2015, talking to the Head Office. He on redirection withdrew the prayer for annual leave. Shiundu tore the letter of termination issued at Nairobi on 3rd September 2015, after the Claimant inserted his comments on circumstances of his being in Nairobi. The Claimant did not have the means to assist the Respondent bring Rama to justice.

Respondent's evidence.

11. Jack Shiundu confirmed the Claimant was employed by the Respondent as a Cashier, based in Mombasa, earning a monthly salary of Kshs. 36,250.

12. He was called to Nairobi on 2nd September 2015 for appraisal. He was given money for travel and subsistence for 1 day. He was to return to Mombasa immediately after the exercise. Rama had embezzled Kshs. 200,000 from the Respondent. Shiundu enquired about this incident from the Claimant, as the Claimant was the cashier at the material time. This was asked as a by-the-way, the main reason for Claimant's travel having been the appraisal. The Claimant was appraised on 2nd September 2015, and asked to return to Mombasa after appraisal.

13. He had not reported by 4th September 2015. Shiundu wrote to him on 9th September 2015 asking the Claimant to show cause. The Claimant did not reply. Shiundu wrote again on 16th September 2015 calling the Claimant to a disciplinary hearing. The Claimant did not respond. He reported to Mombasa on 17th September 2015 and caused a scene. He was asked to report to Nairobi for disciplinary hearing. The Respondent received a letter from the Labour Office Mombasa dated 22nd September 2015. The Claimant alleged his contract had been unfairly terminated by the Respondent. Parties appeared before the Labour Office. The Claimant was unable to show that his contract was terminated by the Respondent. He was never asked to resign by the Respondent. He was not working at Nairobi for 17 days. He had not been transferred. He is entitled to gratuity according to the CBA regulating the Parties' relationship. He is not entitled to notice pay, salary for 17 days worked, and compensation.

14. Cross-examined, Shiundu told the Court that the Claimant worked for about 20 years. Appraisal meant the Respondent would examine Claimant's weaknesses and strengths. The Claimant had a number of warnings. Rama was Claimant's Supervisor. The Claimant should have raised the alarm that Rama intended to steal, as the Claimant was the Cashier. The Claimant was on a 4-month long leave, before he was called to Nairobi. He was the longest serving Employee at Mombasa. He was paid Kshs. 5,400 for travel and subsistence of 1 day in Nairobi. The Claimant's letter dated 3rd September 2015, addressed to the Labour Office, is shown to have been received by the Labour Office on 4th

September 2015. The letter is copied to the Managing Director. It was not received by the Respondent. The letters from the Respondent to the Claimant dated 9th September 2015 and 16th September 2015 were not written as a reaction to the Claimant's letter to the Labour Office. The Respondent did not have information on Claimant's whereabouts between 4th September 2015 and 17th September 2015. The Respondent did not have Claimant's e-mail address and phone contact. Redirected, Shiundu told the Court Parties did not discuss forced resignation at Mombasa County Labour Office. The issue was unfair termination.

The Court Finds:-

15. It is not disputed that the Claimant worked for the Respondent Drycleaner for 20 years.

16. The Human Resource Manager told the Court that the Claimant is entitled to gratuity, under the CBA governing the Parties. If this benefit is given to the Claimant by the CBA, it is not relevant that the Claimant was subscribed to the N.S.S.F. Parties were aware of the N.S.S.F regime, when they concluded their CBA, allowing the Claimant to benefit from the gratuity regime. If the regimes were meant to be mutually exclusive, the Parties would have captured such exclusion in the CBA. Jack Shiundu was a forthright and truthful Witness, whose evidence the Court finds, to be honest and reliable. The amount of Kshs. 461,721 claimed as gratuity is not contested in the evidence availed to the Court. Based on the concession made by Respondent's Witness, the ***Claimant is granted the prayer for gratuity at Kshs. 461,721.***

17. He withdrew the prayer for unpaid leave. It is not clear if what he sought was leave allowance or annual leave pay. The Court shall, based on Claimant's evidence mark the prayer as withdrawn.

18. There is no evidence to support the prayer for punitive damages. The prayer is declined.

19. The Claimant did not adequately account for his time at Nairobi. He was not working for the period beginning 3rd September 2015. There is no evidence that he was required by the Respondent to stay at Nairobi after 3rd September 2015. If he reported dispute to the Labour Office on 3rd September 2015, what compelled him to stay in Nairobi after 3rd September 2015? He was not told by the Labour Office Nairobi to hang around. There is no correspondence from the Labour Office Nairobi, to the Respondent, asking the Respondent to report to the Labour Office Nairobi, any time after 3rd September 2015. Why did he wait until 17th November 2015 to report back to work at Mombasa? It is unconvincing to argue that the Claimant was in Nairobi for 17 days, talking to the Head Office.

20. He is not entitled to claim salary for the period from 4th September 2015. The Court is however, inclined to order, he is paid salary for 3 days in September 2015, when he was still incontestably under Respondent's employment. ***He is granted salary for 3 days at Kshs. 4,182.***

21. The Claimant did not establish that termination was instigated by the Respondent. He was asked to travel to Nairobi for appraisal. He was paid travel and subsistence allowance for 1 day. He was not meant to stay for 2 weeks at Nairobi.

22. He claims he was forced to resign while at Nairobi. There is no evidence of such forcible resignation. The only evidence suggesting such a demand was made by the Respondent are letters written by the Claimant to the Labour Office Nairobi. But where is the follow-up by the Labour Office Nairobi? Did not the Labour Office make further enquiries about the forced resignation? Was the Respondent not called to respond?

23. On return to Mombasa, the Claimant was asked to return to Nairobi, and account for the offence of absconding. Why did he not heed the instruction and return to Nairobi where he would have raised his allegation about forced resignation, in explaining his absence of 2 weeks from Mombasa? He did not state at the Labour Office Mombasa, that he was forced to resign. He reported that his contract was unfairly terminated. Given a 7- day opportunity by the Labour Office to prove unfair termination as required under Section 47[5] of the Employment Act 2007, the Claimant failed.

24. The Claimant has not discharged his evidential burden under Section 47 [5] of the Employment Act, so as to require the Respondent to justify termination.

25. He is not entitled to notice pay and compensation, having abandoned his post. He had the chance to return to Nairobi and subject himself to a disciplinary hearing. He had the opportunity to have his stance on forced resignation, and absconding, ventilated and recorded in writing, through a disciplinary hearing. He opted not to go back to Nairobi. He failed to convince the Labour Office, Mombasa that termination was at the instance of the Respondent.

IN SUM, IT IS ORDERED: -

a) The Respondent shall pay to the Claimant gratuity at Kshs. 461,721 and salary for 3 days worked at Kshs. 4,182- total Kshs. 465,903 in full and final settlement of the Claim.

b) No order on the costs.

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

Dated and delivered at Mombasa this 14th day of December 2018.

James Rika

Judge