



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.1221 OF 2010**

**SIMON LUBENGI METIAKI ..... CLAIMANT**

**VERSUS**

**TEA HOLDING LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ERNEST KINYUA KAMAU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The issue in dispute is the unfair dismissal/termination of the Claimant contrary to section 40(1), 44(2), 45(1), (2) and (4) of the Employment Act.
2. The claimant, Simon Lubengi Metiaki filed the Memorandum of Claim on 30<sup>th</sup> October, 2010 and summons served but the Respondent failed to enter appearance or file defence. On 21<sup>st</sup> July, 2011 the court issued directions for the Registrar to issue notice to the Respondent for mention on 22<sup>nd</sup> September, 2011 but there was no attendance. Hearing was scheduled for 21<sup>st</sup> march, 2012 and the Respondent failed to attend. Further hearing was scheduled for 20<sup>th</sup> June, 2012; 17<sup>th</sup> October, 2012; 20<sup>th</sup> march, 2014; 27<sup>th</sup> may, 2015 on which dates the Respondent remained absent. On 25<sup>th</sup> January, 2017 upon the court being satisfied that the Respondent had been dully served, notice of hearing signed in acknowledgment and affidavit of service filed to this effect on equal date, the Claimant was heard on his evidence.
3. The claim is that the Claimant was employed by the respondents, a tea holding company in Limuru, Kiambu where the 2<sup>nd</sup> Respondent was the managing director. The employment commenced on 1<sup>st</sup> august, 1988 where the Claimant was a Gardener and Day Watchman.
4. The Claimant was earning Kshs.4, 500.00 per month and worked for 12 hours per day. There was no rest day or payment for the same and hours worked overtime were never compensated. He never took annual leave or paid in lieu thereof.
5. On 3<sup>rd</sup> October 2008 the Claimant was terminated without notice, reason or payment of terminal dues.
6. On 29<sup>th</sup> September, 2008 the Claimant notified his supervisor Mrs Alice Kinyua that he was not feeling well and would first attend for medical treatment the following morning before attending work on 30<sup>th</sup> September, 2008. The Claimant proceeded to Tigoni District Hospital where he was treated and given 3 days sick off.
7. On 1<sup>st</sup> October, 2008 when the Claimant reported back at work at notify the Respondent that he was

sick and had 3 sick off days, the clerk Mr Muturi informed him that he had a warning letter. On 3<sup>rd</sup> October, 2008 when the Claimant reported back at work he was informed that he had been dismissed from his employment with the Respondent.

8. The Claimant made an appeal that he had been sick and had medical records for the same but was ignored. The following day he was ordered out of the company house where he rose with his wife and a baby 3 days old and was thus forced to vacate and relocate to his rural home. Appeals for payment of terminal dues were also ignored.

9. That during the course of employment, the Claimant was underpaid and contrary to Regulation of Wages General Orders Legal Notice No.38 of 2006 which provided for minimum wage at Kshs.5,195.00 per month.

10. The Claimant is seeking the payment of;

- a) *September 2008 salary Kshs.5,195.00;*
- b) *Notice pay Kshs.5,195.00;*
- c) *Overtime worked on weekly rest days Kshs.63,360.00;*
- d) *Work on public holidays Kshs.12,000.00;*
- e) *Annual leave for 3 years Kshs.10,909.00*
- f) *Underpayment arrears Kshs.22,935.00*
- g) *Gratuity for non-contribution to NSSF Kshs.5,195.00;*
- h) *Compensation*
- i) *Certificate of service.*

11. The Claimant also testified in support of his case. That he got sick while at work and dully informed the in charge that he would attend hospital on 30<sup>th</sup> September, 2008 which he did at Tigoni Hospital and was issued with treatment cards and give 3 days' sick off. When he went to present the same with the Respondent he was dismissed from employment. Such treatment records have been attached to the memorandum of claim.

12. there was no defence or evidence to challenge the claim.

### **Determination**

13. The Claimant has set out the issues in dispute as being dismissal or termination of employment under the provisions of sections 40, 44, and 45 of the Employment Act. On the leadings and his evidence, the application of section 40 was not addressed. I take it then the applicable provisions relate to matters set out under section 44 and 45 of the Employment Act.

14. Section 44 of the Employment Act give an employee the right to terminate an employee by summary dismissal where the employee is absent from work. However, section 41(2) of the Act requires that before summary dismissal, the employee must be given a hearing and notice unless it is practically not possible to issue such notice and hearing. The failure to issue such notice must be demonstrated by the employer.

15. In this case the Claimant testified that he became sick while at work and informed his in-charge that he would attend hospital. I take it that on 30<sup>th</sup> September to 1<sup>st</sup> October, 2008 the Claimant was not at

work as he had to attend hospital. Such attendance is provided for under section 30 of the Employment Act provides that;

*30. Sick leave (1) After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.*

*(2) For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.*

16. Where the Claimant therefore got sick and informed his in-charge on the need to attend hospital, the only requirement and duty legally placed on his was to submit the medical records and certificate thereof. Where the Claimant remained out of work due to sickness, the requirement was to inform the employer *as soon as is reasonably practicable* that he was sick and required medical attention.

17. I therefore find the actions of the Claimant in attending hospital and reporting back at work within a short time of 2 days being reasonable. However he was not given a hearing and as result the dismissal that followed and eviction from the Respondent allocated accommodation resulted in unfair termination of employment.

18. The Respondent though served and notified of proceedings herein opted not to challenge any of the claims made. I find the Claimant was unfairly terminated from his employment contrary to the provisions of section 45 of the Employment Act. There is no basis or justification for the same.

## **Remedies**

19. On the finding that the Claimant was unfairly terminated, compensation is due. On this regard, I will combine the assessment of the due award of compensation with what is claimed as underpayment arrears. In terms of the Regulation of Wages General Orders Legal Notice No.38 of 2006, the category under which the Claimant was employed, the payment of Kshs.4, 500.00 as his wage was an underpayment and contrary to the set wage guidelines. The due arrears adding up to Kshs.5, 195.00 are payable and amount to Kshs.22, 935.00.

20. On the above basis, compensation due is based on the last payable wage of Kshs.5, 195.00 per month. The Claimant is awarded compensation at gross pay for 12 months all amounting to Kshs.62, 340.00.

21. On the finding that the summary dismissal was unprocedural and unfair, notice pay is due in terms of section 35 of the Employment Act. The Claimant is awarded Kshs.5, 195.00.

22. Under the Regulation of Wages General Orders Legal Notice No.38 of 2006, the work hours for the Claimant were regulated. Any overtime hours were payable separately. On the evidence that the Claimant was never paid for the extra and overtime hours such pay is due and he awarded Kshs.63, 360.00.

23. Work during public holidays is remunerated differently from regular days and where an employee's remains at work of such days, the employer has a duty to pay for the same. The Claimant is awarded his claim at Kshs.12, 000.00.

24. Annual leave for an employee is regulated by section 28 of the Employment Act. Every employer should ensure that each employee is able to take annual leave to rest and resume work refreshed. Where such leave is not taken, the employer has a duty to pay in lieu thereof. The Claimant is awarded pay in lieu of taking annual leave at Kshs.10, 909.00.

25. There is no record of the tabulation or statement of the wages paid to the Claimant to confirm statutory dues were deducted and remitted as required under section 35 of the Employment Act. Where NSSF and NHIF dues are not confirmed by an employer, service pay is due to an employee upon termination of employment. The Claimant is thus awarded Kshs.5, 195.00.

26. Section 51 of the Employment Act requires an employer to issue a certificate of service together with termination. Where such a certificate is not issued and the employee gives evidence that they have been unable to get new employment due to the non-issuance of such a certificate, there is a penalty upon the employer. See **Angela Wokabi versus Tribe Hotel [2016] eKLR**. The Claimant is only seeking for the issuance of his certificate.

**In conclusion, judgement is hereby entered for the Claimant against the Respondent in the following terms;**

- 1) The termination of employment was unfair;**
  - a) Compensation awarded at Kshs.62,340.00;**
  - b) September 2008 salary Kshs.5,195.00;**
  - c) Notice pay Kshs.5,195.00;**
  - d) Overtime worked on weekly rest days Kshs.63,360.00;**
  - e) Work on public holidays Kshs.12,000.00;**
  - f) Annual leave for 3 years Kshs.10,909.00**
  - g) Underpayment arrears Kshs.22,935.00**
  - h) Service pay Kshs.5,195.00;**
- 2) Certificate of service; and**
- 3) Costs of the suit.**

**Delivered in open court at Nairobi this 31<sup>st</sup> day of January, 2017.**

**M. MBARU**

**JUDGE**

In the presence of:

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