



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 331 OF 2011
JAPHETH KATHUNGUMI CLAIMANT
VERSUS
NJUCA CONSOLIDATED CO. LTD. RESPONDENT

Claimant in person

Mr. Mushoka for Respondent

JUDGMENT

1. The suit was commenced by a memorandum of claim on 7th March 2011.
2. The claimant seeks compensation for unlawful and unfair termination of employment on allegations of absconding duty and payment of terminal benefits comprising, payment for underpayments for three years, payment of severance pay for sixteen (16) years and salary for August 2007.
3. The claim is based on the pleadings and oral testimony by the claimant as follows;

That the claimant was employed by the respondent as a supervisor in September 1991 and worked continuously until 9th April 2008. That the claimant initially earned a monthly salary of Kshs.5,700 which was subsequently increased to Kshs.7,000 by the time of termination.

The claimant testified that he served the respondent with devotion, hardwork and enthusiasm and had a clean record at work. That on 5th January 2008, he proceeded on annual leave and was due to return to work on 31st January 2008.

That upon returning from leave he verbally requested the office manager Ms. Milicent Wangari Muiruri to grant him four (4) more days to complete unfinished business. The manager instead told the claimant to go on leave until he felt like coming back since the work at the office was minimal and that she would call the claimant back when the office got busy.

The claimant was recalled after staying at home for two months immediately, but he delayed to return because he had no fare and was unprepared. The claimant had not received a salary since the month of December 2007.

The claimant received a notice dated 9th April 2008 to show cause why he ought not to be

considered to have absconded duty to which notice, the claimant responded in writing on 10th April 2008.

4. The claimant testified that on 5th March 2008, he had called Millicent to enquire if he could return to work and was told to wait at home as he was still not required.
5. That on 15th March 2008, Mr. Kabera, transport director called the claimant and he inquired why the claimant had not returned to work and the claimant had explained to him why he was still at home.
6. M/S Muthoni an employee of the respondent called the claimant by telephone on 3rd April 2008 to return to work and the claimant explained to M/s Muthoni that he would return in a week's time since he needed to handover to his brother the work he was doing at home. The claimant returned on 9th April 2008 and was given the notice to show cause to which he responded on 10th April 2008.
7. On 12th April 2008, M/s Muthoni asked the claimant to return all company property. The claimant testified that he already had handed over logbooks in his custody and had nothing else to handover.
8. The claimant also testified that he was not paid the terminal benefits set out in the memorandum of claim upon termination and he claims the same accordingly.
9. The claimant reported the dispute to the Labour Officer, Thika but the same was not resolved hence the suit.
10. The claimant seeks payment as set out in the suit and herein before in this judgment.

Response

11. The respondent filed a statement of defence on 8th April 2011 and called Mr. Tyson Gitonga Mwangi, legal officer of the respondent to testify in support of the respondent's case.
12. The respondent admits that the claimant was its employee from 1991 to 2008 and was employed in the position of messenger and not a supervisor or clerk as he alleges.
13. The respondent admits that the claimant was paid Kshs.7000 gross pay as at the time of termination on account of absconding from duty. The respondent states that the salary of Kshs.7,000, was in terms of the General Wage Order for the period for the position of a messenger and therefore the claimant was not underpaid as alleged or at all.
14. RW1 further testified that the claimant was on leave from 5th January 2008 up to 31st January 2008. That the claimant upon return was verbally added more days and was called on 3rd April 2008 to return to work on 9th April 2008 but the claimant failed to come back.
15. That the explanation by the claimant in his letter of 10th April 2008 responding to the notice to show cause did not give a satisfactory explanation why he did return to work as requested.
16. The respondent therefore wrote a memo dated 17th April 2008 to the claimant asking him to clear because he had absconded duty. That the claimant did not handover company property in his custody as directed by the Labour Officer and has therefore not been paid his terminal benefits.
17. That the company had already computed his final dues in the sum of Kshs.71,560 and the net payable was Kshs.30,528 upon deduction of statutory dues and monies owed by the claimant to the respondent.
18. The respondent produced a list of documents dated 22nd May 2012 on 25th May 2012 in support of the testimony by RW1.

19. The computation done on 3rd July 2008 included gratuity calculated at 15 days salary for 16 years in the sum of Kshs.64,500. One month salary in lieu of notice in the sum of Kshs.7,000 less advances made to the claimant in the sum of (Kshs.20,516 x 2) making net payable of Kshs.30,528,00.

20. RW1 was not privy to the conversation between the claimant and M/s Millicent and Muthoni and was therefore not able to answer questions regarding those communications under cross examination by the claimant.

RW1 insisted that the claimant was to report on 9th April 2008. RW1 only relied on documents contained in the file.

21. The respondent prays that the suit be dismissed with costs.

Determination

22. The respondent filed written submissions on 17th October 2016. The claimant was not represented and did not make any written submissions. He relied on the pleadings and his oral testimony.

23. The testimony by the claimant which is fully collaborated by that of RW1, is that the claimant was asked to stay at home until he was recalled back.

24. That the claimant stayed at home from 5th January 2008 and was only recalled on 3rd April 2008. The claimant did not receive any salary during this period and effectively there was a fundamental breach of his contract of employment by the respondent by fact of prolonged forced stay at home without work or pay.

25. In the circumstances of the case, it was reasonable for the claimant to embark on other gainful activities to earn a living and was also reasonable for the claimant who was still willing to serve the respondent to ask for a week's notice to return to work to allow him to wide up and handover to his brother the tasks he had embarked on while he remained involuntarily out of the employ of the respondent.

26. The claimant has in terms of section 47 (5) of the Employment Act, 2007 demonstrated on preponderance of evidence that his employment was wrongfully terminated by the respondent.

27. On the other hand, the respondent has failed to justify the reason for the termination as is required of an employer under the same provision.

28. Therefore, the claimant has proved on a balance of probability and in terms of Section 43 as read with Section 45 of the Act, that his termination from employment was not for a valid reason and was therefore unlawful.

29. The claimant is therefore entitled to payment in lieu of notice and to compensation in terms of Section 49 (1) c as read with Section 49 (4) of the Employment Act.

30. In this regard, the claimant had diligently served the respondent for a period of sixteen (16) years and his employment was unlawfully terminated without any notice and was kept for about four (4) months in limbo while expecting to be recalled. He did not receive any salary during this waiting period. This is an aggravating factor.

31. The claimant did not receive any terminal benefits upon termination of employment and he suffered loss and damage. Clearly claimant waited patiently to be recalled and did not contribute to the termination of his employment. The allegation that he absconded duty on the face of compelling evidence to the contrary is also another aggravating circumstance in this case. The long period of service by the claimant and the reasonable expectation that the claimant would work to his retirement is also a favourable

consideration to the claimant.

32. In the final analysis, this is an appropriate case to award the claimant, the maximum compensation equivalent to twelve (12) months salary as compensation for the unlawful termination of employment.

Terminal benefits

Underpayment

33. The documents from the Labour Office indicates that the claimant worked for the respondent for a period of 16 years as an office clerk earning a salary of Kshs.7000 per month. This information was not refuted by the respondent according to the records produced by the respondent from the Labour Office capturing the report of the dispute and the comments by the employer. RW1 did not provide letters of employment which shows that claimant worked in a lesser position of a messenger and not a clerk with supervisory responsibilities as per the claimant's oral testimony under oath.

34. According to the claimant he was entitled to payment of basic pay of Kshs.10,390 plus 15% house allowance on the basic pay for a period of three (3) years.

35. The court finds that the claimant proved the claim on a balance of probability and awards him; (i) Kshs.122,040 arrear basic pay and Kshs.50,106, house allowance for the last three (3) years of employment.

Notice Pay

36. This means that notice pay payable to the claimant upon termination ought to be Kshs.11,948 gross pay and the court so awards.

Severance pay

37. The respondent offered to pay the claimant gratuity calculated at 15% of the salary for a period of sixteen (16) years calculated at Kshs.64,560. The claimant makes the calculation at eighteen (18) days salary for each completed year of service.

38. The court awards the claimant gratuity at $\frac{1}{2}$ gross salary of Kshs.11,948 for sixteen (16) years in the sum of Kshs.95,584.

Salary deduction for August 2007

39. No evidence was tendered with regard to this claim and same is dismissed.

Compensation

40. Following the determination of the gross pay payable to have been Kshs.11,948 as at the time of termination the court awards compensation equivalent to twelve (12) months salary in the sum of Kshs.143,376.

41. In the final analysis the court enters judgment for the claimant as against the respondent as follows;

- i. Equivalent of twelve (12) months salary compensation Kshs.143,376
- ii. One month in lieu of notice Kshs.11,948;
- iii. Severance pay Kshs.95,584;
- iv. Underpayment Kshs.178,146;

v. Total award Kshs.429,054;

vi. The award is payable with interest at court rates from date of filing suit till payment in full;

vii. Costs to follow the outcome

Dated and delivered at Nairobi this 27th day of January 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE