



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 237 OF 2014

LAMECK GEORGE OTIENO OMONDI.....CLAIMANT

v

SCARCE COMMODITIES LIMITED.....RESPONDENT

JUDGMENT

1. Lameck George Otieno Omondi (Claimant) alleges that Scarce Commodities Ltd (Respondent) unlawfully terminated his employment on 28 February 2014.
2. The Respondent on its part countered that the termination of employment was lawful and that parts of the cause of action is statute/time barred.
3. The Cause was heard on 22 September 2016 when the Claimant testified and on 2 November 2016 when the Respondent's Group Human Resources Manager testified.
4. The Court has given due consideration to the evidence and submissions and identified the issues for determination as, *whether the cause of action is statute barred, when employment commenced, whether the termination of the Claimant's employment was unfair and appropriate remedies including entitlements/dues accruing out of the employment contract.*

Limitation

5. Although the issue was raised by the Respondent in the Response, it was not taken up during the hearing.
6. The Court also notes that the letter informing the Claimant of the termination of his employment was dated 4 March 2014 while the instant proceedings were commenced on 20 June 2014, within the 3 year period prescribed under section 90 of the Employment Act, 2007.

Commencement of employment relationship

7. The Claimant testified that he was employed on 5 May 2005 while the Respondent pleaded that the employment started on 1 May 2008.
8. A certificate of service issued to the Claimant and filed in Court indicate that the Claimant was employed on 6 May 2005, while a leave record schedule filed by the Respondent include the Claimant's leave records from 2005.

9. The Court is convinced that the employment relationship commenced in May 2005 on the basis of the certificate of service, the leave records and the Claimant's uncontroverted testimony on date of commencement of the employment relationship.

Whether termination unfair

Procedural fairness

10. The Respondent produced a show cause notice dated 16 January 2014 calling upon the Claimant to explain his *poor performance* or risk summary dismissal.

11. The Claimant denied receiving the show cause notice. He further contended that if the letter was indeed delivered to him, he would have acknowledged receipt by signing on a copy.

12. With the testimony of the Claimant as to the non-receipt of the show notice, the evidential burden shifted to the Respondent to show how the show cause notice was delivered to the Claimant.

13. The Respondent's witness however stated that he joined the Respondent after the Claimant had left employment but confirmed that employees ought to sign in acknowledgment of such letters. He testified that he could not confirm whether the Claimant received the show cause notice.

14. With the material place before Court, the Court can conclude that the show cause notice was not delivered to the Claimant and hence the process taken by the Respondent failed to meet the threshold envisaged under section 41 of the Employment Act, 2007.

Substantive fairness

15. It is the duty of an employer to prove the reasons for termination of employment and that the reasons are valid and fair. That is a requirement of sections 43 and 45 of the Employment Act, 2007 which in a way is a reversal of the evidential burden obtaining generally under the Evidence Act.

16. The reason given for the termination of the Claimant's employment was *poor performance*.

17. The Respondent's witness testimony was record based.

18. The first letter alluding to Claimant's performance was dated 6 August 2013. It has no specifics of the *poor performance* and is general in tone. It was signed by the Managing Director.

19. The second letter is dated 6 January 2014 and this one had specifics as it referred to persistent truck breakdowns.

20. The Claimant in his testimony gave the reasons for the persistent truck failures as old fleet and he stated that he informed the Respondent's Managing Director of the same.

21. The explanation was not challenged and there is no basis for the Court not to believe the explanation as reasonable.

22. The third letter was the show cause notice of 16 January 2014 which the Court has found was not delivered to the Claimant.

23. The show cause was also of a general tenor and was issued under the hand of the Respondent's Managing Director.

24. The Court in this regard finds that the Respondent has not proved *poor performance* as a valid and fair reason for the termination of the Claimant's employment.

26. Before considering remedies, the Court wishes to address the submission by the Respondent that there was an inconsistency between the pleaded case and evidence.

26. It is not correct as submitted by the Respondent that the Claimant's pleaded case was purely anchored on redundancy alone.

27. Paragraph 4 of the Memorandum of Claim pleaded a cause of action of unfair termination. It is the particulars which suggested redundancy.

28. The evidence led in Court was on unfair termination and therefore in the view of the Court, the issue of inconsistency is not material.

29. But the Court would also observe that the Memorandum of Claim was poorly drafted.

Appropriate remedies

1 month pay in lieu of notice

30. The Claimant sought Kshs 80,500/- under this head. The termination of employment letter indicate he was offered 1 month pay in lieu of notice and this is corroborated by the April 2014 pay slip.

31. This head of relief is therefore unsustainable.

House allowance

32. The Claimant sought Kshs 1,134,000/- on account of house allowance.

33. All the pay slips produced indicate that the Claimant was only getting a basic pay and not house allowance.

34. The Respondent did not suggest that it provided the Claimant with housing accommodation in terms of section 31 of the Employment Act, 2007 or that the remuneration was consolidated to include an element of rent in terms of section 31(2) of the Act.

35. Further, it was the duty of the Respondent to draw up a written contract with the requisite particulars in terms of sections 9 and 10 of the Employment Act, 2007.

36. Because the Employment Act, 2007 commenced in June 2008, the Court finds that the Claimant is owed house allowance at least from June 2008 to March 2014.

37. However, the Claimant did not produce evidence of salary progression from 2008 to 2014 to enable precise calculation of house allowance based on the traditional 15% of basic pay and this relief is therefore declined.

Compensation

38. The Claimant served the Respondent for about 9 years and in consideration of the period of service, the Court is of the view that the equivalent of 12 months gross wages at time of separation (Kshs 70,000/-) would be fair and appropriate.

39. The Court has also considered that it has declined to make an award under house allowance.

Severance pay

40. The Claimant was not declared redundant and therefore he does not qualify for severance pay. If by *severance pay* he meant *service pay*, then his membership of the National Social Security Fund disentitles

him to the same.

Conclusion and Orders

41. The Court finds and concludes that the termination of the Claimant's employment was unfair and awards him and orders the Respondent to pay him

(i) Compensation **Kshs 840,000/-**

42. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 20th day of January 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Bichanga instructed by Chepkwony & Co. Advocates

For Respondent Mr. Masese, Senior Legal Officer, Federation of Kenya Employers

Court Assistant Nixon