



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 600 OF 2014

BETWEEN

ABUBAKAR MASIALA SIFUNJA.....CLAIMANT

VERSUS

DIAMOND SHIPPING SERVICES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Omondi Waweru & Company Advocates for the Claimant

Federation of Kenya Employers [FKE] for the Respondent

JUDGMENT

1. The Claimant filed his initial Statement of Claim on the 28th November 2014. He filed Amended Statement of Claim on the 18th June 2015. He states he was employed by the Respondent Company on 15th June 2005, in the position of Operations Assistant. His contract was terminated by the Respondent on 9th October 2014. He earned a monthly salary of Kshs. 51,000 as of the time of termination. He states that termination was unfair and unlawful and prays for the following orders against the Respondent:-

- a) 12 months' salary in compensation for unfair termination at Kshs. 612,000.
- b) Loan Balance with Uokoaji Sacco at Kshs. 450,000.
- c) Unpaid salary for September and October 2014 at Kshs. 102,000.
- d) Loan Balance with Housing Finance at Kshs. 100,000.
- e) Service Pay at Kshs. 2,754,000.
- f) Notice pay at Kshs. 153,000.
- g) Annual Leave Pay at Kshs. 87,189

Total..... Kshs. 4,568,189

h) A declaration that termination was unlawful.

i) Costs and Interest.

2. The Respondent filed its Statement of Response on the 21st May 2015. It is conceded the Claimant was employed by the Respondent as stated in the Claim. His contract was terminated by the Respondent on 24th October 2014 on account of gross misconduct. He was involved in personal business entailing the removal of sludge from shipping vessels at the Port of Mombasa. He undertook personal business for his own benefit, in the name of the Respondent, contrary to Clause 13 and 14 of his contract. He was given a written warning on the subject on the 24th September 2014. He did not stop undertaking the activities over which he was warned. He was called to a disciplinary hearing. He agreed that he was involved in personal business against the Company Policy. His contract was terminated. He was offered terminal benefits comprising 1 month salary in lieu of notice and 52 days of annual leave, totaling Kshs. 153,279. He did not collect the sum. Termination was fair and lawful.

3. The Claimant testified, and closed his case, on the 28th October 2015. Finance Manager of the Respondent, Parames Suravan Venkitachalam, testified for the Respondent on 5th September 2016 when the hearing closed. Parties confirmed the filing of their Submissions on 3rd October 2016.

Claimant's Evidence

4. Mr. Sifunja told the Court he worked for the Respondent for over 9 years. He worked up to 8th October 2014. He was assaulted by unknown persons on his way to the Mosque, on 8th October 2014. He was not able to go to work from the following day. He was injured on the head and hand, and communicated his predicament to the Operations Manager. He was treated at Pandya Hospital, Mombasa. He reported the assault at the Police Station and was issued P3 form. He exhibited his treatment notes and P3 form before the Court.

5. The Claimant informed the Operations Manager that he had 1 day sick-off. The Human Resource Manager called the Claimant on 9th October 2014, asking the Claimant to pick his letter of termination. The Claimant returned to hospital after 2 days and found the Respondent had directed that his medical insurance cover is cancelled. When he went to the workplace later, he found Security Officers at the gate had been asked not to allow the Claimant in. He called the Operations Manager who let him in. The Operations Manager did not however hear the Claimant; he asked the Claimant to pick his letter of termination and leave. No reason was given for the decision to terminate. There was no notice and/ or warning before termination. He was not heard. Termination was unfair.

6. He has not been able to secure alternative employment. The Respondent has been writing to potential Employers, alleging the Claimant is unsuitable to work. He has been unable to pay his Sacco Loan. He would have paid if termination did not take effect. He was not paid his salary for 2 months. The minutes alleging he attended a disciplinary meeting, attached to the Respondent's bundle of documents are incorrect. There was no such meeting. The minutes do not bear Claimant's signature. It is not true that the Claimant ran a private business while in employment. The warning letter did not contain correct information.

7. Under interrogation from the Respondent's Counsel, the Claimant stated he did not know the reason why his contract was terminated. The warning letter stated he was removing sludge for other Companies. Verse Transporters was a Company owned by Claimant's Wife. He was not heard before termination. He was actively enrolled in the National Social Security Fund [N.S.S.F]. He was a beneficiary under a Pension Scheme administered by ICEA Lion. He took the Sacco Loan for his own benefit. The Respondent was involved in this loan agreement, but the Claimant did not have in Court, a copy of the agreement setting out the terms of Respondent's involvement. His contract of employment provided for 1 month salary in lieu of notice, not 3 months' salary. He declined the terminal dues offered by the

Respondent because not all his dues were included in the offer. Redirected, the Claimant testified the agreement between the Sacco and the Respondent was retained by the Respondent. His salary had been reviewed between the date of employment and termination. The terms and conditions of employment had been varied, hence his demand for 3 months' salary in lieu of notice, instead of the 1 month salary contained in the letter of appointment. The Claimant prays the Court to allow the Claim.

Respondent's Evidence

8. Mr. Venkitachalam testified the Claimant carried on private business while still working for the Respondent. He was given a written warning. He did not mend his ways. He was called to a hearing. He was not advised on his right to be accompanied by a Co-Employee or a Shop-floor level Union Representative. Termination was on 9th October 2014. Hearing took place on 24th September 2014. In between, the Claimant was ill, and his issue before Senior Management for consideration.

9. The Respondent offered to pay Claimant's terminal dues calculated at Kshs. 81,653 after tax. He did not collect the sum. The Respondent is ready to pay the amount. His salary for September 2014 was paid as per the pay slip for September 2014. The Respondent was not privy to his Sacco transactions. He was actively registered to the N.S.S.F. The contract provided for 1 month notice of termination, or 1 month salary in lieu of notice. The Respondent offered 1 month salary in lieu of notice. Compensation is not merited. The Claimant wrote e-mail to the Respondent conceding he had committed a minor offence.

10. Questioned by Counsel for the Claimant, Venkitachalam testified the Respondent is a shipping Agent. It is engaged in removal of sludge. The Claimant admitted his mistake in Respondent's annexure 5. He was not in employment when he wrote the e-mail. He was unwell on termination. The minutes of the meeting alleged to have been a disciplinary meeting, are not signed by the Claimant. There is no letter on the record, inviting the Claimant to a disciplinary hearing. He was not advised on his right to be accompanied to the hearing. Termination letter did not reveal specific ground for the decision. The Claimant did his work as Operations Assistant well.

11. There are regulatory requirements in removal of sludge. Vendors are licensed. The Respondent engages Vendors who are licensed. The Claimant was not licensed. Respondent did not witness the Claimant removing sludge. There was no boarding pass indicating the Claimant boarded any Ship to remove sludge. Licences are issued by National Environment and Management Authority [NEMA], and Kenya Ports Authority [KPA]. There are Forms issued from NEMA before removal of sludge. No such Forms were shown to have been issued to the Claimant.

12. Pay slip for September 2014 was not signed by the Claimant. Payment could be confirmed with his Bank. The Witness did not have Claimant's Bank Statements. Termination was on 9th October 2014. The Claimant repeated the offence after the warning. He told the Respondent he was sick. There were Vendors who complained about the Claimant's engagement in the removal of sludge. They were not Witnesses before the Court. The Directors and Company Secretary did not attend disciplinary hearing. The Respondent prays for dismissal of the Claim.

The Court Finds:-

13. These facts are not disputed: the Claimant was employed by the Respondent as Operations Assistant, on 15th June 2005; his contract was terminated by the Respondent on 9th October 2014; he earned a salary of Kshs. 51,000 per month as of the time of termination; he was actively subscribed to the N.S.S.F; he was a beneficiary under a Pension Scheme administered by ICEA Lion; his contract of employment provided for 1 month termination notice or payment of 1 month salary in lieu thereof; and he was offered terminal benefits comprising 1 month salary in lieu of notice and 52 days of annual leave totaled Kshs. 153,279, which offer he rejected.

14. In issue is whether the termination decision was fair and lawful under Section 41, 43 and 45 of the Employment Act 2007; and whether the Claimant is entitled to terminal benefits, compensation, loan payments, costs and interest as pleaded.

15. There is no evidence to support his claim for loan balance with Uokoaji Sacco. He did not show to the Court in what way the Respondent came in. There was no tripartite deed, roping in the Respondent to meet his loan obligations with any lender. The prayer for payment of loan balance with Uokoaji Sacco is declined.

16. Similarly the prayer for loan balance with Housing Finance is found to have no evidential support and is rejected.

17. It is borne out in the Claimant's pay slips, and in his own oral evidence, that he was actively registered to the N.S.S.F. He was in addition, a beneficiary under a Social Security Scheme established by the Respondent and administered by ICEA Lion. He is not eligible to receive additional social security benefits in form of service pay. He is barred from accessing service pay, under Section 35[6] of the Employment Act 2007. The prayer for service pay is rejected.

18. Notice pay was offered by the Respondent based 1 month notice period given under the Claimant's contract. He prays for 3 months' salary in lieu of notice, which is contrary to the contract under which he served. There was no variation of the contract as far as the notice period goes. Claimant's allusion to variation of the contract based on review of salary holds no water. The variation was confined to the salary. It did not touch on the notice period. The prayer for 3 months' salary in lieu of notice is rejected. ***He is allowed 1 month salary in lieu of notice as offered by the Respondent, based on the contract of employment, at Kshs. 51,000.***

19. Pending annual leave days are not in dispute. The Claimant was offered 52 days of annual leave, and prays for 52 days of annual leave. Parties should have entered consent Judgment on this undisputed item, instead of taxing judicial economy by retaining the item as part of the dispute. ***He is granted annual leave pay at Kshs. 87,189 as prayed.***

20. Is compensation merited? There is evidence the Claimant was involved in running personal business while working for the Respondent. Whatever the nature of that business and the regulatory framework under which it was conducted, the Claimant acknowledges in his e-mail of 16th October 2014 to Sajan Philip, that the Claimant had a problem albeit not as big a problem, as that which his Colleagues at the Respondent, had been engaged in. In the view of the Court the Claimant acknowledged he was involved in improper conduct of personal business. His e-mail was sent from Verse Transporters a company he stated belonged to his Wife. He sought in the e-mail of 1st November 2014 to buy sludge from the Respondent. Although these e-mails come after termination, they support the claim by the Respondent that the Claimant was involved in sludge business, even while still working for the Respondent. He was not merely an Employee, but had become a Businessman, in competition with his Employer. He was not hampered in doing this business by the regulations which he submits made it impossible for him to remove sludge. He would not have been seeking to buy sludge from the Respondent, if he was incapacitated in its removal, through the stringent regulations. He concedes he was involved in private business which to him was a small mistake compared to what his contemporaries were involved in.

21. His contract bound him under Clause 14, to devote his time and attention entirely to the Respondent. He was not to engage in other business which was likely to be in conflict with that of the Respondent. His involvement in the small mistake went against this Clause. The Respondent had valid ground under Section 43 of the Employment Act 2007, in terminating the Claimant's contract.

22. Venkitachalam testified there was no letter inviting the Claimant to a disciplinary hearing. He was not advised on his right to be accompanied by a Representative of his choice, to the disciplinary hearing. The Respondent did not call on the Claimant to answer to specific charges. The letter of termination did not spell out the reason for termination. The Claimant was issued a written warning on 24th September 2014. He was unwell between this date and 9th October 2014 when termination issued. After the warning of 24th September 2014, it was not shown that the Claimant continued to engage in the conduct over which he was warned up to 9th October 2014. The minutes capturing disciplinary hearing show hearing took place on 24th September 2014, the date of the warning. If there was a hearing, the inference would be that the

sanction was the warning of 24th September 2014. Why terminate after the Claimant had come from his sick off? What precipitate misconduct took place after the warning? Was there a hearing after the warning? These aspects of the evidence lead to the conclusion that procedure was flawed. It did not meet the standards of fairness prescribed under Section 41 and 45 of the Employment Act 2007. Termination was unfair on this score. ***It is declared termination was unfair on account of the flawed procedure. The Claimant is granted the equivalent of 5 months' salary in compensation for unfair termination at Kshs. 255,000.***

23. The prayers for salary arrears for September 2014 and October 2014 have no merit. The Claimant did not work to the end of October 2014. He has no reason to demand salary for the whole of October 2014. His contract was terminated on 9th October 2014. He would be entitled to 9 days' salary for October 2014. His pay slip for September 2014 indicates he was availed his salary for September 2014. It was not possible to have the Respondent obtain and bring Claimant's bank statements. As it is the Claimant who disputes the evidential value of the pay slip, it would have served him well to supply the Court with his bank statements, which are his confidential documents, disavowing the pay slip. The Respondent offered to pay the Claimant pending annual leave days. Why would the Respondent choose to retain the Claimant's salary for September and October? The balance of probability tilts in favour of the Respondent on this item. The prayer for salary for September and October 2014 is rejected.

24. No order on costs and interest.

IN SUM, IT IS ORDERED: -

a) It is declared termination was unfair on account of fairness of procedure.

b) The Respondent shall pay to the Claimant: 1 month salary in lieu of notice at Kshs. 51,000; annual leave pay of 52 days at Kshs. 87,187; and the equivalent of 5 months' salary at Kshs. 255,000 in compensation for unfair termination- total Kshs. 393,187.

c) No order on the costs and interest.

Dated and delivered at Mombasa this 17th day of February, 2017.

James Rika

Judge