



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**

**KENYA AT NAIROBI**

**CAUSE NUMBER 426 OF 2014**

**PATRICK M. LUMUMBA .....CLAIMANT**

**VERSUS**

**MAVKAN CONSTRUCTION (K) LIMITED.....RESPONDENT**

**JUDGEMENT**

1. In his memorandum of claim filed on 19<sup>th</sup> March, 2014, the claimant averred that he was employed by the respondent as a supervisor in 1995 and worked diligently as such until 23<sup>rd</sup> March, 2011 when his services were unlawfully terminated. At the time of termination he was earning a monthly salary of Kshs 12,000 per month. According to the claimant, the respondent never gave him any reason for the termination nor paid him his terminal dues.
2. The respondent refuted the claimant's averments and stated the claimant was employed in 2004 as a casual labourer and not in 1995 as a supervisor as claimed. According to the respondent sometime in 2011 it had an ongoing construction project along Eldama Ravine Road in Nairobi and the claimant was appointed as site foreman/supervisor.
3. The respondent further averred that on Saturdays it would halt its operations at the site at 2 o'clock and all worker would leave the site however on Saturday afternoon in August, 2011 the respondent received information from its client that there was a strange pick up motor vehicle on the site loading assorted materials from the site such as glass and metal fittings. The respondent's manager, one Mr Mavji Raghvani went to site at around 4:30 p.m. and found the claimant there with assorted materials.
4. The respondent's manager reprimanded the claimant and wanted to report the incident to the police but the claimant pleaded with him not to do so. The manager agreed not to make the report and released the claimant to go home. According to the respondent, the claimant hence forth did not report to work and was absent without leave for a period of 4 months. He returned thereafter seeking his terminal dues. On 28<sup>th</sup> July, 2012 the respondent paid the claimant a sum of Kshs 130,000/= being full and final settlement which sum the claimant acknowledge receipt by appending his signature to the cash payment voucher.
5. In his oral evidence in court, the claimant denied carrying away the respondent's property. He further denied receiving Kshs 130,000/= from the respondent and refuted the signature on the petty cash voucher. He however admitted that he had two different signature.
6. The respondent's witness Mr Mavji Radhvani repeated the averments in the defence and further informed the court that because of his long relationship with the claimant he opted to pay him Kshs.

130,000/= and close the matter.

7. The claimant seeks a declaration that the termination of his services was unlawful. The legal position is that the burden of proof or justification of reasons for dismissal rests with the employer. The test is usually that if a reasonable employer would for reason before him dismiss and employee, the dismissal would be upheld by the Court. In his memorandum of claim the claimant averred that the respondent dismissed him for no reason at all. It is not normal for an employer to wake up and simply tell an employee to leave work when there is still work to be done. It is therefore incredible that the responsible simply gave the claimant marching orders. The respondent averred and stated in court that the claimant was found attempting to remove scrap material from the respondent's site without authority. The claimant never filed any reply to the memorandum of response on this serious allegation. Besides on the issue of receiving he sum of Kshs 130,000/= from the respondent in full and final settlement of the claim, the claimant denied signing the petty cash voucher yet he conceded that the signature on the verifying affidavit and the job card were different. He however stated that he had two different signatures. This therefore raises the reasonable probability that the claimant was paid the sums alleged in full and final settlement of his terminal dues upon separation from employment.

8. The burden of proof in civil claims is on a balance of probabilities. That is to say the person on whom the burden is bestowed must persuade the adjudicating authority that the facts as presented are more probably correct than not. The respondent had a justifiable reason to dismiss the claimant without notice. It however decided to amicably resolve the dispute with the claimant. The claimant received the sum of Kshs 130,000/= on condition that it was in full and final settlement of his claims against the respondent. His attempt to deny that he signed for the money is sharp and dishonest. If he as he concedes he had more than one signature nothing in the signature appended to the petty cash voucher shows it was tempered with or does not belong to him.

9. In conclusion the court finds the claim without merit and dismisses the same with costs.

10. It is so ordered.

Dated at Nairobi this 10<sup>th</sup> day of February 2017

**Abuodha J. N.**

**Judge**

Delivered this 10<sup>th</sup> day of February 2017

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**