



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 167 OF 2015

BETWEEN

DANCAN OUMA OJENGE..... CLAIMANT

VERSUS

P.N. MASHRU LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Muganda Advocate instructed by M/S I.R.B. Mbuya & Company Advocates for the Claimant

Mr. Ajigo Advocate instructed by Menezes, Oloo & Chatur Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 30th March 2015. He states he was employed by the Respondent Company between December 2011, and 15th May 2014, as a Spray Painter. He was paid a salary of Kshs. 16,000 per month. He was entitled to an additional sum of salary and house allowance which was never paid.
2. The Respondent terminated the Claimant's contract on 15th May 2014, in circumstances the Claimant feels were unfair and unlawful. It was alleged the Claimant had stolen his Employer's computer box. The Respondent acted upon receiving the opinion of a witchdoctor about the Claimant's guilt.
3. The Claimant prays for Judgment against the Respondent as follows:-
 - a) Notice pay at Kshs. 18,400.
 - b) Arrears of house allowance for the entire period worked at Kshs. 64,800.
 - c) Annual leave pay for the entire period at Kshs. 31,273.
 - d) The equivalent of 12 months' salary in compensation for unfair termination at Kshs. 192,000.

- e) Punitive damages.
- f) Certificate of Service.
- g) Costs.

4. The Respondent filed its Statement of Response on 22nd May 2015. Its position is that the Claimant was employed on casual terms, as a Spray Painter, from December 2011 to 15th May 2014. His salary of Kshs. 16,000 was inclusive of house allowance. He deserted employment on 15th May 2014. The Respondent did not enlist the intervention of a witchdoctor in making its decision. The Respondent lost its computer box which was under Claimant's care. A report was made to Makupa Police Station, and the Claimant, with 2 other Employees were arrested. At a consultative meeting held between the Parties at Kituo Cha Sheria Offices, the Claimant decided he would not return to work, after the Respondent offered to re-employ him. He nonetheless refused to give the Respondent a notice of resignation. This prompted the Respondent to summarily dismiss the Claimant for absconding.

5. The Claimant gave his evidence, and closed his case, on 10th September 2015. The Respondent's case was scheduled for hearing, with the consent of Parties' Advocates, on the 23rd November 2016. The Respondent did not attend Court, and on the application of the Claimant, proceedings were marked as closed, and the Claimant directed to file his Closing Submissions.

6. In a consent letter adopted as the order of the Court on 8th December 2016, the Parties agreed:-

- a) Respondent's case is re-opened.
- b) Respondent's Witness Statements on record are admitted as Respondent's evidence.
- c) Respondent's documents are similarly admitted as exhibits.
- d) Respondent's case is then closed, and date for mention given to confirm filing of Closing Submissions.

7. The dispute was last mentioned on 7th February 2017, when Parties confirmed filing of their Submissions.

Claimant's Case

8. The Claimant restated the contents of his Pleadings, in his evidence.

9. On 14th May 2014, he was told by the Foreman Mr. Kasu, that a witchdoctor would visit the workplace. The witchdoctor would do so upon the invitation of General Manager Mr. Abdulrazak following the loss of a computer box on 12th May 2014, from the workplace.

10. The General Manager, true to his word, brought the witchdoctor to the workplace, on 14th May 2014. The witchdoctor carried some sticks. He held the sticks on one end, while the General Manager held the other end.

11. The Employees were asked in turns, to place their hands between the sticks. If the witchdoctor declared the grip on the particular hand of an Employee, in between the sticks was strong, it was concluded the individual was guilty of stealing Respondent's computer box.

12. The grip of the witchdoctor's sticks, on the hands of the Claimant, and on the hands of 3 other Employees, was declared to be strong. Consequently, the Respondent found them guilty of an employment offence.

13. They were forwarded to Mariakani Police Station on the same date - 14th May 2014. On 15th May 2014, they were asked to report to the Human Resource Manager madam Fatma. She informed the Claimant there would be no criminal prosecution, but his contract, together with those of his Co-Employees, had been terminated.

14. The Claimant sought legal assistance from Kituo Cha Sheria. A demand letter issued. Fatma pleaded with the Claimant, to return to work, when the Parties met at Kituo Cha Sheria. The other affected Employees were present. They informed the Respondent they did not wish to return to work, and only wished to be paid their terminal dues.

15. The Claimant testified he earned a consolidated monthly salary of Kshs. 16,000. Kshs. 1,500 was house allowance, and Kshs. 14,500 his basic salary. He prays for notice pay; annual leave for 2013 and 2014; and compensation.

16. The Claimant reaffirmed the involvement of the witchdoctor in the process of termination. It is not true as stated by the Respondent, that Police Officers first came and arrested the concerned Employees.

17. On cross-examination, the Claimant stated he was employed in December 2011. He did not sign a written contract of employment.

18. He denied he signed the document marked Appendix (a) of the Respondent's Bundle, titled 'Joining Report'

19. Lusua Teresa Ojenge is the name of his mother, as stated in the 'Joining Report'.

20. The Claimant worked for 2½ years. He was recruited by Fatma. He did not recall if she signed any contract with him.

21. The Claimant did not have any complaint against the Respondent, prior to 14th May 2015. He was paid his salary as agreed.

22. Kasu the Foreman, oversaw the removal of items from vehicles, before the vehicles were spray painted. The Claimant and his Colleagues did the actual removal and return of the items. Kasu told the Claimant about the loss of the computer box.

23. Parties consulted at Kituo Cha Sheria. Fatma pleaded with the Claimant to return. One of the Employees, James, returned to work. It is true the Claimant was dismissed by the Respondent.

24. The witchdoctor was brought to the workplace, after the computer box went missing. General Manager said he could not continue working with thieves. The Claimant went on annual leave in 2012. He claims punitive damages, as his name was soiled. Redirected, the Claimant told the Court that the Electrician, was responsible for removal of the computer box, before spray painting.

Respondent's Case

25. Respondent's Witness Francis Mulili confirmed in his Statement, that the Claimant was employed by the Respondent as a Spray Painter on 1st May 2008, and summarily dismissed on 24th July 2014 after he deserted.

26. His terminal dues were being computed at the time Mulili wrote his Statement. The Claimant is not owed annual leave pay having gone on annual leave consistently.

27. James Otieno states he was one of the suspects in theft of Respondent's computer box. He was arrested, alongside the Claimant, and another Employee. They were arrested, locked up at Mariakani Police Station (Makupa Police Station?) and subsequently released without charge. They were recalled to work. James returned, but the other 2 Employees refused to return, demanding they are paid terminal

dues. At no time did James meet or see a witchdoctor.

28. Mohamed Rajabu states he is the Operations Manager. He was at the time of Claimant's departure, Acting Security Officer. He reported loss of Respondent's computer box at Mariakani Police Station. The Claimant, Ongeso and Otieno were suspected of theft. They were arrested, and locked up at the Police Station overnight. The following day, 15th May 2014, the Respondent resolved to issue the Employees with warnings, and recalled them to continue working. Otieno returned, but Ongeso and the Claimant declined. At no time did Management engage the services of a witchdoctor to assist in arresting of the suspects.

The Court Finds:-

29. The Claimant was employed by the Respondent as a Spray Painter between December 2011 and 15th May 2014. He earned a consolidated salary of Kshs. 16,000, paid monthly.

30. There is nothing in the record to suggest the Claimant was a Casual Employee.

31. His problem with the Respondent started on 14th May 2014. The Respondent lost a computer box from one of its vehicles.

32. The Claimant testified the Respondent sought the intervention of a witchdoctor, in uncovering the Employees behind theft of the computer box.

33. The witchdoctor, with the aid of General Manager Abdulrazak, performed certain macabre rituals, and concluded the Claimant and 2 other Employees, were guilty of the offence. The Employees were arrested, and detained at Mariakani Police Station.

34. On the following day, the Employees were released and called to work. They were informed by Human Resource Manager Fatma Abdallah, there would be no criminal prosecution against them, but their contracts would be terminated.

35. The Respondent's account is different from that of the Claimant. First, the Respondent vehemently denies calling in the aid of a witchdoctor in resolving the dispute. Its position is that upon carrying out internal investigations, there was reason to suspect the Claimant of involvement in theft of Respondent's computer box.

36. The Respondent therefore reported the Claimant and the other suspects to the Police. They were arrested, detained overnight, and released the following day without charges. The Claimants were asked to return to work. The Claimant and Juma Ongeso, declined to go back to work. James Otieno agreed, and is still working. There was no witchcraft involved. The Respondent summarily dismissed the Claimant through a letter dated 24th July 2014, stating the Claimant had absconded.

37. The Court is persuaded by the account given by the Claimant. The Respondent's Witnesses did not attend Court. Their Witness Statements remain untested, and do not carry the same weight, as the evidence given orally by the Claimant. He and his Colleagues were suspected of stealing Respondent's computer box. The Respondent used witchcraft, then reported the Claimant and his Colleagues to the Police. They were released without any charge.

38. The offer to recall the Claimant to work, came only after Kituo Cha Sheria interceded on Claimant's behalf. It was not made by Fatma immediately the Employees were released from police custody. What happened immediately after release from police custody, was that Fatma advised the Employees there would be no criminal prosecution, but their contracts would be terminated. It was on the strength of this verbal termination, that the Claimant sought the assistance of Kituo Cha Sheria, resulting in the offer to resume work.

39. Is use of witchcraft in resolving workplace disputes a valid and acceptable tool?
40. Article 159(2) of the Constitution binds the Court to encourage alternative forms of dispute resolution, including traditional dispute resolution mechanisms.
41. Article 159(3) requires traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or written Law.
42. The Respondent's use of witchcraft violated Claimant's right to fair labour practices under Article 41 of the Constitution. It violated Sections 41, 43 and 45 of the Employment Act 2007. It was repugnant to justice and morality, inconsistent with the Constitution and the Law.
43. The Witchcraft Act, Cap 67 of the Laws of Kenya, outlaws the methods adopted by the Respondent in this dispute, in investigating the employment offence; in apportioning guilt upon the Claimant; and in terminating his contract of employment.
44. Section 2 of the Witchcraft Act makes it a criminal offence for any person to hold himself out as a witchdoctor, able to cause fear, annoyance, or injury to another in mind, person or property, or who pretends to exercise any kind of supernatural power.
45. The Act also outlaws the use of charms, and forbids witchdoctors from advising persons how to bewitch or injure others. Abdulrazak obtained the advice of a witchdoctor, and was supplied with sticks, to bewitch Employees.
46. In his article titled '**Conflict Resolution by Elders: Success, Challenges and Opportunities**,' (<https://www.ciarb.org>), Strathmore University Law Don, Francis Kariuki, examines traditional dispute resolution mechanisms among some African Societies.
47. Some Communities had Elders, who presided over trials by ordeals. Superstition and supernatural played great role in dispute resolution, especially in seeking and finding the truth. There was ordeal by fire, and ordeal by poison. Ordeal by poison would make the guilty person sick, while ordeal by fire made the person blister.
48. Among other Communities in Kenya, it was believed witchcraft could be used to blind or disable enemies. Warning systems about conflicts included looking at goat intestines, and studying the stars. Murder suspects were made to drink water used in washing their clothes. In all Societies sampled by Kariuki, a key element in traditional dispute resolution, consisted the infliction of fear upon the suspects. Trials were by one form of ordeal, or the other. Witchcraft, as shown in the Witchcraft Act, thrives on its ability to cause fear. The Respondent conducted investigation and disciplinary proceedings by ordeal.
49. The Kenya Law Reform Commission, in a blog dated 15th December 2014, under the banner '**Justification For Review of Witchcraft Act, Cap 67**' recommends review of the Act to bring it in line with the Constitution of Kenya.
50. It is suggested that the Act is not consistent with Article 11 of the Constitution, which recognizes culture as the foundation of the nation, and which requires the State to promote all forms of national and cultural expression.
51. The Commission suggests the Act is not in line with Article 27, which demands that no person shall be discriminated against on among other grounds, his religion, conscience, belief and culture.
52. According to the Commission, there is a thin line, between witchcraft and religion. Witchcraft is defined as use of magical faculties, most commonly used for religion, divinatory or medicinal purposes.
53. Religion is an organized collection of beliefs, cultural systems and world views that relate humanity

to an order of existence. The word 'religion,' is sometimes used interchangeably with faith, belief system, or set of duties. Religion tends to rely on broader social acceptance, while witchcraft relies more on private belief.

54. The Commission confirms the practice of witchcraft has not always been confined to African Societies. It has existed in places such as Britain and Australia. The law in these jurisdictions has recognized times have changed, and witchcraft is no longer perceived as a danger to law and order. Penalties for engaging in witchcraft have been reduced.

55. The Commission concludes that the cultures and beliefs of Kenya's indigenous peoples, should be accorded the necessary legal recognition, in accordance with Article 11 of the Constitution, and respected, until such time the majority of Kenyans, grow out of their beliefs and fears in witchcraft.

56. A review of the Witchcraft Act would help in drawing the line between witchcraft and religion, and help in clarifying what is witchcraft, and when it can be applied as a traditional form of dispute resolution mechanism, without offending justice, law and morality.

57. The Act dates back to 1925. It was enacted by the colonial regime as part of the regime's suppression of African cultures. The Act remains in force. There is no place in our workplaces for supernatural, superstition, charms, sorcery and witchcraft in general. These are not acceptable forms of traditional dispute resolution mechanisms.

58. The Respondent acted unfairly and unlawfully. Having done so, the Respondent did however make amends.

59. Parties held a meeting at Kituo Cha Sheria. The Respondent offered the Claimant his job back. He declined the offer. He opted to pursue this Claim. The Respondent concluded that the Claimant had absconded, and issued the letter of summary dismissal.

60. An Employee who is offered his job back by his Employer, has the discretion to take it or leave it. The wish of the Employee is paramount, even where reinstatement is under consideration by the Court, in redressing unfair termination.

61. The Employer nonetheless, did offer to place the Employee where the Employee would have been, had termination not taken place. The Employer mitigated its wrongful act. The remedy of compensation is purposed on redressing economic injury. Any economic injury suffered by the Claimant, after he rejected to go back to work, is, by and large, self-inflicted. Compensation to him, if any should be minimal.

62. *The Respondent shall pay to the Claimant the equivalent of 4 months' salary at Kshs. 64,000, in compensation for unfair termination.*

63. The Claimant prays for punitive damages. Punitive damages are granted in addition to actual damages, in certain circumstances. They are awarded when a Respondent's behavior, is found to be especially harmful. They are aimed at reforming, or deterring, a Respondent and others, from engaging in conduct similar to that which formed the basis of the Lawsuit.

64. The Court has concluded the Respondent used witchcraft in dealing with its Employees. This conduct was especially harmful and retrogressive to industrial relations. Witchcraft remains outlawed, and has no place in dispute resolution, in a civilized Society.

65. The Respondent is not a gullible simpleton, a village outfit, but is a major enterprise, resident in the resort city of Mombasa. It should embrace conventional dispute resolution mechanisms, and avoid wizardry.

66. The practice of witchcraft appears commonplace in Kenya. Driving or walking through the streets,

one is confronted with posters advertising 'mganga.' Among the potpourri of services offered by these witchdoctors, is favourable intervention in resolving cases pending in our various Courts.

67. It is not unusual to find charms, placed at strategic corners inside the Court-room, in the false hope of influencing the mind of the Court.

68. ***The prayer for punitive damages is allowed. The Respondent shall pay to the Claimant Kshs. 450,000 in punitive damages.***

69. The prayer for notice is rejected, the Claimant having declined the prayer for re-employment.

70. He alleges he did not go on annual leave throughout his period of employment. There are leave application forms and petty cash vouchers, attached to the Statement of Response. These documents indicate the Claimant took annual leave at some point. It cannot be true that he did not go on annual leave throughout. His prayer is declined.

71. The pay slip for April 2014, shows the Claimant received basic salary of Kshs. 14,500, and house allowance of Kshs. 1,500 monthly. At paragraph III (a) of his Statement of Claim, Claimant alleges he was entitled to an additional sum of house allowance. He suggests the total sum of Kshs. 16,000 paid to him monthly, was basic salary. The pay slip clearly shows Kshs. 1,500 was house allowance. The prayer for house allowance in arrears, has no merit, and is declined.

72. Certificate of Service shall be released by the Respondent to the Claimant under Section 51 of the Employment Act 2007.

73. No order on the costs.

IN SUM, T IS ORDERED:-

a) Termination was unfair.

b) The Claimant is granted the equivalent of 4 months' gross salary in compensation for unfair termination at Kshs. 64,000; and punitive damages at Kshs. 450,000 – total Kshs. 514,000.

c) Certificate of Service to issue.

d) No order on the costs.

Dated and delivered at Mombasa this 31st day of March 2017.

James Rika

Judge