



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 266 OF 2015

BETWEEN

DANCAN EDWARD BARASA ONYANGO CLAIMANT

VERSUS

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

Rika J

Court Assistant: Benjamin Kombe

Nyawinda K. Aoko Advocate instructed by Kituo Cha Sheria, Advocates for the Claimant

Oloo & Chatur Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 30th April 2015. He states he was employed by the Respondent as a Mechanic. He does not say on which date he was employed, but pleads that particulars are well within the Respondent's knowledge. Such pleading is not helpful to the Court. An Employee must reveal as much details of the employment contract, as are known to him. His contract was terminated by the Respondent on 2nd January 2015. He states that termination was unfair and gives the following 'particulars of claim':-

- a. 1 month salary in lieu of notice at Kshs. 22,000.
- b. Service /gratuity pay at Kshs. 22,000.
- c. Damages for unfair termination at Kshs. 264,000

Total Kshs. 308,000

- d. Certificate of Service to issue.

2. At the final paragraph 1.7 of the Statement of Claim, the Claimant lists 'Relief Sought' to include:-

- I. An order compelling the Respondent to immediately release the Claimant's terminal dues.
- II. An order directing the Respondent to pay Claimant all terminal dues pending.
- III. An award for damages for unlawful and or unfair termination.

IV. In the alternative Judgment is entered for Kshs. 308,000 as prayed for in the Claim.

3. These particulars and prayers are quite confusing. What line is to be drawn between the particulars, the main prayers and the alternative prayer? The Pleadings by the Claimant are not well drafted.
4. The Respondent filed its Statement of Response on 16th June 2015. It admits to have employed the Claimant as a Mechanic, giving the date of employment as 2nd January 2015. The Claimant left employment of his own volition on 5th January 2015, after clearing with the Management. He was advised to collect his terminal dues and certificate of service later, but never went back to the workplace. He hatched a plot to bring this Claim, in the hope of unjust enrichment. The Respondent computed and offered to pay the Claimant salary for 2 days worked in January 2015; pending leave for 2013/2014; pro-rata leave; and 1 month salary in lieu of notice out of compassion. The Claimant was subscribed to the N.S.S.F and ineligible for service/ gratuity
5. Parties agreed that the dispute is considered and determined on the strength of the record. They confirmed filing of their Closing Submissions, on 9th December 2016, when Judgment was scheduled for delivery.

The Court Finds:-

6. The Respondent's position is that the Claimant left employment, of his own volition on 2nd January 2015. He cleared with the Respondent, and left. The Respondent did not terminate his contract of employment.
7. The Claimant states in his Witness Statement dated 27th April 2015, that he was asked by his boss, while in the course of his work, to go and provide security guard services at his boss's parcel of land. The property was the subject matter of a dispute. The Claimant refused to do so, because it was not in his line of duty. He was told to leave by his boss and report back on 5th January 2015. When he did, he was told his contract was no more. He was asked to clear.
8. The Witness Statement of Salim Joha, Human Resource Manager said nothing about the allegations made by the Claimant, about being asked to act as a Security Guard for his boss, while he was employed and worked in the position of Mechanic.
9. It is improbable that the Claimant just asked for clearance forms, filled the forms and walked away into the uncertain world of unemployment. In the view of the Court, he did not voluntarily terminate his contract. The most probable account is that given by the Claimant. He was asked to work as a Security Guard. He was not employed as a Guard; he was employed as a Mechanic. This was his line of work. He declined to work as a Security Guard, and was sacked. The Respondent went on to ask the Claimant to fill clearance forms and offered him terminal benefits. There was no plot hatched or executed by the Claimant, aimed at unjust enrichment.
10. Although the Claimant's Pleadings are unclear, the Court understands him to plead that termination was unfair, and the Court should grant him the remedy of compensation.
11. Termination was at the instance of the Respondent. It was not based on valid ground. It was not carried out fairly. Sections 41, 43 ad 45 of the Employment Act were disregarded. ***He is granted the equivalent of 6 months' salary in compensation for unfair termination at Kshs. 132,000.***

12. There is no support in law and evidence, for the prayer for service/gratuity pay. The Claimant did not direct the mind of the Court to any wage instrument, contract, CBA or workplace policy, allowing him to receive service/ gratuity at the end of service. His pay slips show he was enlisted to the N.S.S.F and would not be eligible for service pay under Section 35 [6] of the Employment Act 2007.

13. The Respondent offered to pay the Claimant terminal dues computed at Kshs. 49,136. These included notice pay. It was not necessary to plead what has been offered. There was no need to plead under ‘*Relief Sought*’ ‘*terminal dues*’ and ‘*terminal dues pending.*’ The Respondent made a reasonable computation and offer of terminal dues. ***Terminal dues of Kshs. 49,136 shall be paid by the Respondent to the Claimant.***

14. ***Certificate of Service which the Respondent states is ready for collection, shall be released to the Claimant forthwith.***

15. ***Interest granted at the rate of 14% per annum from the date of Judgment, till paid in full.***

16. No order on the costs.

IN SUM, IT IS ORDERED:-

[a] Termination was at the instance of the Respondent.

[b] It was unfair.

[c] The Respondent shall pay to the Claimant: the equivalent of 6 months’ salary in compensation for unfair termination at Kshs. 132,000; and terminal dues as computed and offered by the Respondent at Kshs. 49,136, total- Kshs. 181,136.

[d] Certificate of Service to issue.

[e] Interest granted at 14% per annum from the date of Judgment till payment is made in full.

[f] No order on the costs.

Dated and delivered at Mombasa this 30th day of JUNE 2017

James Rika

Judge