



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 904 OF 2015

BETWEEN

JOHN KYALO MULELACLAIMANT

VERSUS

PAN AFRICAN LOGISTICS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Munyithya, Mutugi, Umara & Muzna Co. Advocates for the Claimant

Cootow & Associates, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 1st December 2015. He states he was employed by the Respondent as a Port Clerk in the year 2008. He rose to become Workshop Supervisor. His contract was terminated by the Respondent, in circumstances he feels were unfair, on the 22nd April 2015. He earned a monthly salary of Kshs. 70,000 as of the date of termination. He was granted annual leave of 21 days in March 2015. On expiry, he was granted another 7 days. At the end of the 7 days, he reported for duty and was informed by the Director Lawrence Mugavana, that his contract had been terminated. He was not given notice, a hearing, or reason for the decision. He seeks Judgment against the Respondent for:-

- a) 1 month salary in lieu of notice at Kshs. 70,000.
- b) Unpaid annual leave at Kshs. 244,999.
- c) Gratuity at Kshs. 490,000.
- d) Compensation for wrongful termination at Kshs. 840,000.
- e) Holidays and Sundays worked at Kshs. 40,000.

f) Overtime pay at Kshs. 100,000.

g) Service pay at Kshs. 120,000.

Total.... Kshs. 1,943,936

h) A declaration that termination was unfair.

i) Certificate of Service.

j) Costs and interest.

2. The Respondent filed its Statement of Claim on 8th February 2016. It is admitted the Claimant was employed by the Respondent in the year 2008. His contract was not terminated at all; he deserted duty. There was a routine audit carried out by the Respondent which showed the Claimant had misappropriated Kshs. 560,139 entrusted to him by the Respondent. When invited by the Management to explain his position, he fled. He then wrote demand letter through his Advocates to the Respondent on 10th June 2015, alleging he had been unfairly dismissed. The Respondent urges the Court to dismiss the Claim with costs to the Respondent.

3. The Claimant gave evidence on 26th September 2016 and 10th November 2016 when he rested his case. Norah Muga, Co-Director of the Respondent gave evidence on the same date, bringing the hearing to an end. The matter was last mentioned on 6th February 2017 when Parties confirmed the filing of their Closing Submissions and Judgment scheduled for delivery.

Claimant's Evidence:-

4. The Claimant narrated his employment history with the Respondent, from 2008 when he was appointed a Port Clerk, to the date of termination by which he had risen to the position of Workshop Supervisor.

5. He was given a written contract which provided for gratuity payment at the end of service, except if termination was on account of gross misconduct. He went on annual leave and on return was told by the Director there was no more work for him. He was directed to collect his terminal dues from the Accountant. He found a discharge voucher had been prepared. There was no letter of termination. The Respondent had Claimant's personal details including the phone number. He was not told what the complaint against him was. He was required to sign discharge which he declined. He was paid nothing.

6. He was not charged with any employment offence. He was not taken through a disciplinary process. He was not made aware of any audit. He took annual leave for the year 2015. He claims annual leave for 2013 and 2014. Gratuity was provided for under the contract. It was denied to the Claimant.

7. Kshs. 70,000 paid to him monthly was gross salary, the Claimant told the Court, on cross-examination. N.S.S.F contributions were remitted. He had loans with CFC bank and Bandari Sacco. The Director Mr. Mugavana guaranteed the loan. Bandari loan was guaranteed by fellow Employees. The Claimant earned about Kshs. 24,000 per month, after deductions. He has a family and bills to meet.

8. He arranged for Respondent's Trucks to undertake various transportation trips. It is not true that in the process, he was entrusted money he could not account for. He was not given a termination letter. There was no disciplinary hearing. There should have been one, if there was any complaint by the Respondent.

9. The Claimant wrote to the Respondent a demand letter before filing the Claim. Respondent's Advocates replied, stating the Claimant was required at the workplace for a disciplinary hearing. He did not go for the hearing. He was not shown the letter from the Respondent, by his Advocates. He would agree disciplinary issues have not been resolved.

10. Mulela confirmed he took annual leave for 2015. It is not specified what year the prayer for unpaid annual leave, relates to. The Claimant has since secured alternative employment. Compensation for work done on Holidays and Sundays is not specified. Overtime is claimed based on hours of work. He prays for service pay as well as gratuity. The Respondent paid N.S.S.F subscriptions on Claimant's account. Gratuity is claimed from 2008. It is not true that the Claim is filed prematurely.

11. On redirection, the Claimant stated the Respondent's Advocate's letter, stating the Claimant was required to attend a disciplinary hearing, was not copied to the Claimant. The Respondent had Claimant's contacts. He was paying CFC loan at Kshs. 9,404 monthly. The loan with Bandari Sacco did not involve his Employer. His net salary on termination was Kshs. 29,500. The Bank had not notified the Claimant about any default in his loan repayment. It is true the Managing Director Mr. Mugavana called the Claimant and told him not to report to work.

Respondent's Evidence:-

12. Norah Mugavana told the Court she is a Co-Director and General Manager of the Respondent. She explained that the Claimant had a meeting with Mr. Mugavana on fact-finding. Funds entrusted the Claimant were missing. A sum of Kshs. 560,139 could not be accounted for. The money related to vehicle spares and Drivers' allowances among other items.

13. The Respondent intended to have a disciplinary hearing. The Claimant had admitted he failed to account. While the Respondent was waiting to convene the hearing, the Claimant sent a demand letter to the Respondent, alleging he was unfairly dismissed. The Respondent had not terminated his contract. Normally, the Respondent issued termination letters to Employees on termination. The Respondent replied to the demand, calling on the Claimant to avail himself for a disciplinary hearing. He did not respond. The Claimant deserted and went to work for another Company within the same industry as the Respondent.

14. The Claimant confirms he took annual leave of 21 days in March 2015. If he did not take annual leave for other years, they were forfeited. He is not entitled to notice pay. Gratuity is provided for in the contract. There was no termination and the prayer for compensation is without foundation. There is no evidence of overtime. Details of Sundays and Holidays worked have not been disclosed. Hours worked are not given. The Claimant was subscribed to the N.S.S.F, and therefore ineligible for service pay. The Cause herein is premature.

15. Mrs. Mugavana told the Court on cross-examination that she discharged the role of human resource. There was no separate department for the role. There was to be a disciplinary hearing. The letter from the Respondent to Claimant's Advocates was not copied to the Claimant. The Respondent followed up the Claimant after he abandoned his job. She did not have evidence of communication made to the Claimant to this end.

16. Payment Vouchers at work were approved by Mr. Mugavana. There was no money lost. The Claimant took money from Respondent's Drivers, in a sort of trade union system. There was no evidence he did so, from the Drivers. There was no finding that money was lost to the Respondent, as there was no disciplinary hearing. There was no criminal trial arising from the allegations. Mr. Mugavana was in charge of staffing. The Claimant was employed in 2008 and confirmed in 2010. The Respondent tabulated his terminal dues. The Accountant prepared discharge. Mrs. Mugavana did not have details of the computation. She told the Court in concluding her evidence, upon redirection, that it was not necessary to copy the letter calling the Claimant to a disciplinary hearing, to the Claimant. The disciplinary case should have been resolved before the Claimant came to Court. The Claimant did not respond to Respondent's invitation. Terminal dues have not been paid, because there are outstanding issues. The Respondent has not terminated Claimant's contract to-date.

The Court Finds:-

17. The facts surrounding Claimant's employment history with the Respondent, his terms and conditions

or service, largely not in dispute. It is accepted he worked for the Respondent, initially as a Port Clerk from the year 2008. He was promoted becoming Workshop Supervisor. He left employment in April 2015. It is not agreed how he left employment. The Claimant states the Respondent terminated his contract. The Respondent states it did not terminate, and has not terminated to-date; the Claimant deserted. It is agreed he earned a monthly salary of Kshs. 70,000.

18. The letter from the Respondent to Claimant's Advocates, dated 10th June 2015 does not seem to be persuasive. The Respondent alleges it did not know about Claimant's whereabouts. It alleges the Claimant absconded on 14th April 2015. In that space of 2 months, the Respondent took no action in tracing the Claimant. There are no letters calling the Claimant. Records, including the leave application forms, show the Respondent had Claimant's details, including the phone number.

19. The Respondent waited until the Claimant engaged Advocates and made a demand, to assert the Claimant had not been dismissed and was due to attend a disciplinary hearing. There was no invitation made directly to the Claimant, to attend any hearing. There was no invitation between April and June 2015.

20. There were no particulars of the offence given to the Claimant over which he was required to attend a disciplinary hearing. He was not told he had deserted, stolen money from the Respondent, or in any way failed to account. In her evidence, Mrs. Mugavana was not able to explain what the nature of the offence, with which the Claimant was to be charged, was. No money was stolen. She veered to allegations about the Claimant running some kind of trade union check-off system, where he illegally collected money from Drivers. There were no Drivers who were availed before the Court, to support the assertion of illegal practice of trade unionism by the Claimant. In the Witness Statement of Mrs. Mugavana, it is alleged the Claimant owed the Respondent Kshs. 78,184, which is not even claimed by way of counterclaim, by the Respondent. The initial allegation was that the Claimant did not account for Kshs. 560,139. Mrs. Mugavana testified in the same breath that there was no money lost. The accusations against the Claimant were a hodgepodge of unintelligible and inconsistent statements.

21. The Claimant's account of the circumstances leading to termination is more coherent and believable. He took annual leave of 21 days in March 2015. At the expiry of the leave period, the Respondent extended the period by another 7 days. There is no reason given for extension, but any reasonable person would think the extension was not well intended, and was a harbinger of termination instigated by the Respondent.

22. At the end of the extension, the Claimant expected to go back and continue with his work. He actually did go back, but was advised by Mr. Mugavana on 22nd April 2015, that this was his last day of employment. The Accountant went on to compute Claimant's un-detailed terminal dues, and require the Claimant to execute a discharge. There is no doubt termination was instigated by the Respondent. It was not the Claimant who initiated termination. It is certainly not true that the Respondent has not terminated Claimant's contract of employment to-date. His name would still be on the payroll if this was the case.

23. Termination was at the instance of the Respondent. It was not based on valid ground under Sections 43 and 45 of the Employment Act 2007. It was carried out without regard to the minimum standards of procedural fairness under Section 41 and 45 of the Employment Act. It was unfair. The Claimant is entitled to compensation under Section 49 as read together with Section 50 of the Employment Act, and Section 12 of the Employment and Labour Relations Court Act.

24. *The Respondent shall pay to the Claimant the equivalent of 10 months' salary in compensation for unfair termination at Kshs. 700,000.*

25. *1 month salary in lieu of notice granted at Kshs. 70,000.*

26. Gratuity is given under clause 11 of the contract, at 1 month salary for every year worked, except if the Claimant's contract was terminated summarily. The Respondent does not state Claimant's contract was terminated summarily. It does not allege to have terminated the Claimant's contract at all. The Court

has concluded termination was by the Respondent. The benefit is not affected by the Claimant's status with the N.S.S.F. It is an additional benefit agreed upon by the Parties, above the minimum standards given by the statute. ***The Respondent shall pay gratuity based on a period of 7 years, at Kshs. 490,000.***

27. Mrs. Mugavana's position was that the Claimant took annual leave in March 2015. If he did not take in the previous years, annual must have been forfeited. There is no provision in the Employment Act, which supports forfeiture of annual leave. Annual leave is either utilized by the Employee, or paid for in cash by the Employer. Forfeiture of annual leave is a term which is alien to the Employment Act 2007. The Claimant is shown to have taken annual leave for 1 year. He took 28 days. He was entitled under his contract to 21 days annually. Over a period of 7 years, this would translate into $7 \times 21 \text{ days} = 147 \text{ days} - 28 \text{ days} = 119 \text{ days}$ of annual leave. $119 \times \text{a daily rate of Kshs. } 2,692 = \text{Kshs. } 320,348$. ***He is allowed the prayer for annual leave pay at Kshs. 320,348.***

28. There is no support for additional service pay at Kshs. 120,000. The Claimant was subscribed to the N.S.S.F and ineligible under Section 35[6] of the Employment Act to receive service pay under this provision. He has been paid gratuity under the contract which serves the same purpose as service pay. He should not crave multiple social security payments, while the Respondent made more than adequate provision for his social security.

29. Overtime worked on normal days and on Holidays and Rest Days, is made in a vacuum. There are no details of days and hours worked in excess of normal hours. There is no method to the computations; just figures thrown wildly at the Court. These items are declined.

30. ***The Respondent shall issue the Claimant with his Certificate of Service forthwith; pay costs of the Claim; and interest at the rate of 14% per annum from the date of Judgment, till payment in full.***

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant the equivalent of 10 months' salary in compensation for unfair termination at Kshs. 700,000; 1 month salary in lieu of notice at Kshs. 70,000; gratuity at Kshs. 490,000; and annual leave pay at Kshs. 320,348, total- Kshs. 1,580,348.

c) Certificate of Service to issue.

d) Costs to the Claimant.

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

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

James Rika

Judge