



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 305 OF 2014

BETWEEN

MTAWALI KEDENGE MRAMBA.....CLAIMANT

VERSUS

NYATI AUTO SPARES RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Matete Mwelese & Company Advocates for the Claimant

Kamoti Omollo & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 8th July 2014. He states he was employed by the Respondent as a Messenger, on 2nd June 2009. His contract was terminated by word of mouth by the Respondent, on 4th December 2013. He was diagnosed with tuberculosis. The Respondent explained it could not continue employing the Claimant because of his illness. It is not true that the Claimant absconded as alleged by the Respondent. As of the date of termination, the Claimant earned a monthly salary of Kshs. 11,000. He did not take annual leave for 6 years. Termination was without notice, and justification. He prays for Judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs. 11,000.
- b. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 132,000.
- c. Outstanding annual leave at Kshs. 66,000.
- d. Unpaid house allowance for 6 years at Kshs. 118,800.

Total... Kshs. 327,800

- e. Certificate of Service to issue.

f. Any other suitable relief.

g. Costs.

2. The Respondent filed its Statement of Response on the 5th September 2014. It does not deny to have employed the Claimant. It does not deny to have terminated his contract. Its position is that the Claimant was summarily dismissed on 10th January 2014, on the ground of engagement in an act of gross misconduct. He took annual leave every year. He was paid a consolidated salary. His prayers for unpaid annual leave and house allowance are time-barred. The Claim has no merit. The Respondent prays it is dismissed with costs to the Respondent.

3. The Claimant testified, and closed his case, on 7th September 2015. Shamsu Dean Kashmiri, Respondent's Director, testified on 17th November 2016 when hearing closed. The dispute was last mentioned in Court on 14th December 2016 when Parties confirmed the filing of their Closing Submissions and Judgment scheduled for delivery.

Claimant's Evidence:-

4. Mramba told the Court he is a Construction Worker, previously employed by the Respondent as a Messenger. He was issued a letter of employment dated 2nd June 2009. He was persistently sick and was diagnosed with Tuberculosis. He was told by the Respondent he could not continue working because he was contagious. Respondent's Accountant computed his terminal dues. The Respondent however objected to payment, saying the computed amount was too high. The Claimant was paid nothing. He was not heard or notified on termination. He did not go on annual leave for 6 years worked. House allowance was not included in his monthly salary. He made demand before filing Claim. The Respondent alleged in its reply, that the Claimant absconded. This is not true. He was dismissed on the ground of illness and was never recalled by the Respondent.

5. On cross-examination the Claimant stated he worked for 6 years for the Respondent. His letter of employment did not indicate house allowance would be paid separately. Director Shahid told the Claimant he could not continue working because he was ill. It is not true that the Claimant deserted. The Claimant would go on 2, or so, days of annual leave. He filled Leave Application Forms exhibited by the Respondent. In the year 2010, he was shown to have taken 19 days; 26 days in 2011; 23 days in 2012; and 3 days in 2013. He did not know his prayers for house allowance and annual leave pay are time barred. He closed his evidence on redirection with the clarification that his letter of employment, and pay slip, did not make provision for house allowance. He could not make demand for house and leave allowance while in employment as he apprehended he would be dismissed.

Respondent's Evidence:-

6. Kashmiri, a Veterinary Doctor, told the Court the Claimant was Respondent's Employee as stated in Claimant's evidence. He was diagnosed with tuberculosis. The Respondent advised he seeks treatment. The Respondent gave the Claimant money for antibiotics. He used to discharge his messaging role, on a motorcycle. He told the Respondent the motorcycle made him tired. He demanded to be paid his terminal dues. On seeing what was computed, he declined terminal dues and left. Kashmiri had told the Claimant he was at liberty to go back to work when he felt better. The Respondent wrote to the Labour Office reporting that the Claimant had absconded. Leave records showed he had 9 outstanding days, which formed part of what the Respondent offered to him.

7. Kashmiri affirmed on cross-examination that indeed the Claimant was ill as stated in his evidence. He started treatment on 4th December 2013. The whole of December 2012 he was on treatment. He did not write a letter of resignation. Details of terminal dues offered were not made available to the Court. The Respondent did not write to the Claimant seeking his whereabouts. It is not true that the letter to the Labour Office was written to enable the Respondent reply to the Claim. The Respondent cannot claim for notice pay from the Claimant as the Claimant was unwell. The Respondent's reply to the demand letter

indicated the Respondent required notice pay. Kashmiri told the Court, Claimant's pay slip did not show house allowance. He stressed on redirection that house allowance was part of the Claimant's monthly pay.

The Court Finds:-

8. The Claimant was employed by the Respondent as a Messenger on 2nd June 2009. He was issued a written contract of the same date. He left employment on 4th December 2013.

9. Although Counsel for the Respondent objected to the Claimant's production of medical records during trial, it is conceded by Respondent's Witness Kashmiri, that the Claimant fell ill with tuberculosis. The infection was diagnosed December 2013. It is not clear to the Court why some Parties object to production of documents, disrupting smooth flow of proceedings, even when those documents, merely affirm a common position.

10. The Respondent's position is that it reasonably accommodated the Claimant by meeting the cost of his drugs, and offering him the chance to return to work after healing. The Claimant complained the motorcycle he used in discharging his role tired him; he demanded to be paid his terminal dues; and declined these dues on computation. He deserted after this.

11. The Claimant's position is that he was dismissed because of his illness. He was offered terminal dues which were computed by the Accountant. Respondent's Directors felt the amount was too high and declined to authorize payment.

12. Respondent's evidence on the manner of Claimant's exit is not convincing. There is no letter granting the Claimant sick leave, or offering to have him back after treatment. Assuming he abandoned his job as alleged by the Respondent, it was conceded by Kashmiri there was no attempt made by the Respondent, to trace Claimant's whereabouts. There was no disciplinary process initiated against the Claimant for the employment offence of desertion. Weighing the evidence of the Respondent against that of the Claimant, the Court is inclined to uphold the Claimant's evidence.

13. The situation the Respondent was faced with was similar to the situation encountered by the Employer in the case of ***Bernard Gonzale Lando v. Mehta Electrical Limited [2015] e-KLR***. In that case as in the present case, the Employee revealed to the Employer that he was infected with tuberculosis. He sought medical attention. He acted responsibly. The Respondent did not act as required under the Employment Act 2007 and the Occupational Safety and Health Act 2007. There are no measures shown to have been taken by the Employer, to bring the issue to the attention of Health Authorities. The Respondent offered no assistance to the Claimant and adopted the wrong approach in stigmatizing, and dismissing the Claimant to minimize the risk of the infection spreading at the workplace. The reasons given by the Respondent in justifying termination were not valid. There is nothing to show the Claimant absented himself from work without lawful cause.

14. The 2 cases are similar and the Court does not see any reason why it should depart from its previous position. ***The Claimant is granted the equivalent of 12 months' gross salary in compensation for unfair termination.***

15. The Claimant lied to the Court about his annual leave record. He pleads he did not ever go on annual leave. He prays for annual leave pay over a period of 6 years worked. There are Leave Forms exhibited by the Respondent, showing the Claimant took annual leave. If he was honest on this item, he ought to have acknowledged the days of annual leave utilized, and claim of any balance. Why would he lie, that he did not utilize his entire annual leave entitlement, for 6 years? The prayer for annual leave pay is rejected.

16. The salary of Kshs. 11,000 paid to the Claimant was expressed to be basic salary in the pay slip. His letter of employment showed basic salary payable. The pay slips consistently showed total allowances paid as zero. The Respondent did not meet its statutory obligation under Section 31 of the Employment Act 2007. ***The prayer for arrears of house allowance is granted at 15% of Kshs. 11,000 = Kshs. 1,650 per month x 12 months x 6 years = Kshs. 118,000.*** The Respondent was in continuous breach of a

statutory provision. It is similarly an offence under the Employment Act and the Labour Institutions Act, not to pay an Employee his statutory dues. Payment can be enforced through the wage offence mechanism under the Labour Institutions Act, or enforced through a Cause such as filed by the Claimant herein. Such dues have accrued to the Claimant, and as long as his Claim in general is not affected by limitation of time, disparate claims accrued over the period of service, which were not honoured by the Employer during service, cannot be defeated by the statute of limitation. Respondent's submission that the prayer for arrears of house allowance is time-barred under Section 90 of the Employment Act has no merit. Every month the Respondent failed pay house allowance, there was a renewal in the cause of action.

17. 1 Month salary in lieu of notice is granted to the Claimant, based on his consolidated monthly salary of Kshs. 12,650.

18. Certificate of Service to issue.

19. No order on the costs.

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

IN SUM, IT IS ORDERED:-

a. It is declared termination was unfair.

b. The Respondent shall pay to the Claimant the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 151,800; arrears of house allowance at Kshs. 118,000; and notice pay at Kshs. 12,650, total- Kshs. 282,450.

c. Certificate of Service to issue.

d. No order on the costs.

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