



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 419 OF 2015

BETWEEN

EDMOND ICHAMI MUYEMBE.....CLAIMANT

VERSUS

NDOLO INVESTMENTS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimant

Mutisya & Associates, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 29th June 2015. He states he was employed by the Respondent in 2004 as a Security Officer, on casual terms. Beginning 2010, the Claimant was issued renewable short term contracts. He was sent away on 12th November 2012 for shortage of work. He was recalled on 11th June 2014 and placed on a contract. His last contract was for 6 months, beginning 29th December 2014. It was terminated by the Respondent on 19th April 2015 before maturing. He was accused by his Supervisor on 19th April 2015 of chewing a stimulant called *miraa*, or *khat* [*catha edulis*], and being inebriated while at work. He explained he was just chewing ordinary gum and was not drunk. The Supervisor and Management rejected his explanation. Respondent's Manager Ben, told the Claimant on the following day that his contract had been terminated. He asks the Court to declare termination was unfair, and grant the following orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 10,911.
- b) Annual leave pay for 13 years at Kshs. 114,660.
- c) Underpayment of salary at Kshs. 76,914.
- d) Service pay at Kshs. 81,900.

e) Gratuity at Kshs. 98,280.

f) 2 months' salary for the unexpired contractual period at Kshs. 21,822.

f) 12 months' salary in compensation for unfair termination at Kshs. 130,932.

Total...Kshs. 535,419

g) Costs, Interest and any other suitable relief.

2. The Respondent filed its Statement of Response on the 21st June 2016. Its position is that it employed the Claimant on 22nd January 2010 until 12th November 2012 when his contract was terminated on the ground of redundancy. He reapplied for his old job and was taken in on 11th June 2014 in a contract of 3 months; 20th September 2014 for 6 months; and 29th December 2014 for 6 months. He refused to transfer to a Branch Office of the Respondent on 19th April 2015. He deserted. His contract was not terminated by the Respondent. The Claim has no merit. The Respondent urged the Court to dismiss the Claim with costs to the Respondent.

3. The Claimant testified, and closed his case on 28th June 2016. Respondent's General Manager Bernard Oyigo testified, and closed Respondent's case on 30th November 2016. The matter was last mentioned on 10th February 2017 when Parties confirmed the filing of their Closing Submissions, and Judgment scheduled for delivery.

4. The Claimant restated in his evidence, his employment history and the terms and conditions of service, as outlined in the Statement of Claim. He alleged he was dismissed after he arrested an Employee of the Respondent called Kevin Monga're for stealing certain items belonging to the Respondent, from the workplace. Monga're had been employed through the intervention of the General Manager. The Claimant was not paid anything in 2012 when he was sent away on redundancy. It is not true that the Claimant chewed *miraa* or was drunk at work.

5. Cross-examined, he told the Court his earliest employment letter dates back to 2010, not 2004. He did not pursue benefits on redundancy in 2012. He was told he would be paid on return. He reapplied for his job, and was reemployed. He was blocked from consulting the Business Owner Ndolo by the General Manager. It is not true that he was transferred from one station to another, and declined transfer. He did not desert. His last monthly salary was Kshs. 8,000. He states it was Kshs. 10,911 in his Statement of Claim. He told the Court on redirection he was employed in 2004. He was not issued with a letter of transfer.

6. General Manager Oyigo confirmed the employment history of the Claimant at the Respondent. It is not true that the Respondent at any time accused the Claimant of chewing *miraa*. He left work voluntarily upon declining transfer to another site. Cross-examined, Oyigo told the Court the Claimant was not taken through a disciplinary process for refusal to transfer. He refused to submit himself to a disciplinary process saying he would report the Respondent to his Brother who is a Lawyer. He was paid Kshs. 18,000 terminal dues after redundancy in 2012. He was paid nothing in 2015 because he deserted.

The Court Finds:-

7. The Claimant states he was employed initially in the year 2004 as a Security Officer. He worked on casual terms until the year 2010 when he received the 1st written contract.

8. The Court is not able to find in his favour with regard to the date of employment. The Respondent states it employed the Claimant on 22nd January 2010. There is a letter of confirmation dated 30th October 2010. There are subsequent short term periodic contracts executed between the Parties. The Respondent adequately discharged the onus of proof, with respect to the date of employment, under Section 10 [7] of

the Employment Act 2007.

9. Record of redundancy in 2012 shows the Claimant was paid a sum of Kshs. 18,000 in terminal dues. Severance pay was based on 2 years completed in service, which would only confirm the year 2010, as the date of employment. The Court finds 2010 the more probable year of employment, based on a trail of employment records.

10. There is no evidence that the Claimant was transferred to a different site by the Respondent and declined transfer. It was never suggested by the Respondent that the Claimant left employment after he was caught chewing *miraa* or after being found drunk on the job. These are Claimant's own allegations which are not stated by the Respondent, as having any relevance to Claimant leaving employment. The explanation by the Respondent is that the Claimant was transferred, declined transfer, and deserted.

11. The record indicates he had been transferred by the Respondent many times in the course of his employment. He was transferred to various business premises by the Respondent. He is not recorded to have resisted or declined past transfers. All appear to be within Mombasa, so that it is questionable why he would decline the last transfer, which was within the same geographical space.

12. Oyigo testified there was no document recording Claimant's refusal to transfer. He was not taken through a disciplinary hearing, either on the charge of refusal to transfer, or desertion. The Respondent did not show valid reason in termination of the Claimant's contract, and there were no charges, or hearing in any form before the Claimant left.

13. Termination was unfair. Granted that there were only 2 months left in the last contract, there is no good reason why the Claimant should be paid the equivalent of 12 months' salary in compensation for unfair termination. ***He is granted the equivalent of 2 months' salary in compensation for unfair termination at Kshs. 16,000, based on his monthly salary of Kshs. 8,000.***

14. ***He is granted 1 month salary in lieu of notice at Kshs. 8,000.***

15. He did not draw the attention of the Court to the relevant Wage Orders, in supporting his prayer for underpayment of salary. The Court, in the absence of the relevant Wage Orders is unable to grant this prayer.

16. He merits gratuity for a period of 5 years worked from 2010 to 2015, under Clause 17 of the Regulation of Wages [Protective Security Services] Order 1998, given at ***18 days' salary for every completed year of service. This translates to Kshs. 27,692.*** He did not establish the prayer for service pay under any other legal regime. He did not submit on service pay in his closing Submissions, as a separate item from gratuity. His separate prayer for service pay is rejected.

IN SUM, IT IS OREDERED: -

a) Termination was unfair.

b) The Respondent shall pay to the Claimant: the equivalent of 2 months' salary in compensation for unfair termination at Kshs. 16,000; 1 month salary in lieu of notice at Kshs. 8,000; and gratuity at Kshs. 27,692- total Kshs. 51,692.

c) No order on the costs.

d) Interest allowed at 14% per annum from the date of Judgment till payment in full.

Dated and delivered at Mombasa this 28th day of June 2017.

James Rika

Judge