



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 299 OF 2014

BETWEEN

ERIC MUTUKU MWANZIA CLAIMANT

VERSUS

ECONOMIC MAINTENANCE PRODUCTS RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Marende Necheza & Company Advocates for the Claimant

Sichangi Partners, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on what appears in the receipt issued by the Court upon filing, as 1st July 2014. The Statement of Claim is dated 25th June 2014. He states he was employed by the Respondent as a Salesman in the year 2002, earning a basic salary of Kshs. 21,000. He earned a commission of up to Kshs. 2,450 up and above his salary, on reaching a certain target every month, giving him a total monthly pay, of Kshs. 23,550. He was entrusted the authority to withdraw money from the Bank and pay Employees, on behalf of the Respondent. He was assigned duty in Mombasa and Western Kenya. He was given money to promote Respondent's business. He worked weekdays and weekends. His contract was terminated by the Respondent on 25th November 2013. The Respondent alleged the Claimant was involved in private business. The Claimant states termination was malicious, unfair and unlawful. He prays for Judgment against the Respondent for:-

- a. A declaration that termination was unfair.
- b. Compensation for unfair termination the equivalent of 12 months' salary at Kshs. 282,600.
- c. 1 month salary in lieu of notice at Kshs. 23,550.
- d. Salary for days worked in November 2013 at Kshs. 19,625.
- e. Leave allowance at Kshs. 23,550.

f. Overtime on weekends at Kshs. 399,474.

g. Severance pay for 11 years at Kshs. 129,525.

Total... Kshs. 878,324

2. The Respondent filed its Statement of Response on 17th October 2014. It agrees to have employed the Claimant. His salary was Kshs. 21,000 monthly, not Kshs. 23,550. Commission was to earned based on a monthly target. He was authorized by the Respondent to withdraw money from Respondent's Bank, to facilitate his field work. He underperformed as sales went down in regions supervised by him. He misappropriated Respondent's money. He overstated mileage. He received money from Clients without accounting. His prayer for unpaid annual leave and overtime pay for work done of public holidays and weekends is time-barred. His total claim for Kshs. 878,324 is mathematically incorrect and extortionist. The Respondent prays for dismissal of the Claim, with costs to the Respondent.

3. The Claimant gave evidence, and closed his case, on 27th May 2015. The Respondent's Witness was due to be heard on 4th September 2015, 13th June 2016, and 8th February 2017. On the latter date the Court was informed that Respondent's Witness was terminally ill. It was agreed by Counsel, that Respondent's Witness Statement filed on 10th November 2014 is admitted as Respondent's evidence; and documents filed by the Parties similarly adopted as their exhibits. Hearing closed 8th February 2017. The dispute was last mentioned on 30th March 2017, when Parties confirmed the filing of their Submissions and Judgment scheduled for delivery.

4. The Claimant told the Court he was the Salesperson responsible for Coast and Western Regions. He earned a monthly salary of Kshs. 21,000. There was a commission of Kshs. 2,450. The Director, Rawal, accused the Claimant of having certain products which he was selling privately, in competition to the Respondent. The Claimant was not given a chance to explain. He was not given notice. His contract was terminated, on the ground that he was carrying out private business, in competition to his Employer's. He did not volunteer to work on Sundays. He was given a work schedule by the Respondent. He did not underperform. He did not misappropriate funds. He had been authorized to withdraw large sums by the Respondent. The allegations about Claimant misappropriating money was not in the letter of termination.

5. Cross-examined, the Claimant testified that payment of commission was subject to reaching a certain target. The Respondent had terminated Claimant's contract earlier on in 2002 on the ground of poor performance. The Respondent had written in 2009 to the Claimant, complaining about abuse of trust. The Claimant was reemployed by the Respondent after he explained himself. Redundancy was not a ground given by the Respondent in justifying termination. He was instructed to work overtime; he did not have written instructions in Court. He would travel Saturdays and Sundays. He was still on duty on those days. Redirected, the Claimant told the Court Kshs. 2,450 was wage arrears, paid after wage increment announced by the Government. The only issue relating to termination in 2013 was that the Claimant sold products privately, in competition to those of his Employer.

6. Y.R. Rawal states the Claimant was employed as a Field Salesperson. He was in charge of Coast and Western Regions. His basic salary was Kshs. 21,100 monthly. He was to earn incremental commissions based on sales made. He was paid an allowance while he travelled to his areas of duty. He chose to travel on Sundays instead of Mondays as instructed by the Respondent. He underperformed, with sales diminishing. He overstated mileage. He faked receipts, denying he was paid Kshs. 11, 126 by a Customer. He was issued a warning letter dated 14th December 2009. The Respondent had no choice but to terminate his contract after he admitted to these allegations.

The Court Finds:-

7. The letter of termination dated 25th November 2013, states no other reason in justifying termination, other than that the Claimant carried out private work in direct conflict with the interests of the Respondent. There was no allegation about poor performance, manipulation of mileage, and faking of

receipts etc. In the response to the demand letter written by Claimant's Advocates, the Respondent added to these other reasons in justifying termination, explaining that the Claimant was guilty of continuous irresponsible behaviour. The only relevant ground, in justifying termination, is that stated in the letter of termination.

8. Three questions arise in resolving the dispute: whether the reason given by the Respondent in terminating the contract was a valid reason; whether the decision was arrived at fairly; and whether the Claimant deserves the remedies sought.

9. Unfortunately, the Witness Statement filed by Respondent's Witness Rawal, does not establish that the Claimant was engaged in private business in competition to that of his Employer. The Respondent sold cleaning products such as detergents. Rawal does not identify which products the Claimant sold in competition to those sold by his Company. There are details of where, when and to whom the products were sold. The Respondent needed to do much more than merely allege the Claimant engaged in the objectionable practice of placing himself in competition with his Employer. The reason given by the Respondent was not shown to be a valid reason. Termination was not justified as required under Section 43, 45 and 47 of the Employment Act 2007.

10. Procedure was plainly unfair. It did not follow a single letter of the law under Section 41 and 45 of the Employment Act 2007. The letter of termination states termination was with immediate effect. There was no letter calling on the Claimant to show cause, why he should not face disciplinary action. There were no charges. The Claimant was not heard, in the presence of a Colleague, or a Trade Union Representative at the Shop Floor Level. There was no notice in any form, shade or colour. Termination was at the will of Y.R. Rawal. It was substantively bereft of justification, and procedurally flawed. ***It is declared termination was unfair.***

11. The employment relationship was governed by the contract dated 22nd April 2002, as varied by different letters, written by the Respondent to the Claimant, subsequent to the year 2002. From the contract, it is clear the Claimant was paid a monthly basic salary, and incremental commissions, based on the volume of his sales.

12. His last monthly basic salary as stated by Y.R. Rawal, and in Claimant's pay slip, was Kshs. 21,100. Anything paid above this was commission, which was variable, depending on sales targets achieved. There was no evidence that Claimant's invariable salary was at any time adjusted beyond Kshs, 21,100 monthly. There was allusion to adjustment through Wage Orders, but no Legal Notice on wage increment, applicable to the Claimant, was brought to the attention of Court.

13. ***He is granted the equivalent of 7.5 months' salary in compensation for unfair termination at Kshs. 158,250.***

14. ***Notice pay of 1 month, is granted to the Claimant at Kshs. 21,100.***

15. His contract was terminated on 25th November 2013. He was an Employee of the Respondent for 25 days in November 2013. ***He deserves salary for 25 days worked, which is granted at Kshs. 20,288.***

16. He prays for leave allowance. His contract entitled him to annual leave of 24 working days. He does not state which clause in the contract allowed him leave allowance. He does not specify which annual leave, the prayer for leave travelling allowance, relates to. He does not complain that he did not go on annual leave, and does not seek annual leave pay; he seeks leave allowance which is paid to enable the Employee travel while on annual leave, and is different from annual leave pay. There is no support for the prayer for leave allowance. The item is declined.

17. As a Salesperson, the Claimant travelled between Coast and Western Kenya. He states he worked on Saturdays and Sundays. There was no compulsion on him to work on weekends. The nature of work he did on these days involved travel. A Salesperson in transit has a degree of flexibility on his hours of work. The time taken in the aircraft, train or motorcar can hardly pass for overtime work, unless it can be

demonstrated the Salesperson was actively hawking his wares in these modes of transportation. The Court is not persuaded that the Claimant was actively on duty, on Saturdays and Sundays, to merit overtime pay of Kshs. 399,474. Furthermore he was on commission, so that if he selected to work excess hours, it would boost his sales and earn commission, rather than overtime pay. The prayer for overtime pay is declined.

18. Easier to reject is the prayer for severance pay. Severance pay falls under Section 40 of the Employment Act. It is paid on redundancy. No Party stated of alluded to a redundancy situation. Termination was on other ground, not redundancy. Severance pay is not available to the Claimant.

19. The Claimant does not pray for costs and interest. The Respondent did not participate in the proceedings in full, and it is only fair there is no order on costs and interest.

IN SUM, IT IS ORDERED:-

a. It is declared termination was unfair.

b. The Respondent shall pay to the Claimant: the equivalent of 7.5 months' salary at Kshs. 158,520 in compensation for unfair termination; salary for 25 days worked in November 2013 at Kshs. 20,288; and 1 month salary in notice pay at Kshs. 21,100- total Kshs. 199,638.

c. No order on the costs and interest.

Dated and delivered at Mombasa this 21st day of June 2017

James Rika

Judge