



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 268 OF 2016

BETWEEN

NICHOLAS MWEU MUIA CLAIMANT

VERSUS

NANAK MECHANICAL ENGINEERING LIMITED..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Kanyi J & Company Advocates for the Claimant

Sherman Nyongesa & Mutubia Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 31st March 2016. He states he was employed by the Respondent as a Fitter, in Mid-2009, on a monthly salary of Kshs. 10,000. The salary was raised to Kshs. 13,857 from April 2010, the rate applicable up to 1st February 2016, when the Respondent terminated the Claimant's contract of employment.

2. Termination was unfair. The Respondent gave no reason justifying its decision. The Claimant was not heard. He was paid 1 month salary in lieu of notice, 2 months' advance pay and 1 month annual leave pay, all totaled at Kshs. 52,000. He asks the Court to grant him Judgment against the Respondent, in the following terms:-

a) Service pay from 2003 – 2009 at 15 days' salary for every complete year of service at Kshs. 55,965

b) House allowance for the year 2008-2009 at Kshs. 35,040

c) Overtime at 8 hours every 6 days in a week, for 13 years at Kshs. 20,832 x Kshs. 122 = Kshs. 2,541,504

d) 12 months' salary in compensation for unfair termination at Kshs. 166,284

Total.....Kshs. 2,798,793

e) Certificate of Service to issue

f) Costs

g) Any other suitable relief

3. The Respondent filed its Statement of Response on the 22nd April 2016. The Claimant was dismissed upon being found to be persistently rude and disrespectful to Respondent's Manager Manmeet Singh. He also incited other Workers to strike and sabotage Respondent's business. The Respondent lost trust in the Claimant. Termination was fair. The Claimant is not entitled to any of the prayers. The Respondent prays that the Claim is dismissed with costs to the Respondent.

4. The Claimant testified he was employed in the year 2003. He stated 2010 was the year he was confirmed, and registered under the N.S.S.F and N.H.I.F. He was injured on his hand in July 2014. He was hospitalized July/August 2014. He reported back to work in September 2014. He was unable to continue fitting. He was reassigned to stores, where he issued spanners and other tools. He was placed on leave in January 2016. He reported back in February 2016. He was given the letter of termination. He worked from 8.00 a.m. to 6.00 p.m. Monday to Friday, with lunch break of 1 hour from 1.00 p.m. He worked from 8.00 a.m. to 4.00 p.m. on Saturdays. He amended the prayer for house allowance to cover the years 2007 -2009. There was no warning letter before dismissal. He was not warned about incitement.

5. Cross-examined, the Claimant stated N.S.S.F Statement for 2016 shows contributions were made. He was trained as a Fitter. He is a General Fitter. It is not true that the Respondent used complex machines. It was a general fitting industry. It is not true that the Claimant became a Fitter in 2009. He was a Fitter initially, earning a salary of Kshs. 3,000. He was injured while operating the machine. He was allowed sick leave of 2 months, and paid his salary while away. An apprentice assumed his role while he was away. The apprentice was paid by the Respondent for his role. The Claimant was compensated for his work injury. Storekeeping was light duty. The Claimant was paid for discharge of this role.

6. He discussed going on leave with his boss. Discussion took place in December 2015. He would take leave in January 2016. He took leave. He could not continue working as a Fitter after the accident. He was paid terminal dues shown in the letter of termination. He was paid annual leave pay, even though he was not owed any annual leave days. He did not have a written contract showing house allowance entitlement. He was subscribed to N.S.S.F. He did not have records showing he worked overtime. He did not sign any document authorizing overtime work. He requested for Certificate of Service from the Respondent. It has not been availed to him, the Claimant told the Court on redirection. The Respondent did not produce clocking records to counter the prayer for overtime. He did not reject light duty. He trained the Apprentice who assumed his role.

7. Manmeet Singh Jitsingh Sohansingh testified he is a Mechanical Engineer, working for the Respondent. He has worked for 16 years. The Respondent offers mechanical and general engineer fitting.

8. The Claimant approached Manmeet demanding he is granted annual leave. The Claimant was rude and disrespectful. He was paid his dues and left. He had brought Employees together to make demands by force. He had already been allowed annual leave of 30 days. Manmeet did not know why the Claimant became rude and disrespectful. It was not known to Manmeet why the Claimant was demanding to go on leave in December 2015. The Witness exhibited Leave Application Forms showing the Claimant had gone on leave on various occasions. He used to skip work without permission. The Respondent issued to him warning letter. He was paid a total sum of Kshs. 52,000 as terminal dues. He was a Member of N.S.S.F. Overtime worked was paid for in cash immediately, or at the end of the month. He never complained about overtime while in employment.

9. Manmeet told the Court on cross-examination that he has 22 Employees. He did not issue contracts spelling out terms of service. The Claimant worked for 6 or 7 years. The Witness was not able to say from which year. Manmeet did not give reasons for termination. He told the Claimant he would terminate his contract due to the Claimant's rudeness. The Claimant filled Leave Application Forms. He did not acknowledge warning letter. He did not train any other Employee. He worked up to December 2015. There were no records of overtime paid. He was paid on trust. He started work on casual terms. Manmeet did not know if N.S.S.F dues were paid from 2003 -2009. The Respondent did not warn the Claimant for being rude and disrespectful. Perhaps the procedure was flawed. The Claimant was not given his Certificate of Service.

The Court Finds:-

10. The Claimant pleads at paragraph 3 of his Statement of Claim that he was employed by the Respondent as a Fitter, from Mid-2009. He testified he was employed in the year 2003. He bases his prayers on a period of service of 13 years. The Witness Statement filed by Manmeet for the Respondent adopts the year 2009 as the year when the Claimant was employed by the Respondent. Manmeet also testified that the Claimant worked for 6 to 7 years. This evidence, coupled with the pleading by the Claimant at paragraph 3 of the Statement of Claim, leads the Court to conclude the Claimant was employed in the year 2009.

11. There is no dispute that the Claimant's contract was terminated by the Respondent. 2 reasons were given in justifying termination: the Claimant was rude and disrespectful to Manmeet; and he incited Colleagues to strike and sabotage Respondent's business. Other peripheral reasons are given in the Witness Statement filed by Manmeet to include persistent absenteeism and failure to obey instructions.

12. The evidence given by Manmeet did not satisfy the Court that these were valid grounds. It was not shown in which way the Claimant was rude and disrespectful. Details of his call to strike and sabotage production were not given. There were no dates given when the Claimant absented himself from work without the leave of the Respondent or without any other lawful cause. Manmeet conceded there was no reason given for the decision in the letter of termination dated 1st February 2016. He however stated he informed the Claimant he would be dismissed on the ground that the Claimant was rude. It was the evidence of Manmeet that perhaps procedure was flawed.

13. In the view of the Court both fairness of procedure, and substantive justification, lacked from the entire process leading to termination. Not only did the Respondent fail in giving valid reason, but failed also, in hearing the Claimant. There is no record of any charges leveled against the Claimant. There was no disciplinary hearing. The Respondent did not meet the minimum standards of fairness under Section 41, 43 and 45 of the Employment Act 2007. Termination was unfair. ***The Claimant is granted the equivalent of 6 months' salary in compensation for unfair termination at Kshs. 83,142.***

14. The prayer for service pay, from 2003 to 2009, is rejected on the ground that the date of employment was the year 2009.

15. Similarly the Claimant has not shown the Court that he was in employment between 2007 -2009 to merit consideration on the prayer for house allowance.

16. Overtime is calculated from the year 2003. The Court has concluded based on the Pleadings and Evidence on record, that the Claimant was employed in the year 2009. The claim for overtime at a staggering Kshs. 2,541,504 cannot therefore be mathematically correct. Factually, it has not been shown that the Claimant in any event, worked 8 hours uniformly in excess, over a period of 13 years. There were no records showing overtime worked. The formula adopted in computing overtime was not made clear to the Court. It was not made clear in the Evidence and Submission of the Claimant. The Claimant merely submits, without providing the Court with adequate evidence, that he should be granted overtime as pleaded. Furthermore it is common ground that the Claimant was away on sick leave for 3 months. He includes this period in his computation of overtime pay. The item is rejected.

17. There was no dispute on annual leave pay, and the Court is unable to discern what evidence the annual leave application forms, stands for.

18. Certificate of Service should have been forwarded to the Claimant without requiring him to make demands. It is the responsibility of the Employer under Section 51 of the Employment Act 2007, to place the Certificate of Service in the hands of the Employee. ***The Respondent shall release to the Claimant his Certificate of Service forthwith.***

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) Termination was unfair.

b) The Respondent shall pay to the Claimant the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 83,142.

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 in full.

Dated and delivered at Mombasa this 15th day of September 2017.

James Rika

Judge