



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 330 OF 2016

BETWEEN

ANTHONY KINGORO CLAIMANT

VERSUS

ABOO INSURANCE BROKERS LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Okanga & Company Advocates for the Claimant

Aboo & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 25th April 2016. He states he was employed by the Respondent as an Audit Junior from 29th June 2009, to June 2015 when his contract was terminated by the Respondent. His salary was Kshs. 39,000 per month as of the date of termination. He states termination was unfair, and that he was not paid his terminal benefits in full. He prays for:-

- a) 3 months' salary in lieu of notice at Kshs. 117,000
- b) Pro-rata annual leave at Kshs. 14,300
- c) House allowance at Kshs. 3,500
- d) Fuel allowance at Kshs. 2,500
- e) 6 months' salary at Kshs. 234,000
- f) 12 months' salary in compensation for unfair termination at Kshs. 468,000

Total..... Kshs. 839,300

g) Costs, Interest and any other suitable relief

2. The Respondent filed its Statement of Response on 28th May 2013. Its position is that the Claimant was employed by the Respondent as an Audit Junior for the period stated in the Claim. It was agreed between the Claimant, and Respondent's Director that the Claimant is transferred to Nairobi Office, where he would work until July 2015. From July 2015, the Claimant would cease being on salary, and would be engaged on commission only. He moved to Nairobi in June 2015 without informing the Respondent. He engaged Respondent's Clients directly, without involving the Respondent, and made misrepresentations to the Clients. This led to the Respondent losing some Clients. Notice period under his contract was 2 months. Other prayers as well, have no basis. The Respondent prays for dismissal of the Claim.

3. The Claimant gave evidence on 16th March 2017, and 28th June 2017 when he closed his case. Abdulmajid Mohamed Aboo gave evidence for the Respondent on the latter date, bringing the hearing to a close.

4. The Claimant told the Court he is a freelance Insurance Agent. He was employed by the Respondent in 2009 as a Marketer. He was issued a letter of appointment. His contract was terminated by the Respondent through the phone, in June 2015. He was in Nairobi when he received communication on termination. There was no letter of termination

5. He earned a salary of Kshs. 39,000. Notice period was for 3 months under the contract. The Parties had agreed the Claimant would be paid house allowance of Kshs. 3,500 monthly. He used a motorbike in doing his work, and was entitled to Kshs. 2,500 per month. 6 months' salary was granted to the Claimant under the contract. He was not given a hearing and prays for compensation for unfair termination. He was in marketing and underwriting. He did not perform other roles.

6. Cross-examined, the Claimant stated termination was by word of mouth, in June 2015. His salary for the month was not deposited. He called the Director from Nairobi, and was told there was no more salary. He pushed for payment of his salary, and was paid in July 2015. He had not agreed to be placed on commission. The text messages exhibited by the Respondent, between the Claimant and Director Aboo were correct. The two agreed once the Claimant was on his feet, he would work on commission. Aboo complained that the Claimant was not working. The Claimant in the text messages stated he would put things in order. He did not go on annual leave for the last year. He did so in bits in the other years. He took 5 days in May 2015. House allowance was paid through m-pesa and not reflected in the pay slips. Redirected, the Claimant stated he did not desert. His contract was terminated by the Respondent.

7. Aboo told the Court he had known the Claimant for 8 years. The Claimant was a marketing person. The letter of employment described the Claimant as Junior Auditor in error. It was copy-pasted from another Company, the Respondent being one, in a Group of Companies.

8. The Claimant was to start working on commission from 1st August 2015. He was to report to a specific Office. He did not do so, and did not hand over at Mombasa. Aboo did not know where the Claimant was. The Claimant sent Aboo *whassup* message on 30th June 2015, asking for his salary for the month. The Claimant was paid house allowance when he worked in Lamu, but not when working in Mombasa. Cross-examined, Aboo stated the Claimant was to work on commission from 1st August 2015. The Claimant did not report to Nairobi as instructed. For the 6 months he worked in 2015, his Child was sick, and his business output negligible. Aboo and the Claimant agreed the Claimant would go and work in Nairobi, to be with his family, in the hope it would stabilize him, and make him productive. The Claimant worked for 8 years.

The Court Finds:-

9. The Claimant was employed by the Respondent as a Marketing Officer on 29th April 2009. He left employment in June 2015. His last salary was Kshs. 39,000.

10. It was agreed between the Parties that from 1st August 2015, the Claimant would start working on commission. He was to work at Respondent's Office in Nairobi in the months of June and July 2015.

11. The text messages between the Claimant and Aboo exhibited by the Respondent confirm this arrangement. The arrangement however does not appear to have gone through. Aboo felt the Claimant was not working for these 2 months. The Claimant was told by Aboo, Aboo would not support the Claimant for the month of July, because the Claimant was not working. It was then that Claimant replied saying, " *I'll put things in order.*"

12. The Claimant complains that his contract was terminated unfairly, by the Respondent. This was done through a phone call.

13. The Court does not agree that termination was unfair. There was an agreement that the Claimant would cease to be an Employee of the Respondent, beginning 1st August 2015. He would become an agent of the Respondent, marketing Respondent's products at Nairobi. He was to earn a commission as opposed to a salary. In the 2 months of June and July 2015, he was supposed to work from Respondent's Nairobi Office. There is no evidence that he worked as agreed. He was paid his salary for June 2015. He was not paid salary for July 2015. He does not seem to have worked for the Respondent on commission as agreed, beginning 1st August 2015.

14. Termination was attributable to both Parties. It was agreed that the Claimant works on commission, beginning 1st August 2015. Employment ended effectively through this agreement between the Parties.

15. The prayer for compensation for unfair termination is declined as is the prayer for notice pay.

16. The date of termination in the view of the Court would be the date it was agreed the Claimant would cease to be on the payroll, and work on commission. This was 1st August 2015. He was still an Employee of the Respondent in July 2015. He merited the salary for July 2015, regardless of the Respondent's feeling that the Claimant was doing nothing. Aboo told the Claimant the Respondent would not continue 'supporting' the Claimant, as the Claimant was not working as expected. The Claimant was still in employment, and on the payroll. Payment of his salary should not have been viewed as an act of 'supporting' the Claimant. ***While the prayer for notice pay is disallowed, the Court orders under prayer [c] of the Statement of Claim, that the Claimant is paid salary for July 2015 at Kshs. 39,000.***

17. There was no evidence explaining the prayer for 6 months' salary. The Claimant stated merely that this was granted under his contract. The Court did not understand under which clause of the contract this prayer was made. It is noted however that the prayer was abandoned in the Closing Submissions filed by the Claimant. It should have been withdrawn earlier to avoid creating confusion in the mind of the Court, while analyzing the record and judgment-writing. The item shall be treated as withdrawn.

18. Fuel allowance was not included in the raft of payable benefits contained in the contract. It was not shown to have been the policy of the Respondent. There is no basis to grant an order for payment of fuel allowance.

19. Kshs. 39,000 paid to the Claimant monthly, was described in the pay slip as basic salary. There was no house allowance shown to have been paid. Aboo conceded the Claimant was not paid house allowance while based in Mombasa. The Claimant prays for Kshs. 3,500 as house allowance. It would seem he seeks house allowance for a month. ***He is granted Kshs. 3,500 as house allowance.***

20. There is no evidence that the Claimant took annual leave in his last 6 months, or received leave pay for the period. ***He prays for pro-rata leave of 14,300. The prayer is allowed.***

IN SUM, IT IS ORDERED:

[a] Termination of Claimant's contract was by agreement of the Parties, and not unfair.

[b] The Respondent shall pay to the Claimant salary for July 2015 at Kshs. 39,000; house allowance of Kshs. 3,500; and annual leave pay of Kshs. 14,300- total Kshs. 56,800.

[c] No order on the costs.

Dated and delivered at Mombasa this 24th day of November 2017.

James Rika

Judge