



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT MOMBASA
CAUSE NUMBER 14 OF 2015

BETWEEN

ERICK CHUMA ZAKACLAIMANT

VERSUS

RAKAL LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Ms. Maina Advocate instructed by Marende Birir Shimaka & Company Advocates for the Claimant

Ms. Adagi Advocate instructed by Inamdar & Inamdar Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his Statement of Claim on 20th January 2015. He claims he was employed by the Respondent on 1st March 2010. His duties comprised preparation of orders, packing and delivery of stationery. He was paid a monthly salary of Kshs. 13,000. His contract was terminated on 10th July 2013. He was not given any reason for termination. No notice preceded termination. He feels termination was unfair and unlawful, and seeks the following orders against the Respondent:-

- a) 12 months' salary in compensation for unfair termination at Kshs. 156,000.
- b) House allowance at Kshs. 2,500 per month added up at Kshs. 78,000 for the period in employment.
- c) Severance for 3 years at Kshs. 19,500.

Total..... Kshs. 253,500

The Claimant additionally prays for a declaration that termination was unlawful, unfair, illegal and wrongful; general damages and interest of the suit; and any other relief the Court may deem it fit to grant.

2. The Respondent in its Statement of Response filed on 3rd March 2015, concedes the Claimant was its Employee. He was paid Kshs. 13,000 per month, which was a consolidated salary, factoring in the housing element. He never throughout his employment raised a question on house allowance. On 9th July 2013, the Claimant was informed by the Respondent's Director, in the presence of the Claimant's Witness Mr. Mjomba, that the Claimant's contract would be terminated for operational reasons. The Respondent intended to reduce its cases of loss of stock. He did not contest termination. He was paid terminal benefits at Kshs. 19,842 after deductions. He was paid above the basic wage applicable to General Labourers. He does not merit the prayers sought.

Claimant's Case:

3. The Claimant testified on the 13th July 2015. He told the Court he worked as a Storekeeper. He used to package and forward Respondent's goods to various Customers. He was not paid house allowance. He was called by the Manager and told his contract of employment had been terminated. There was no warning or notice. He was advised there would be a meeting. He did not ask Mjomba to accompany him. It is not true that the Respondent was reorganizing. There were allegations of theft. Termination was unfair.

4. Cross-examined, the Claimant testified he was not given a written document assigning him the role of a Storekeeper. The Claimant was subscribed to the N.S.S.F. He did not know if other Employees earned house allowance. The Claimant seeks the assistance of the Court in terms set out in paragraph 1 of this Award.

Respondent's Case:

5. The Respondent testified through its General Manager Bhupendra Lakhamshi Shah, and Its Administrator Charles Mjomba, on 8th October 2015. Shah conceded the Claimant was employed by the Respondent, at a consolidated monthly salary of Kshs. 13,000. He was a General Labourer. He was consulted before termination. Other Employees were also affected by the layoffs. He was called to a meeting by the Management and asked to go along with a Colleague of his choice. The meeting took place on 9th July 2013. The Claimant attended the meeting in the company of a Colleague of his choice. He was advised to collect the letter of termination on 10th July 2013. He did so, was paid his terminal benefits, and acknowledged payment. He did not complain that the termination was unfair. He was subscribed to the N.S.S.F.

6. On cross-examination, Shah testified he stated in his Witness Statement, that the reason for termination was operational. There was loss of stocks. He also stated business was low. The Claimant was not selected for any specific reason. Others were released after him. There were no specific reasons why the Claimant was selected for termination. He did not recall when others left. The Claimant was notified of the meeting on 9th July 2013 by Mjomba, through the word of mouth. Kshs. 11,000 was the basic salary, and Kshs. 2,000 the house allowance.

7. Mjomba testified the Claimant was employed in 2010 as a General Labourer. He was the only General Labourer who left on the particular day; other General Labourers continued to perform the Claimant's function. Another Employee Sammy Mwendwa left employment on being laid off later. The Claimant was paid a net sum of Kshs. 19,842 in terminal dues, which he collected and acknowledged payment of. His house allowance was Kshs. 1,800. Mjomba prepared pay slips. Cross-examined, he stated business was low, leading to Claimant's loss of employment. Mjomba did not have proof of low business. There was no theft of stocks at the Respondent. There was a meeting held on 9th July 2013. Mjomba called the Claimant to the meeting. The Claimant did not have prior knowledge of the meeting. There were 5 General Labourers. 4 were employed before the Claimant. 16 General Labourers had previously lost their jobs. Mjomba testified he was not sure how much house allowance was. Business has not picked up to-

date. The Respondent prays the Claim be dismissed.

The Court Finds:-

8. There is no doubt the Claimant was employed by the Respondent Company on 1st March 2010. He states he was employed and worked as a Storekeeper. The Respondent states he was a General Labourer. It is not a material disagreement, as the Claimant does not seek any underpayment of wages. His designation is not material to the dispute.

9. He was paid Kshs. 13,000 per month. This is the rate agreed to between the Parties, and would not be affected by the Claimant's designation, considering the rates given in the Wage Orders are basic. Parties are free to negotiate rates above the basic. He states Kshs. 13,000 was the basic pay. He was not paid house rent allowance, which he claims at Kshs. 2,500. The Respondent explains that Kshs. 13,000 paid to the Claimant was a consolidated figure, which included house rent allowance. There was no clarity in the evidence of the two Witnesses who gave evidence for the Respondent on this. Shah stated the Claimant's basic pay was Kshs. 11,000, and house rent allowance at Kshs. 2,000. Mjomba, who prepared pay slips, stated house rent allowance was Kshs. 1,800. Presumably basic pay was Kshs. 11,200.

10. The pay slip attached to the Claim is self-explanatory. Basic pay is shown at Kshs. 13,000. The slot for 'house allowance' is left blank. Basic pay as the Court has stated in the past, is that pay received by an Employee, without any allowances. It cannot be that the salary of Kshs. 13,000, which is stated to be basic, was consolidated. Section 31[2] [a] of the Employment Act 2007 requires where house rent allowance is consolidated, there must be a provision in the contract of employment expressly stating so. The Respondent has not directed the mind of the Court to any such provision contained in any contract of employment.

11. The result is that the Claimant is entitled to claim arrears of house rent allowance. He claims Kshs. 2,500 per month. He does not justify the amount, merely stating this was the rent he paid where he resided. House rent allowance is not based on the actual rent an Employee pays, where that Employee chooses to reside. The Wage Guidelines fixes house rent allowance at a minimum 15% of the basic salary. The correct amount would be Kshs. 1,950, which for a period of 39 months and 10 days worked, translates to Kshs. 76,700. ***The Court grants to the Claimant house rent allowance in arrears at Kshs. 76,700.***

12. The Respondent was not clear, in explaining termination reasons. The two Witnesses for the Respondent gave various reasons why it was necessary for the Claimant to leave. Mjomba stated business was low. He did not have proof that business was low. Shah testified business was low, and there was need to reduce staff. It was stated the Respondent was reorganizing its business, with the aim of combating the problem of theft of its stocks. According to Mjomba however, there was no theft of the Respondent's merchandise. Section 43 of the Employment Act requires that in any claim arising out of termination of a contract of employment, the Employer shall prove the reason or reasons of termination. The Respondent did not do this. It instead oscillated between termination on account of theft of stocks, and termination on account of staff reduction due to diminished business. There was no clarity on the reason or reasons for termination. If it was based on reorganization, there was no explanation why only the Claimant, was marked out for the exit. The letter of termination is vague, stating merely that termination was due to changes of staff/personnel. The changes and personnel affected, and how these related to the Claimant's job, were not made known to the Court.

14. The nature of the hearing granted to the Claimant on 9th July 2013 is obscure. Was he being heard on account of the allegations of theft, or the meeting was merely consultative one, preceding declaration of his position redundant? Whatever its nature, procedure did not conform to Section 41 on hearing of an Employee. If it was intended that the Claimant's position had become redundant, the procedure under Section 40 was not followed. Either way there was no substantive justification and procedural fairness, in the termination process. ***The Claimant is granted compensation for unfair termination, the equivalent of his 6 months' gross salary, at Kshs. 13,000 + Kshs. 1,950 = Kshs. 14,950 x 6 = Kshs. 89,700.***

15. As it is not clear if termination was on the basis of redundancy [diminished business] or other causes, the Court does not find the prayer for severance pay merited. The Claimant should be contented that he was subscribed to the N.S.S.F. He did not leave employment without some form of social security. The claim for general damages is misplaced, the Claimant having pursued and been granted, compensation for unfair termination. IN SUM, IT IS ORDERED:-

a) It is declared termination was unfair.

b) The Respondent shall pay to the Claimant compensation for unfair termination at Kshs. 89,700 and arrears of house rent allowance at Kshs. 76,700- total Kshs. 166,400.

c) The sum shall be paid within 30 days of the delivery of this decision.

d) Interest granted at the rate of 14% per annum, with effect from the end of the 30 days, should the sum remain unpaid.

e) No order on the costs.

Dated and delivered at Mombasa this 22nd day of March, 2016

James Rika

Judge