



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 673 OF 2011

FREDRICK MORI OBENGE..... CLAIMANT

VERSUS

BIA TOSHA DISTRIBUTORS LTD RESPONDENT

Mr Awiti for the Claimant

JUDGMENT

1. This is a claim for compensation for unfair termination of employment, erroneous computation of terminal dues and withholding of salary for a month worked.
2. The Respondent did not enter appearance by itself or through an advocate inspite of service of summons and statement of claim on 11th July 2012 by Mr Arthur Odinga being a duly authorized process server.
3. The averments in the statement of claim and annexures 1 – 6 thereof have therefore not been controverted and the court takes the facts thereof as proven.
4. In summary, the Claimant was employed by the Respondent on 13th March 2007 as a Systems Operator and he received a letter of appointment with terms and conditions of service produced as annex 'FMo1'. Upon completion of probation the Claimant worked continuously until 26th August 2009, when the Respondent without notice and without following a fair procedure terminated the Claimant from its employment vide a letter produced as annex 'FMo2'.
5. The Claimant was not given a letter to show cause nor was he invited to a disciplinary hearing before the termination. The Claimant was offered;
 - a. 6 days salary from 20th to 26th August, 2009
 - b. One month's salary in lieu of notice
 - c. 4 days salary in lieu of leave days not taken less any dues owed to the company
6. At the time of termination the Claimant earned Kshs 21, 595 per month plus performance commissions. His payslip was produced and marked 'FM03'.
7. The Claimant disputes the allegation in the letter of termination that he had knowingly neglected to perform his work which omission allegedly led to loss of 38 empty crates of beer. The Respondent did not take opportunity to contest this denial by the Claimant having put no defence.

8. The Court therefore finds that the Claimant has proved on a balance of probabilities that his employment was terminated without a valid reason and without affording him a fair hearing contrary to sections 41, 43 and 45 of the Employment Act 2007.
9. The Claimant is therefore entitled to compensation in terms of Section 49(1) (c) as read with section 49 (4) of the Act.
10. The Claimant clearly intended to continue with his employment but was unlawfully and unfairly denied that opportunity. The Claimant lost his source of income and suffered loss and damage. The Claimant has not sought to be reinstated and claims 12 months maximum compensation. The Claimant had worked for a period of two years diligently and had a good record of work for the period.
11. Accordingly, the court awards the Claimant six (6) months' salary as compensation for unlawful and unfair termination of employment in the sum of Kshs 129,570.

Terminal Benefits

12. The Claimant seeks payment of Kshs 21,595 being salary for the month of August 2009. The claim has not been controverted and is awarded accordingly.
13. From the payslip marked 'FMo3' the Claimant was registered with NSSF and contributions were made in respect thereof. The Claimant is therefore not entitled to severance pay claimed in the statement of claim.
14. The Respondent is to pay one month salary in lieu of notice in the sum of Kshs 21,595 which was offered but not paid.
15. Total award to the Claimant is as follows;
 - a. Compensation (6 months) Kshs 129,570
 - b. Salary for August 2009 Kshs 21,595
 - c. Payment in lieu of one month notice Kshs 21,595

Total award is Kshs 172,760

16. The award is payable with interest at court rates from date of filing suit till payment in full. The respondent is also to pay the costs of the suit.

Dated and delivered at Nairobi this 18th day of March 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE