



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 293 OF 2015

BETWEEN

FELIX MUNYOTO MATHEKACLAIMANT

VERSUS

TEA WAREHOUSES LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Otwere Advocate instructed by Osoro Omwoyo & Company Advocates for the Claimant

No appearance 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 the 6th May 2015. He states he was employed by the Respondent Clearing and Forwarding Company as a Port Clerk, on the 1st June 2004. He worked up to 18th December 2012, when the Respondent unfairly and unlawfully terminated his contract of employment. His letter of dismissal is dated 18th December 2012, and states dismissal was effective from 14th January 2013. The Claimant feels termination was unfair and unlawful and seeks the following orders against the Respondent:-

- a) Deducted, but unremitted N.S.S.F contributions amounting to Kshs. 4,000.
- b) Deducted, but unremitted N.H.I.F contributions amounting to Kshs. 4,000.
- c) 1 month salary in lieu of notice at Kshs. 39,500.
- d) 15 days' salary for each year completed in service at Kshs. 138,250.

e) 12 months' salary in compensation for unfair termination at Kshs. 474,000.

f) Unspecified overtime pay.

Total..... Kshs. 659,750

g) Certificate of service to issue

h) Unspecified leave and house allowances

i) Costs; interest; and any other suitable relief

2. The Summons and the Statement of Claim were served on the Respondent at its Offices in Shimanzi, Mombasa. They were received and acknowledged by the Receptionist Mr. Alexander B. Furaha. The Respondent did not enter appearance, or file any form of Response. The hearing was scheduled for 13th October 2015. The Notice was served on the Respondent. There was no attendance on the part of the Respondent when the hearing took place. The Claimant testified, and closed his case on the 13th October 2015.

3. He told the Court he was employed by the Respondent in June 2004. He was a Port Clerk. His duties included loading and offloading of containers. He worked up to the year 2013 when the Respondent terminated his contract of employment.

4. A container was stolen from the Respondent's Go-down, sometime in 2012. It was recovered. The Claimant was alleged to have been involved in theft of the container and was arrested and charged in Chief Magistrates' Court at Mombasa Criminal Case Number 3150 of 2012. He was acquitted on 26th March 2015.

5. He was serving on contracts which were issued periodically every 3 years. He held a valid contract at the time of termination. He was dismissed with effect from 14th January 2013. There was no warning. He was not called upon to show cause why disciplinary action should not be taken against him. He was not heard. The criminal case was still on, when the Respondent decided to dismiss the Claimant. He worked on Saturdays and Sundays. He was not compensated for the excess hours worked. The standard meal allowance was deemed to be overtime pay by the Respondent. The Respondent did not forward his N.S.S.F dues for some months, despite having deducted the same from the Claimant's monthly dues. The Claimant prays the Court to allow the Claim.

The Court Finds: -

6. The Claimant's evidence, pleadings and submissions are unchallenged. The Court is satisfied the Claimant was employed by the Respondent Company as a Port Clerk, in the year 2004. He was dismissed by the Respondent, with effect from 14th January 2013. The reason given by the Respondent in the letter of summary dismissal, justifying the decision, is that the Claimant was involved in theft of the Respondent's container.

7. There was no disciplinary process leading to the dismissal decision. There were no charges. The Claimant was not called upon to show cause why disciplinary action should not issue. There is no evidence of any internal investigation carried out by the Respondent, which implicated the Claimant. If the Respondent intended to rely on the public processes driven by the Police and the Criminal Court, these processes culminated in the acquittal of the Claimant.

8. The Respondent had the obligation to show there was a valid reason to justify its decision, and show its decision was carried out fairly, as required under Section 41, 43, 45 and 47 of the Employment Act. It did

not at the time of making its decision meet these obligations. It did not attend Court and make any attempt by adducing evidence, to show any of these legal provisions were followed. The Claimant bore the burden of showing to the Court under Section 47 of the Employment Act that unfair termination occurred. This burden was adequately discharged through the unchallenged evidence, pleadings and submissions availed to the Court by the Claimant.

9. The Claimant is granted 8 months' gross salary in compensation for unfair termination at Kshs. 316,000.

10. The prayer for notice pay of 1 month does not seem to the Court wholly justified. The dismissal letter dated 18th December 2012 indicates dismissal was effective 14th January 2013. Less the December and New Year holidays, there were at the very least 15 working days between 18th December 2012 and 14th January 2013. The Claimant's contract entitled him to 30 days' notice. Notice pay should in the view of the Court be granted based on the balance of 15 days. **The Claimant is granted 15 days' notice pay at Kshs. 19,500.**

11. There is no support for the claim of gratuity. It is not a benefit conferred under any clause in the various contracts engaging the Claimant. It was not shown to be given under any wage instrument, collective bargaining agreement or law. If by gratuity the Claimant intended to pray for service pay under Section 35 of the Employment Act, he is ineligible for service pay as he was actively subscribed to the N.S.S.F.

12. He prays for refund of unremitted N.S.S.F and N.H.I.F contributions at 4,000 with respect to each statutory body. The Court does not think these contributions, if unremitted, should revert to him. They under the law should be remitted to the relevant bodies. The Claimant's role should be to follow up, and confirm with the relevant bodies that his accounts have been updated, so that he can derive maximum benefit under the law governing those bodies. The Respondent is directed to remit all contributions deducted on account of the Claimant's N.S.S.F and N.H.I.F obligations. In default the Claimant shall seek enforcement from the N.S.S.F and the N.H.I.F.

13. There was no evidence or material availed to the Court, to establish the claim for overtime pay. The Claimant simply pleaded 42 hours. He did not show when in the 7 years, he worked excess 42 hours. He gave the Court no evidence of his clocking system. The Claim for overtime pay is rejected.

14. Leave allowance and house allowances were mentioned by the Claimant. He also alluded to underpayments in his Statement of Claim. There was no evidence clarifying to the Court what these claims are about. There was no coherence to these claims. There was no evidential support of any form. These claims are rejected.

15. The Claimant shall have the costs of the Claim and interest at 14 % per annum, from the date of delivery of this Award.

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant 8 months' gross salary in compensation at Kshs. 316,000; and 15 days' salary in notice pay at Kshs. 19,500 – total Kshs. 335,000.

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

d) Costs, and interest at 14% per annum from the date of the delivery of the Award, to the Claimant.

e) Certificate of Service to issue.

Dated and delivered at Mombasa this 24th day of June 2016.

James Rika

Judge