



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 87 OF 2015

MORRIS MWENDA MATIRI.....CLAIMANT

VERSUS

MOBICOM (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday, 9th June, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 13.05.2015 through M/S F.K. Gitonga & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's action to summarily dismiss the claimant from his employment was unlawful, unfair and inhuman.
- b) A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- c) An order for the respondent to pay the claimant his terminal benefits and compensatory damages totaling to Kshs. 367, 500.00.
- d) Interest on (c) above from the date of the suit till payment in full.
- e) Costs of the suit plus interest thereon.

The statement of defence and counterclaim was filed on 25.05.2015 through Kiboi & Company Advocates. The respondent prayed that the claimant pays to the respondent a sum of **Kshs. 195, 220.00** being sums owing per the audit report of early September 2014 on account of shortages allegedly attributable to the claimant. The respondent further prayed that the claimant's suit be dismissed with costs.

The claimant filed the answer to defence and counterclaim on 09.06.2015 denying the counterclaim and praying for judgment as per the memorandum of claim.

At all material time the claimant served as the respondent's branch manager at Meru. The claimant had served in employment of the respondent for about 5 years. On 25.09.2014 the claimant was summoned by his supervisor one Janet Ondingo. The supervisor informed the claimant that an email from the respondent's head office had directed that the claimant's employment be terminated with immediate effect. The termination was without a notice or a hearing as per section 41 of the Employment Act, 2007 and the claimant's case was that it was therefore unfair, unlawful and inhuman because he lost

employment all of a sudden.

On 11.09.2014 the respondent had conducted an audit of sales at the Meru branch. As a result the claimant was said to have incurred a shortage in sales for Kshs. 195, 220.00. In the circumstances the claimant acknowledged receipt of an invoice alleging the shortage. It was the claimant's case that he had prepared the daily sales reports and such reports had not disclosed the shortages subsequently alleged in the audit report. After the audit the claimant protested the allegations to his supervisor and he was advised that the grievance would be resolved. He worked until 25.09.2014 when his supervisor advised him about the email that terminated his employment with immediate effect.

The court has considered the evidence on record and makes findings as follows.

The claimant's termination was unfair because the claimant was not afforded a notice and a hearing as per section 41 of the Employment Act, 2007. The claimant had served for 5 years. There is no reason to doubt the account by the claimant that on 25.09.2014 Janet informed the claimant about the email requiring the claimant to leave employment in view of the alleged shortage of Kshs. 195, 220.00. The claimant's employment was terminated by the said email and it was without a notice and a hearing as envisaged in section 41 of the Employment Act, 2007.

The respondent has not established the valid reason for that termination as envisaged in section 43 of the Act. The claimant was not showed the basis of the alleged shortage and the same was not shown to the court. First, the court returns that the termination was unfair and second, the respondent has failed to establish the counterclaim. The documents and records of reconciliation establishing the alleged shortage were not filed in court or explained to the court and they were not shown to the claimant before the termination. The claimant did not contribute to his termination. He was keen to continue in employment. He is awarded **Kshs.210,000.00** being 12 months' gross salaries and further one month pay in lieu of the termination notice being **Kshs.17, 500.00** under section 35(1) (c) of the Act (as the 3 months pay in that regard and as prayed for was not justified).

The claimant is entitled to recover his salary for September 2014 being **Kshs.12, 372.00** as it was deducted on account of a shortage which had not been established in a due administrative or disciplinary process initiated by the respondent for that purpose.

The claimant has prayed for 5 months' pay in lieu of annual leave for the 5 years of service at Kshs. 17, 500.00 per month making **Kshs. 87, 500.00**. At paragraph 3 of the statement of claim the claimant has stated that he was employed by the respondent particularly for 5 years. The respondent has submitted that the claimant has failed to show that he worked for the five years. Nevertheless, in paragraph 2 of the statement of defence the respondent has pleaded that it admits that it had employment relations with the claimant. The evidence on record does not suggest any other period the parties were in a relationship except the 5 years. There is no material denial by the respondent that the claimant served for 5 years. Taking the pleadings into account together with all other material on record, the court returns that on a balance of probability the claimant has established that he served for 5 years and he was not given the statutory annual leaves and he is entitled as prayed for.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The declaration that the respondent's action to summarily dismiss the claimant from his employment was unlawful, unfair and inhuman.
- 2) The respondent to pay the claimant **Kshs.327, 375.00** by 01.08.2016 failing interest at court rates to be payable thereon from the date of the judgment till full payment.
- 3) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Thursday, 9th June, 2016**.

BYRAM ONGAYA

JUDGE