



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 807 OF 2014

KENNEDY SENELWA OMBEVA.....CLAIMANT

VS

KEVITA INTERNATIONAL COMPANY LIMITED.....RESPONDENT

AWARD

Introduction

1. The Claimant's claim brought by a Memorandum of Claim dated 11th April 2014 and filed in Court on 15th May 2014 seeks compensation for unlawful termination of employment.
2. The Respondent filed a Response on 25th June 2014 and a supplementary bundle of documents on 8th December 2015. At the hearing the Claimant testified on his own behalf and the Respondent called Maurice Otieno Oyugi.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a driver at monthly salary of Kshs. 20,000 effective 1st March 2012. He worked from 7.00 am to 5.00 pm, seven days a week without leave or off day.
4. On 1st February 2014, the Claimant together with his Manager and a colleague driver by the name James traveled to Nakuru for a function. On the return journey to Nairobi, James was the one driving the company motor vehicle which he was allowed to take home by the Manager.
5. On reporting to work on 3rd February 2014, the Claimant discovered that some of the tools to wit; spanner and pliers were missing from the said motor vehicle. His colleague James said he was not aware of the whereabouts of the said tools.
6. On 8th February 2014, the Claimant together with his Manager and his colleague James traveled again to Nakuru and the issue of the missing tools was raised with the Claimant being blamed for misplacing them.
7. When the Claimant reported for duty on 12th February 2014, he was told by Maurice Otieno to go back home and report back on 14th February 2014.

8. On reporting back on 14th February 2014, the Claimant was told that he would be terminated. He signed for a termination letter on 14th March 2014 but the Respondent did not give him a copy.

9. On termination, the Claimant was paid one month's notice pay and salary for February 2014. He claims the following:

- a. A declaration that the termination of his employment was unlawful and unfair
- b. Overtime.....Kshs. 38,598.75
- c. House allowance.....39,727.68
- d. 21 days' leave pay.....17,767.11
- e. Service pay.....12,690.00
- f. Underpayment.....64,379.08
- g. NSSF refund.....2,400.00
- h. NHIF refund.....3,840.00
- i. 12 months' salary in compensation.....305,579.00
- j. Costs plus interest

The Respondent's Case

10. In its Response filed on 25th June 2015, the Respondent states that the Claimant was employed as a driver through a formal contract dated 12th February 2013.

11. The Respondent avers that the Claimant was engaged in activities bordering on gross misconduct. He had been issued with warning letters and given an opportunity to defend himself.

12. The Respondent sets out the following particulars of gross misconduct:

- a. Failing to obey lawful company policies issued by the Respondent or persons placed in authority over him and in particular allowing unauthorized personnel into the company's vehicle;
- b. Willfully neglecting to take care of company property therefore subjecting the Respondent to loss;
- c. Failing to heed to numerous verbal and formal warnings given to him.

13. The Respondent denies that the termination of the Claimant's employment was unlawful and unfair.

Findings and Determination

14. The following are the issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

15. The letter terminating the Claimant's employment is dated 14th February 2014 and states as follows:

"Dear Kennedy,

RE: NOTICE TO TERMINATE YOUR SERVICES

This is to inform you that you have been given one month's notice after which your employment would stand terminated.

You are further informed to proceed on your leave with immediate effect during this period of notice.

This decision has been made after exhausting all the available options at our disposal. You are aware of the previous warnings to you.

Your attitude has been unacceptable because of always loosing (sic) Company property.

You will be paid your February salary and for a further sixteen days as balance of your notice period.

Sincerely,

Maurice Oyugi

Manager"

16. From this letter the termination of the Claimant's employment had to do with loss of company property. The company property in issue is not defined but from the pleadings filed, the Court made the assumption that these were car tools that the Claimant was accused of having lost.

17. Section 43 of the Employment Act, 2007 requires an employer to have a valid reason for terminating the employment of an employee. This reason would ordinarily be made known to the employee in the course of internal disciplinary proceedings that are triggered by a notice to show cause.

18. The procedure to be adopted in conducting the internal disciplinary process is contained in Section 41 of the Act and as held by **Radido J** in **Loice Otieno v Kenya Commercial Bank Ltd [2013] eKLR** this procedure is mandatory even in cases of summary dismissal.

19. The Claimant denied any role in the loss of the tools and there was no evidence that he was given an opportunity to defend himself against these accusations in the manner contemplated under Section 41 aforementioned.

20. That being the case the Court finds that the Respondent failed to establish a valid reason for terminating the Claimant's employment and that in effecting the termination, due procedure was ignored.

Remedies

21. Before making a determination on the remedies available to the Claimant, I need to dispense with a preliminary issue regarding the effective date of the Claimant's employment with the Respondent.

22. The Claimant claims that his employment commenced on 1st March 2012 and the Respondent states that the Claimant was employed by a formal contract dated 12th February 2013. I have looked at this contract which was produced by the Respondent and have formed the opinion that it was the intention of the parties to reduce their agreement into writing.

23. Once parties agree to a written agreement which is legally acceptable, the Court should not interfere by introducing oral terms. The only exception would be where a written contract is issued to deny an employee accrued benefits. Having evaluated the evidence presented before the Court, I did not find any such mischief and therefore reach the conclusion that the effective date of the Claimant's employment was 12th February 2013 as stated in the contract of employment of the same date.

24. Back to the termination. The termination letter issued to the Claimant which I have reproduced above required the Claimant to take his leave during the notice period. There is no legal basis for such an arrangement. Notice and leave are two distinct entitlements for an employee and cannot be traded. The only option available to an employer who does not want an employee to serve notice is to pay salary for the notice period.

25. To my mind, an employer who avoids the obligation to give notice by asking the employee to take leave engages in an unfair labour practice. That said and having found the termination of the Claimant's employment substantively and procedurally unfair I award him six (6) months' salary in compensation.

26. In making this award I have taken into account the Claimant's length of service and the Respondent's conduct in the termination transaction with specific focus on the unfair labour practice I have cited above.

27. The Claimant also claims house allowance. Section 31 of the Employment Act, provides as follows:

31.(1) An employer shall at all times, at his own expense provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

2. This section shall not apply to an employee whose contract of service-

a. contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

b. is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

28. In *Milkah Khakayi Kulati v Sandstorm (Africa) Limited [2014] eKLR* this Court held that where there is no evidence that the salary of an employee contains a housing element, then house allowance is payable.

29. Clause 1 of the Claimant's employment contract which the Respondent relied on heavily provides for a basic salary of Kshs. 20,000. Additionally, none of the Claimant's pay slips reflects payment of house allowance.

Overall, the Court found no evidence that the salary paid to the Claimant was inclusive of house allowance.

30. I therefore award the Claimant house allowance at Kshs. 3,000 being 15% of his basic salary and adopt the resultant figure of Kshs. 23,000 as the Claimant's salary for purposes of this claim. In light of the finding that the Respondent erred in utilizing the Claimant's leave as notice period, I allow 14 days' leave pay having discounted 7 days which the Claimant admitted having taken.

31. With regard to the claims for National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) refunds, the only order I will make is for the Respondent to facilitate regularization of the Claimant's respective accounts. Service pay is not payable where an employee is a contributing member of NSSF and this claim therefore fails.

32. The claims for overtime compensation and underpayment were not proved and are dismissed.

33. Finally, I make an award in favour of the Claimant in the following terms:

- a. 6 months' salary in compensation.....Kshs. 138,000
 - b. House allowance for 12 months (3,000x12).....36,000
 - c. Leave pay for 14 days (23,000/30x14).....10,733
- Total.....184,733**

34. The award amount will attract interest at court rates from the date of the award until payment in full.

35. The Claimant will have the costs of this case.

36. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF JULY 2016

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JUDGE

Appearance:

Mr. Rakoro for the Claimant

Miss Wachanga for the Respondent