



REPUBLIC OF KENYA
IN THE INDUSTRIAL COUR AT MOMBASA
CAUSE NUMBER 255 OF 2014

BETWEEN

SAMUEL MUTUNGA MUNYAO CLAIMANT

VERSUS

**PHILEMEON MWEU NGEWA t/a COCONUT AUCTIONEERS AND JONGETO
ENTERPRISES... RESPONDENT**

Rika J.

Court Assistant: Benjamin Kombe

Mr. Kenzi Advocate instructed by B.W. Kenzi & Co. Advocates for the Claimant

Mr. Nyabena Advocate, instructed by Mathew Nyabena & Co. 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 the 5th June 2014. He states he was employed by Mr. Philemon Mweu Ngewa, who operates 2 enterprises, Coconut Auctioneers and Jongeto. He was employed in the position of a Marketing Clerk. He is not clear in his pleadings on the date of employment, but states he was confirmed to the position of Marketing Clerk, on the 30th March 2007. He was summarily dismissed by the Respondent on the 16th April 2014. He states dismissal was based on vendetta. It was unfair. His last salary was Kshs. 23,500. He prays for the following orders against the Respondent:-
 - a) 16 days' salary for work done in April 2014 at Kshs. 11,528.
 - b) Annual leave pay of 90 days at Kshs. 70,500
 - c) Severance pay at 15 days' salary for every year completed in service.
 - d) Sundays [supposed to get double pay] at Kshs. 285,121.20

Total..... Kshs. 489,399

e) General damages unfair termination.

2. The prayers, particularly prayer [d] and [e], are not clear in their wording.
3. The Respondent filed his Statement of Response on 4th February 2015. He admits to have employed the Claimant on permanent terms, on 1st February 2007, in the position of Clerk Marketer. The Claimant collected money from one Amos Kaburu Nchunge [a Tenant] on behalf of the Respondent's Client. He issued Amos the receipt, but did not forward the money to the Respondent's Office. When the Respondent enquired about the payment from the Claimant, after the Claimant had returned to work from his annual leave, the Claimant deserted work. The Respondent reported the matter to the Police. On 16th April 2014, the Respondent wrote to the Claimant advising him that after 12 days of absence, the Claimant was deemed to have dismissed himself from employment. The Respondent's Advocates forwarded cheques for the Claimant's February and March 2014 salary, through a letter dated 12th May 2014. At the same time the Claimant was invited back to continue with his employment. He was therefore not dismissed by the Respondent. The Respondent urges the Court to dismiss the Claim.
4. The Claimant gave evidence, and closed his case, on the 27th July 2015. The Respondent testified on 23rd October 2015, and on 19th February 2016, when hearing closed. The matter was last mentioned in Court on 17th June 2016 when the decision of the Court was reserved for delivery on the 29th July 2016.

Claimant's Position

5. He testified he worked for 7 years. He never went on annual leave. His sick leave was considered by the Respondent to be his annual leave. He had accumulated 90 days of unutilized annual leave.
6. He was not paid salary for February and March 2014. He was not paid salary for 16 days worked in April 2014. He was issued a letter of summary dismissal dated 16th April 2014. It was alleged he had absented himself from work for 14 days. He had not absented himself. His boss told him unless he agreed to testify against a Co-Employee who was faced with a case of theft against the Respondent, the Claimant would be dismissed.
7. The Respondent wrote reinstating the Claimant. The Claimant did not accept this, as he had not been paid his dues. The Claimant felt the Respondent was putting pressure on the Claimant to testify in the criminal trial.
8. The Claimant clarified in his evidence that he is seeking 16 days' salary, 90 days' annual leave pay, and overtime for excess hours worked on Sundays. His letter of appointment indicates Sunday was a working day.
9. Cross-examined, the Claimant stated he worked for both enterprises. He served warrants, and was involved in repossessions and attachments. He worked in all Respondent's Offices. He performed auctioneering roles Monday to Saturday, and did Jongeto duties on Sundays. He would be sent to the field on Sundays.
10. His Colleague Kisovi, dealt with finances. The Claimant, with Kisovi, served notice of distress for rent, on Amos Kaburu Nchunge. Mrs. Nchunge went to the Respondent's Office, and reported she had paid the money to Kisovi. Kisovi told the Claimant it was true, that Kisovi had been paid the money. He asked the Claimant to issue a receipt.
11. The Claimant issued a receipt stating cash was received. He had not seen the cash. He did not indicate Kisovi gave him the instructions. The Respondent and Kisovi were senior to the

Claimant. He would not disobey their instructions.

12. The Respondent wanted the Claimant to record a statement on the incident. He wanted him to be a Witness. It is not true that the Claimant refused to record a statement. He told the Respondent he did not know about the money. It was usual for the Claimant to issue receipts on superior's instructions.
13. The Claimant was subscribed to the N.S.S.F. He worked for 6 days in a week. He rested for 1 day. The working hours varied. There were Employees in every Branch. The Respondent sent the Claimant to any Branch the Respondent felt, was ineffective. He was told by the Respondent to leave after 16th April 2014. He looked for alternative work after dismissal. It is not true that the Claimant stole from a Customer.
14. The Claimant restated in winding up his evidence, that the letter of employment indicated Sunday was a working day. The Claimant was offered to be reinstated. He was not asked to repay the money alleged to have been misappropriated. He was not allocated work when he went back to work on 16th April 2014. The Claimant prays the Claim is allowed.

Respondent's Position

15. Philemon Mweu told the Court he and his spouse are Directors of the 2 firms. The Claimant worked for Coconut Auctioneers, not Jongeto. He was a Clerk and Marketer. The 2 firms operate under the same roof.
16. Coconut was losing money. Mweu investigated. Money was lost through receipts issued by Kisovi and the Claimant. There was a receipt for Kshs. 64,000 issued to Amos. It was signed by the Claimant. Cash was supposed to be received by the Person who signed the receipt. The Claimant confirmed he wrote the receipt. The Respondent reported the offence to the Police, who have since been looking for the Claimant.
17. Kisovi was arrested. The Respondent asked the Claimant to testify against Kisovi. He declined. He demanded to be paid his salary. He was told to wait. He did not. He disappeared. The Respondent made calls to the Claimant. He did not answer the calls. The Respondent wrote the letter dated 16th April 2014, advising the Claimant that he had deserted. Desertion resulted in self-inflicted dismissal. The Claimant wrote a demand letter to the Respondent, through the Claimant's Advocates. There was a consultative meeting involving the Parties and the Advocates. It was agreed the Claimant is paid his February and March salary. The Respondent also reinstated the Claimant. He rejected reinstatement. The Respondent was ready to have the matter solved amicably.
18. Mweu told the Court the Claimant was subscribed to the N.S.S.F. He had 84, not 90 pending annual leave days, as of the date he left employment. The Respondent and his firms did not work Saturdays and Sundays. There was a provision for work on Sunday, but there was no work. The Respondent did not collect debts on Sundays. The Claimant left the Respondent and joined a Competitor. He does not deserve compensation.
19. Questioned by the Claimant's Advocate, the Respondent testified he owns both firms. He assigned the Claimant to Coconut, not Jongeto. The letter dated 10th December 2013 indicates he could be called to work for Jongeto. The pay slips are in the name of Jongeto. Coconut dealt with auctioneering, Jongeto with real estate. It is not true that the Claimant was employed by both firms. The letter of confirmation dated 30th March 2007 was in the name of Jongeto. This was issued in that name by error.
20. The Respondent wanted the Claimant to testify against Kisovi. The Claimant refused to do so. Mweu thought the 2 Employees worked in collusion to misappropriate his firms' funds. The

money was never remitted to the office. The Claimant was never charged. The Claimant dismissed himself. If the Claimant goes back to the Respondent, the Respondent would discuss and consider re-employing the Claimant.

21. Mweu testified on redirection, that he gave the Claimant a hearing. The Claimant did not deny issuing the receipt. He was not told by Mweu to leave. He disappeared while under investigation. The Respondent was ready to take him back. There was a meeting between the Parties and the Claimant's Advocates. He agreed he wrote the receipt, but refused to assist the Police in prosecuting the offender. Perhaps in the view of the Respondent, the Claimant feared he would be apprehended. The Respondent prays the Court to dismiss the Claim.

The Court Finds: -

22. The Claimant was employed by Mr. Mweu. Mweu traded under the firms Coconut and Jongeto. It is of no effect whether the Claimant was assigned duty under the banner of Coconut, Jongeto or both; he was essentially an Employee of Philemon Mweu.

23. Mweu in any case, conceded the letter dated 10th December 2013, stated the Claimant could be called to work for any of his business firms. The letter confirming the Claimant dated 30th March 2007 was issued in the name of Jongeto. Pay slips issued in the name of Jongeto. The Claimant was an Employee of Philemon Mweu, in whatever form Philemon Mweu appeared.

24. He employed the Claimant as a Clerk Marketer. The date of confirmation, 30th March 2007 is clear on the record. The actual date of employment is less so.

25. It is also clear the Respondent wrote to the Claimant on 16th April 2014, alleging the Claimant had abdicated duty, resulting in summary dismissal. The Respondent explained in his evidence, that the Claimant had done so, to avoid being involved in the criminal prosecution relating to theft by Employee. Mweu intended to have, and pressured the Claimant to be, a Witness against the main suspect Kisovi, in the criminal trial. According to the Respondent, the Claimant vanished to avoid being a Witness, or for fear he could be an accused person. Displaying a certain degree of ambivalence, the Respondent testified that he did not dismiss the Claimant; the Claimant dismissed himself based on the above-stated apprehension.

26. The Respondent was less ambivalent in explaining what followed. He was issued a letter of demand from the Claimant's Advocates dated 28th April 2014. This was 2 weeks after the Respondent had written the letter of summary dismissal. The demand required the Respondent to meet same demands as are contained in the Statement of Claim. There was a meeting held between the Claimant and his Advocate on the one part, and the Respondent on the other. After this, the Respondent offered to reinstate the Claimant. He offered to pay the salary for February and March 2014. The Claimant rejected the offer. He explained to the Court he did so, because his terminal dues had not been paid.

27. The Court does not think the Claimant acted reasonably. The Respondent was willing to have him back in employment, after just about 1 month from the date of summary dismissal. The Respondent was making good the salary arrears, and restoring the Claimant in full, to the position at which the Claimant was, on 16th April 2014.

28. If, assuming the summary dismissal on 16th April 2014 was unfair, why would the Claimant reject the remedy offered by the Respondent a month later? The remedy of compensation is based on the assumption that an Employee has sustained economic loss. What loss did the Claimant sustain after he was offered full restoration in May 2014? It was the evidence of the Respondent that even if the Claimant offered himself for employment with the Respondent today, the Respondent would be open to having the Claimant back. The Court finds the Respondent to have acted reasonably all through, and even when he tripped such as when he declared the Claimant to

have dismissed himself, quickly recognized he had erred, and offered a reasonable remedial measure. The Claimant remained impervious to all entreaties.

29. It is not lost on the Court that the Claimant did issue a receipt, for money which was not remitted to the Respondent's Office. He was not under obligation to aid Kisovi, even if Kisovi was his superior, in a criminal undertaking. Employees are obliged to follow instructions of their superiors, only if those instructions are legally and reasonably issued. The Claimant had no reason to issue a receipt for any amount of money, just because he was instructed to do so by Kisovi. He had not seen any money being received. Why would he issue receipt, sign and acknowledge that money had been received? His first obligation was to the Respondent. He did not ensure that the Respondent's business was protected from loss and reputational damage.
30. Refusal by the Claimant to give evidence against Kisovi only firmed the view that the Claimant was involved in abetting and/or aiding the activities over which Kisovi was being prosecuted for. It was wrong to assume the Respondent was bent on exerting undue pressure on the Claimant to testify. The Claimant had issued the suspect receipt. It is not contested money was lost to the Respondent. The Claimant was first in the line of the commission of the offence, and his evidence central to uncovering the anatomy of the crime. There was no reason for him to resist giving evidence. It was his civic duty to testify.
31. In the end the Court does not think the evidence supports a conclusion that the Claimant was unfairly dismissed. He left employment in a cloud of suspicion. When the Respondent offered to have him back, the Claimant rejected the offer, probably because as suggested by the Respondent, he was working or expected to work for another Auctioneer. He suffered no economic loss. The claim for general damages for unfair dismissal is rejected.
32. There was no evidence that the Claimant worked every Sunday. The claim for overtime pay has no basis. Although the letter of appointment stated Sundays remained working days, the evidence of the Claimant was that he would be called by the Respondent and sent to the field even on Sundays. Mweu explained Sunday was not a routine working day, but the Claimant was not precluded from being called to duty, when the occasion demanded. The Court formed the view this was not regular duty, but duty required to be performed as a matter of exigency. It certainly cannot form part of a claim for cumulative overtime pay, for a consistent period of 7 years as claimed. Furthermore it is the position in the contract, and in the evidence of the Claimant, that he rested on Saturday. He worked 6 days of the week, and rested on Saturday. Regulation number 5 of the Regulation of Wages [General] Order stipulates that the normal working week shall consist not more than 52 hours, spread over 6 days of the week. The Claimant did not show that he worked over 52 hours in his 6 days of the week. Working on Sunday in itself, does not amount to automatic excess hours warranting overtime pay. The prayer is rejected.
33. The Claimant did not convince the Court that he was owed 90 days of annual leave. He did not specify the relevant years, during which these days accrued. He testified sick leave was translated by the Respondent into annual leave. He did not inform the Court when he was on sick leave, and on how many days he took such leave. The Respondent was candid, conceding in his evidence that the Claimant was owed 84 days of annual leave, as of 16th April 2014. ***The Court shall allow the claim for annual leave pay for 84 days - Kshs. 23,500 divide by 26 working days = Kshs. 903 x 84 =Kshs. 75,923.***
34. The claim for severance pay seems to the Court to be misconceived. Severance pay arises under Section 40 of the Employment Act, in redundancy situation. The evidence on record does not suggest there was such a situation. Service pay, assuming this is the prayer the Claimant intended to pursue under this head, is not available to Employees who are subscribed to the N.S.S.F or who are beneficiaries under other Social Security Plans. They are ineligible under Section 35 [6] of the Employment Act. The Claimant was subscribed to the N.S.S.F. His prayer for severance, or service pay, is rejected.

35. He left employment on 16th April 2014. This is when the letter of summary dismissal issued. It would not matter that the Claimant was on leave prior to this date. He was still in employment and entitled to his salary. He earned his salary for 16 days worked. There is no reason not to pay him for days worked. ***He is granted salary for 16 days worked at Kshs. 14,461.*** Parties shall meet their own costs of this litigation.

IN SUM, IS ORDERED:-

a)The Respondent shall pay to the Claimant annual leave pay at Kshs. 75,923 and salary for 16 days worked at Kshs. 14,461- total Kshs. 90,384.

b) No order on the costs.

c)The full amount shall be paid within 21 days, in default the amount to attract interest at 14% from the end of the 21 days, until full payment.

Dated and delivered at Mombasa this 29th day of July, 2016.

James Rika

Judge