



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 419 OF 2014

BETWEEN

GIDEON MUTETI NJAU CLAIMANT

VERSUS

SAMEER AGRICULTURE AND LIVESTOCK

KENYA LIMITED..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Vincent Chokaa & Company Advocates for the Claimant

Khalwale & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. Mr. Gideon Muteti Njau filed his Statement of Claim, on the 3rd September 2014. He states he was employed by the Respondent, on 1st November 2013, as a Sales Supervisor. He earned a salary of Kshs. 45,000 per month. He was dismissed by the Respondent through an e-mail, on the 13th June 2014. He feels termination was unfair and unlawful, and seeks the following orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 45,000.
- b) 8 months' salary for the 8 months left in his contract, at Kshs. 360,000.
- c) 11 days' salary for days worked in June 2014, at Kshs. 17,677.
- d) 21 days of annual leave at Kshs. 33,747.
- e) 10 months' unpaid N.S.S.F contributions at Kshs. 460,424.

f) Certificate of Service.

g) Damages for termination of service and loss of job.

h) Costs, Interest and any other order the Court may deem fit to grant.

2. The Respondent filed its Statement of Response on 12th October 2014. Its position is that the Cause is premature, and ought to have been lodged before the Labour Officer for investigation. It is conceded the Claimant was employed by the Respondent, as a Sales Supervisor. He was not employed on the basic salary claimed. He collected money from Respondent's Customers, failed to account and when asked by the Respondent to explain, absconded. He was given every opportunity to explain himself. He, instead of utilizing that opportunity, absconded. The Respondent states at the time of absconding, the Claimant owed the Respondent a sum of Kshs. 29,784. He did not issue the Respondent notice of termination, or pay 1 month salary in lieu of notice. The Respondent counterclaims Kshs. 29,784 and Kshs. 35,000 – total Kshs. 64,784.

3. The Claimant was heard in person, and closed his case on the 26th October 2015. Mr. Cedric Lumidi, Respondent's Human Resources Advisor, testified for the Respondent on the 18th March 2016, when the hearing closed.

4. The Claimant testified he was employed in January 2012. His contract was renewed for 15 months. His last contract commenced 1st November 2013. He was served with an e-mail communication by the Respondent, on 13th June 2014, terminating his employment, 8 months before the due termination date. There were a series of e-mails from the Respondent to him, alleging he owed the Respondent certain amounts of money. At no time was he called to account. It was alleged that he abandoned duty when challenged by the Respondent to account; he did not abscond. He urges the Court to find his contract was unlawfully and unfairly terminated, and grant the prayers sought.

5. Lumidi confirmed the Claimant was employed by the Respondent, in the position stated in the Claim. He had a fixed term contract, running from 1st November 2013, to 31st January 2015. He was a Sales Supervisor, earning a basic monthly salary of Kshs. 45,000. He was to supervise the entire Coast region.

6. The Claimant was not allowed to handle cash. He would not supply goods to unregistered Customers. He took goods worth Kshs. 19,000 to an unregistered Customer. The Head of Sales e-mailed the Claimant asking for an explanation. The Claimant did not respond. He absconded. The Respondent made attempts to call the Claimant. He did not respond. He is not entitled to the remedies claimed. He was subscribed to the N.S.S.F. He did not render any services for the 8 months he seeks to be paid for. He worked for less than 1 year. He does not merit annual leave. N.S.S.F would be payable to the Fund, not to the Claimant.

7. Questioned by the Claimant, Lumidi testified he was aware the Claimant had worked from 2012. He served under his second contract in 2013. E-mail communication from the Head of Sales to the Claimant was official. Lumidi did not have any invoices showing the Claimant supplied goods to an unregistered Customer. The matter was not reported to the Police. The Claimant's contract was renewed and salary improved in 2013. The Claimant was working well initially, but changed later. He absconded. The Witness clarified on redirection that he did not deal with accounts documents. The Claimant was granted the opportunity to state his case. The Respondent urges the Court to dismiss the Claim.

The Court Finds: -

8. The Claimant was employed by the Respondent Company as its Sales Supervisor based at Mombasa. He earned a basic salary of Kshs. 45,000 per month. He was contracted for a fixed period, running from 1st November 2013 to 31st January 2015. He had previously served under another contract from the year 2012.

9. The Claimant did not serve his last fixed term contract to maturity. It was alleged by the Respondent

that the Claimant had supplied goods to unregistered Customers, sometime in June 2014. When asked by e-mail to explain, he abandoned duty. Attempts by the Respondent to reach the Claimant did not yield fruit. The Respondent therefore maintains the Claimant absconded, and owes the Respondent the sums mentioned above as counterclaim.

10. The assertion that the Claimant supplied goods to unauthorized Customers, and owed the Respondent the sum of Kshs. 29,784 or Kshs. 19,784, arising from these transactions, was not adequately supported through evidence. There were no documents showing the nature of requisition and supply. There was no evidence from the Driver who made the deliveries. The unauthorized recipient of the goods was not made known to the Court, and was not called as a Witness.

11. There was an email from the Respondent asking the Claimant not to report to work until he was cleared. This appears to support his claim that he was told by the Respondent not to continue working. It does not seem to the Court that the Claimant abandoned his position. He was expressly informed by his Employer to step aside until he was cleared.

12. What followed after the Claimant stepped aside? The Respondent states it made attempts to recall the Claimant, but the Claimant was unreachable. There is no evidence of any communication recalling the Claimant, and no evidence that the Respondent formally brought any charges against the Claimant, either on the allegation relating to abandonment of duty, or supply of goods to unregistered Customers.

13. In the view of the Court termination was flawed for lack of valid reasons or reason in justification. It did not meet the threshold for procedural fairness under Section 41 and 45 of the Employment Act.

14. The Claimant seeks 'damages due to termination of service and loss of job.' He also prays for salary for the 8 months left in his contract period. Compensation aims at redressing economic injury. It would be double compensation if the Claimant is paid compensation, and salary for the remainder of his contract. **He is granted compensation for unfair termination, the equivalent of his 7 months' salary under Section 49 of the Employment Act at Kshs. 315,000.** The prayer for anticipated salary for the balance of the contract period is rejected.

15. The Respondent instructed the Claimant to step aside, but did not formally terminate his contract, or issue notice of termination. The allegation that the Claimant abandoned work has been rejected by the Court, **and grant of 1 month salary in lieu of notice at Kshs. 45, 000 is allowed.**

16. **The claim for 11 days worked in June 2014 is allowed at Kshs. 17,677 as prayed.**

17. The Claimant had not finished 12 continuous months in employment, under his last contract, as of June 2014. He was not ripe for annual leave entitlement under Section 28 of the Employment Act. He served under different contracts from 2012. He would not be deemed to be in continuous service, with respect to the two contracts. The second contract was in the form of *tabula rasa*. The prayer for annual leave pay is declined. The N.S.S.F deductions are a statutory obligation owed by the Parties to the N.S.S.F. It is not to be retained by the Employer, or returned to the Employee; it should if confirmed to have been deducted and unremitted, be forwarded to the N.S.S.F, on account of the Claimant. The Claimant would then pursue this as part of his Social Security Benefits with the N.S.S.F. If for some reason the Employer has not remitted the contributions to the Fund, the Claimant should follow up the matter with the N.S.S.F, rather than seek refund from this Court. The prayer is declined.

18. The Court finds no evidence to support the counterclaim, and the same is declined.

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant the equivalent of 7 months' salary in compensation for unfair termination at Kshs. 315,000; 1 month salary in lieu of notice at Kshs.

45,000; and salary for 11 days worked in June 2014 at Kshs. 17,677 – total Kshs. 377,677.

c) Certificate of Service to issue.

d) No order on the costs.

Dated and delivered at Mombasa this 23rd day of September 2016.

James Rika

Judge