



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NUMBER 432 OF 2015

BETWEEN

MOHAMED NAZIR EBRAHIMCLAIMANT

VERSUS

CORNER GARAGE & SPRAYING WORKS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Nyandwat Odundo & Company Advocates for the Claimant

Kanyi J & 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. Mohamed Nazir Ebrahim filed his Statement of Claim on the 1st July 2015. He states he was employed by the Respondent Garage, on or about 21st May 1971, as the Garage Administrator. He was not issued a written contract. He worked up to December 2011. He worked diligently and helped the Respondent establish a good customer portfolio. He states the Respondent terminated the Claimant's contract without just cause and notice after the Claimant fell ill. In the year 2014, it became clear to the Claimant that the Respondent would not pay him terminal dues, and the balance of the Claimant's salary arrears, necessitating the filing of the Claim, through which the Claimant seeks the following orders against the Respondent:-

- a) 7 months' salary arrears at Kshs. 385,000.
- b) Pending annual leave for 2 years at Kshs. 77,000.
- c) 1 month sick off at Kshs. 55,000.
- d) Service pay at 15 days' salary for each of the completed years of service at Kshs. 1,100,000.

e) Compensation for unfair termination.

f) Costs, Interest and any other suitable reliefs.

2. The Respondent filed its Statement of Response on 30th June 2015. It concedes to having employed the Claimant through an oral contract, as its Administrator. He was employed on or about May 1972. His gross salary was Kshs. 55,000 as stated in the Claim. He did not work up to November 2011. He deserted duty sometime in October 2011. He resurfaced in September 2012 claiming he had been unwell. He was offered his job back, but did not show up the following day. The Respondent reached out to the Claimant, who reported to the Respondent that he would be in a position to resume duty in March 2013. He did not resume at all. He instead reported sometime in 2014, demanding to be paid salary arrears. The Respondent computed the Claimant's terminal dues. The Claimant was paid his terminal dues. He abandoned work. His contract was not terminated by the Respondent. It is stated by the Respondent that the Claimant purchased Motor Vehicle registration number KAJ 446 K from the Respondent at Kshs. 150,000. He did not pay the purchase price. He did not issue notice of termination to the Respondent. The Respondent counterclaims Kshs. 150,000 in purchase price, and Kshs. 44,190 in notice pay- total Kshs. 194,109.

3. The Claimant filed a Reply to the Statement of Response, and Response to the Counterclaim, on the 14th August 2015. The Claimant paid for the Motor Vehicle in full at the time of the transfer of ownership, in line with paragraphs 5 and 6 of the Sale Agreement dated 10th November 2010. His employment was terminated unfairly and unlawfully by the Respondent after the Claimant fell ill. The Counterclaim has no merit.

4. The Claimant gave evidence, and closed his case on the 10th December 2015. The Respondent's Financial Controller Mr. Shiraz Shamshudin Abdulkadir gave evidence for the Respondent on the 18th March 2016 when hearing closed. The matter was last mentioned in Court on the 22nd June 2016, when Parties confirmed the filing of their Submissions and Award of the Court reserved for 5th September 2016.

Claimant's Case

5. The Claimant testified he worked for the Respondent for 40 years. His duties as the Administrator involved overseeing breakdown services; purchase of spare parts; and preparation of job cards, among other duties. He became unwell in 2011. He gave a medical report from his Doctor to the Respondent's Financial Controller.

6. He was never issued a letter of termination, or called to a disciplinary hearing. He did not have any warning letters. He was given 3 cheques by the Respondent in September 2012, which reduced his salary arrears to 7 months. Part-payment was made because the Claimant had requested to be paid, as he was due for treatment in India.

7. He was owed annual leave for a period of 2 years by the time he left. He was told he was not entitled to service pay, because he was a member of the N.S.S.F. The Claimant testified he merits service for the period the law excluding him from receiving such payment, was not in place. He was paid a total of about Kshs. 160,000 in installments of about Kshs. 20,000 every week. He was in the meantime dependent on his family for support.

8. It is not true that the Claimant was offered back his job, which he declined. There was no communication from the Respondent making such an offer. He did not abandon work in 2011. He availed his Doctor's letter to the Respondent. Secondly, he lived next to the Respondent's Directors. They knew where he lived. He received Kshs. 331,000 from the N.S.S.F. He claims service pay at Kshs. 1,100,000.

9. The Claimant testified he had agreed Kshs. 150,000 be deducted from his terminal dues, in settling the purchase price for the motor vehicle sold to him by the Respondent. The Claimant denied that he ever

wrote a letter of resignation. He was asked by Mr. Shiraz to write the letter dated 9th May 2014, indicating he resigned from the Respondent, in order for the Claimant to be paid his outstanding dues. He was asked to sign a discharge to receive his dues, which he refused to sign. He was healthy and ready to continue working.

10. Questioned by the Counsel for the Respondent, the Claimant testified he studied up to form 3. He worked from 21st May 1971. He was placed on the pay roll in 1972. From 1972, his salary had N.S.S.F contributions deducted.

11. He left work in September 2011 after he fell ill. He was granted sick off in October. He took his Doctor's letter to Shiraz. He did not follow up with his Employer after he delivered the letter. His health was better by March 2012. He did not seek extension of his sick leave. He agreed he was sold a vehicle by the Respondent at the cost of Kshs. 150,000. He would be willing to return to work if the Respondent recalled him. Shiraz drafted the letter which alleged the Claimant had resigned. The Claimant did not abscond. He prays for 7 months' salary; annual leave for 2 years; 1 month sick-off; service pay; and compensation for unfair termination. He does not object to the Counterclaim on the cost of the vehicle. The Counterclaim on notice pay is not justifiable. The Respondent offered to pay the Claimant Kshs. 176,407. He was paid Kshs. 160,000, with a balance of Kshs. 16,407. N.S.S.F dues were paid to the Claimant. He asks for service pay with regard to the years before the Employment Act 2007. He prays for compensation for unfair termination, believing termination was instigated by the Respondent. Redirected, the Claimant told the Court he delivered his Doctor's letter to Shiraz, and saw no need to seek extension of sick off afterwards. He was compelled to pursue his dues for almost 3 years. He was never issued with a letter to show cause why disciplinary action should not issue.

Respondent's Case

12. Shiraz testified he has worked for the Respondent for 12 years. The Claimant was Purchasing Manager, employed in 1972. He worked for 40 years, serving up to 2011. His last salary was Kshs. 55,000.

13. The Claimant left employment in September 2011. The Respondent recalled him severally. He kept saying he would return on various dates. He did not honour his pledges. He finally reported in January 2014, said he wanted to quit and demanded, that he is paid his terminal benefits. The Respondent agreed to pay. He wrote the resignation letter dated 9th May 2014. He resigned on medical grounds.

14. The Respondent owed him 7 months' salary at Kshs. 308,763 and annual leave for 2 years at Kshs. 61,753. The Respondent considered the Claimant to owe the Respondent notice pay of 1 month basic salary, which was deducted from his dues. The Respondent similarly deducted the sum of Kshs. 150,000 in purchase price for the vehicle sold to the Claimant in 2010. The Claimant was paid a total of Kshs. 176,407 in installments of Kshs. 20,000. He signed 8 vouchers for a total sum of Kshs. 160,000. He was advised to collect the balance of Kshs. 16,407, but never did so. He was assisted by the Respondent in payment of his N.S.S.F benefits. He never supplied the Respondent with any medical evidence confirming he was ailing. Shiraz explained the Respondent put in a Counterclaim 'just in case' the Court finds the Respondent is owed something by the Claimant. He testified the Respondent is ready to pay the Claimant Kshs. 16,407 left of his total dues.

15. " My relationship with the Claimant was very good," Shiraz stated on cross-examination. He knew where the Claimant resided. The Claimant had been resident at the place for about 20 years. Shiraz called the Claimant several times. The Claimant promised to return but never did so. Only he could say why he did not return. He was owed 7 months' salary. It is not a fair labour practice to withhold an Employee's salary. He had a car loan of Kshs. 150,000. It is not true that he gave his Doctor's letter directly to Shiraz. He was paid in August 2014, after 3 years from the date he left in 2011. The Respondent had a problem with its cash flow. It is true the Claimant was going back to the workplace on several occasions to demand for his dues, not to demand for his job back. The Respondent did not terminate the Claimant's contract of employment. Shiraz did not write the letter of resignation. The Claimant wrote the letter voluntarily. He is owed Kshs. 16,407 by the Respondent. He was not required to sign the discharge before

he could be paid this amount. Shiraz closed his evidence with the clarification that the Claimant's Doctor gave him sick off for 1 month; he did not return to work, even after this month expired.

The Court Finds: -

16. The Claimant's position is that he was employed by the Respondent Garage as an Administrator, on the 21st May 1971. The Respondent agrees to have employed the Claimant, but gives the date of employment as falling in the year 1972. The legal position under Section 10 of the Employment Act is that the Employer has a duty, to give an Employee, particulars of employment. The date of employment is a particular of employment. If, in any legal proceedings, the Employer fails to produce a written contract proving its position with respect to a disputed term of the contract, or disprove the position given by the Employee as the correct term, the position given by the Employee prevails. In this case the correct date would therefore be the 1971 date, stated by the Claimant.

17. Although Parties went at great lengths in justifying their respective positions with regard to the other aspects of the dispute, the Court is of the view that the issues in dispute fall within a very narrow space.

18. It is agreed the Claimant worked for about 40 years. It is also agreed that he was actively subscribed to the National Social Security Fund. A huge chunk of his Claim is based on service pay for the 4 decades worked, calculated at Kshs. 1,100,000. He is not entitled to service pay under Section 35 [6] of the Employment Act. This has been the holding in a catena of this Court's decisions [refer to ***Nairobi Industrial Court Cause Number 352 of 2012 between Abdi Halaka Garamboda v. Fidelity Security Systems Limited***; and ***Mombasa E&LRC Cause Number 298 of 2015 between William Mureka Okinda v. Southern Shipping Services Limited***, as well as ***Mombasa E&LRC Cause Number 254 of 2015 between Caleb Otieno Nyakwan v. Kalpesh Marji t/a Umiraj Enterprises***]

19. The Court does not agree with the Claimant that he would be entitled to service pay for the period the Employment Act 2007 was not in force. He did not show to the Court what law, or wage instrument entitled him to service pay, or gratuity pay, with regard to the period before the coming into force of the Employment Act 2007. He was paid N.S.S.F benefits at Kshs. 331,000, based on the whole service period, and has no reason to seek additional social security benefit. The claim for service pay is rejected.

20. It is difficult to understand why the Claimant seeks arrears of salary of 7 months. He acknowledged this was paid in installments of Kshs. 20,000, with the Respondent acknowledging a balance of Kshs. 16,407. The Claimant conceded he was sold a vehicle by the Respondent for Kshs. 150,000, which he had not paid by the time he left. Both Parties accept the money was offset from the Claimant's dues. Why then would the Parties waste time in claiming and counterclaiming what is not owed?

21. The claim for 1 month sick off at Kshs. 55,000, as well as that of annual leave pay at Kshs. 77,000, are similarly without merit. The Claimant left employment in September 2011. He obtained sick off in October 2011. He did not have the leave of the Respondent when he left initially. The 1 month granted to him by the Doctor expired. The Claimant did not seek extension. He just stayed away. Section 30 of the Employment Act requires ailing Employees to avail to the Employers a certificate of incapacity to work signed by duly qualified medical practitioner. The Employee must notify the Employer or cause the Employer to be notified about the Employee's absence, and the reasons for it. Notification must be made as soon as is reasonably practicable. The Respondent disputes receiving the letter from the Claimant's Doctor. Even assuming the letter was received, sick leave was for a specific period of 1 month. After this the Claimant kept away without reverting to the Respondent. He has no reason to demand to be paid 1 month sick off, while he opted to extend his sick leave indefinitely. It similarly is not justifiable to claim pending annual leave for 2 years. The Claimant was not clear which years this claim relates to, out of his over 40 years of work.

22. Was termination unfair? The Court has concluded the Claimant was largely at fault, having left employment on the strength of his sick off, and extended this break indefinitely, without involving the Respondent. Perhaps he felt there was no need to go on working, because he was in poor health and not receiving his regular monthly salary. He did not show that his contract was terminated by the Respondent.

He does not even claim he was constructively dismissed. In the view of the Court he opted to cease working based on a mixture of poor health and non-payment of salary. Termination was not at the instance of the Respondent. It was for the Claimant to show to the Court, under Section 47 [5] of the Employment Act 2007, that unfair termination took place. The Respondent would only be required to justify its decision once the Claimant has discharged this obligation. The Claimant did not show he was unfairly dismissed by the Respondent. There is no decision which was made by the Respondent. The Respondent cannot therefore be called upon to justify anything.

23. The Claimant was wronged by the Respondent by having his salary of 10 months withheld. He was taken through a rough patch. It took nearly 3 years for the Respondent to pay. When paid, it was in installments of Kshs. 20,000 for about 8 weeks. He was not happy with the treatment. The Employment Act requires that the salaries or wages of an Employee are paid when they fall due, under Section 18. The Respondent breached this law, and its obligation under the contract of employment. The Court is of the view that the Claimant would be entitled to damages for breach of his terms of employment, with regard to the delayed salary, but not compensation for unfair termination. There is no doubt he was taken in circles before his arrears of salary were met in staggered installments. He was ailing and had to rely on his family for sustenance. The Respondent, if hampered by financial resources, did not come out and boldly engage the Claimant on the staggered mode of payment. Why would the Respondent retain the Claimant's arrears of salary for nearly 3 years? The conduct of the Respondent was contrary to its contractual and statutory obligation to pay the Claimant his salary when due.

24. The Claimant is therefore granted damages for breach of contract, rather than compensation for unfair termination, under the prayer for any other suitable remedy, at Kshs. 220,000.

25. He is granted the balance of his arrears of salary at Kshs. 16,407. He did not notify the Respondent on leaving employment, particularly after his sick leave had expired. **In the view of the Court the Respondent's counterclaim for 1 month basic salary in notice pay, at Kshs. 44,109 has merit and is allowed.**

26. Costs to the Claimant.

IN SUM, IT IS ORDERED:-

a) The Claimant's contract was not terminated by the Respondent and compensation is not payable.

b) The Respondent shall pay to the Claimant Kshs. 220,000 as damages for breach of contract, and Kshs. 16,407 as balance of the Claimant's salary- total Kshs. 236,407.

c) The Claimant shall pay to the Respondent 1 month basic salary at Kshs. 44,109 as notice pay to be offset against the sum in [b].

d) In total the Respondent shall pay to the Claimant the sum of Kshs. 192,298.

e) Costs to the Claimant.

f) Interest granted to the Claimant at 14% per annum from the date this Award is delivered.

Dated and delivered at Mombasa this 5 day of September, 2016.

James Rika

Judge