



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 709 OF 2016**

**CHRISPIN OCHIENG OMONDI.....CLAIMANT**

**VERSUS**

**FIVE FORTY AVIATION LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Chrispin Ochieng Omondi, the Claimant in this case worked for the Respondent, Five Forty Limited from September 2011 until January 2016. He brought this action seeking compensation for unfair termination of employment.
2. The Claimant's claim is contained in a Statement of Claim dated 25<sup>th</sup> April 2016 and filed in Court on 26<sup>th</sup> April 2016. The Respondent filed a Statement of Defence on 20<sup>th</sup> June 2016. By consent of the parties, the case proceeded by way of written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent as an Aircraft Technician from September 2011. Towards the end of January 2016, the Respondent, through its Chief Engineer, Mohammed Uppal suspended the Claimant and another employee on allegations of stealing company oil. The suspension was for two weeks to pave way for investigation.
4. The Claimant and his colleague remained away from work until mid-March 2016, when they were asked to see the Chief Executive Officer who informed them that he no longer had confidence in them and that they had been terminated.
5. As a condition to payment of his terminal dues, the Claimant was required to discharge the Respondent from any liability but he declined. His gate pass allowing him entry into Wilson Airport which was his work station was confiscated by the Respondent hence effectively locking him out.
6. The Claimant denies the allegations of stealing and states that no warning, show cause letter or notice was ever issued to him in that regard neither was the outcome of the investigations revealed to him. He was not taken through any disciplinary process.
7. The Claimant pleads his salary as Kshs. 55,000 as at the time he left employment. He states that he was not paid house allowance during the entire period of his employment. The Respondent had also failed to pay him his salary for February and March 2016 as well as his terminal dues. He had also not been issued

with an acceptable certificate of service.

8. The Claimant contends that the Respondent has by its conduct, defamed him before his colleagues, family members, friends and right-thinking members of the society by branding him a thief and an untrustworthy person.

9. The Claimant's claim is particularized as follows:

- a) A declaration that by the Respondent's conduct, he was defamed by being branded a thief;
- b) A declaration that the termination of his employment was both unfair and unlawful;
- c) An order directing the Respondent to issue him with an acceptable apology for branding him a thief;
- d) An order directing the Respondent to issue him with an acceptable certificate of service;
- e) General and exemplary damages as compensation for defamation;
- f) Kshs. 110,000 being February and March 2016 salaries;
- g) Kshs. 55,000 being 1 month's salary in lieu of notice;
- h) Kshs. 453,750 being unpaid house allowance for 55 months;
- i) Kshs. 132,000 being severance pay;
- j) Kshs. 220,000 being service pay;
- k) Kshs. 660,000 being compensation for unfair and unlawful termination;
- l) Costs plus interest.

### **The Respondent's Case**

10. In its Statement of Defence filed on 20<sup>th</sup> June 2016, the Respondent admits having employed the Claimant as an Aircraft Technician.

11. The Respondent avers that there was a serious theft of oil by its servants with suspicion pointing to the Claimant. A decision was yet to be taken when the Claimant rushed to his lawyers.

12. Regarding the claim for house allowance, the Respondent states that under clause 5 of the contract of employment dated 29<sup>th</sup> September 2011, the parties had agreed on a salary net of deductions but inclusive of house allowance. During his employment, the Claimant had not raised the issue of house allowance.

13. The Respondent states that the Claimant's salary for February and March 2016 as well as one month's salary in lieu of notice had been paid vide cheque No 102666 for Kshs. 83,079.

14. On the claim for defamation, the Respondent responds that these are issues of tort and are irrelevant to the contract of employment.

### **Findings and Determination**

15. There are two issues for determination in this case:

- a) Whether the Claimant has proved a case for unlawful termination and defamation;
- b) Whether the Claimant is entitled to the remedies sought.

## **The Termination**

16. The Claimant states that his employment was terminated on allegations of involvement in theft of company oil. The Respondent denies the Claimant's claim in this regard. Section 47(5) of the Employment Act, 2007 provides as follows:

***(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.***

17. The Claimant chose not to testify before the Court. The question then is whether he has proved a case for unlawful termination of employment and defamation. In his Statement of Claim filed in Court on 26<sup>th</sup> April 2016, the Claimant gives a detailed account of the circumstances leading to the termination.

18. In my view, these are matters of fact that ought to have been tested in *viva voce* evidence. In the absence of such evidence, the Court finds that the Claimant has failed to discharge the burden of proof placed on him by Section 47(5) of the Employment Act. His claim for unlawful and unfair termination therefore fails and is dismissed.

19. Regarding the claim for damages for defamation I have this to say. This Court has held that a defamation claim arising from an employment relationship falls within the province of the Employment and Labour Relations Court (see ***Wilberforce Ojiambo Oundo v Regent Management Limited [2013] eKLR***).

20. The only question therefore is whether the Claimant has provided and proved particulars of defamation. In light of the finding that the Claimant's pleadings regarding the circumstances of the termination of his employment were not supported by evidence, the claim for defamation arising therefrom must also fail.

## **Other Claims**

21. The Claimant claims house allowance for 55 months. Section 31(1) and (2) of the Employment Act provides that:

***(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to 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).***

22. The Claimant filed a letter dated 24<sup>th</sup> July 2014 on salary increment stating inter alia:

*“With effect from 1<sup>st</sup> July 2014, your **gross salary** will be Kshs. 50,000/- per month.”[Emphasis added]*

23. By the Claimant’s averment, this figure was later increased to Kshs. 55,000 which was his salary at the time he left employment. From the letter dated 24th July 2014, it seems to me that there was an intention between the parties that the Claimant would be paid a gross salary, inclusive of a housing element. The claim for house allowance is therefore unmeritorious and is dismissed.

24. There is evidence on record that the Claimant was paid one month’s salary in lieu of notice together with his salary for February and March 2016. These claims are therefore without basis and are dismissed. There is also evidence that the Claimant was issued with a certificate of service. The claims for severance pay and service pay were not proved and are dismissed.

25. The result is that the Claimant’s entire claim fails and is dismissed.

26. Each party will bear their own costs.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER 2016**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Shijeje for the Claimant

Mr. Kimetto for the Respondent